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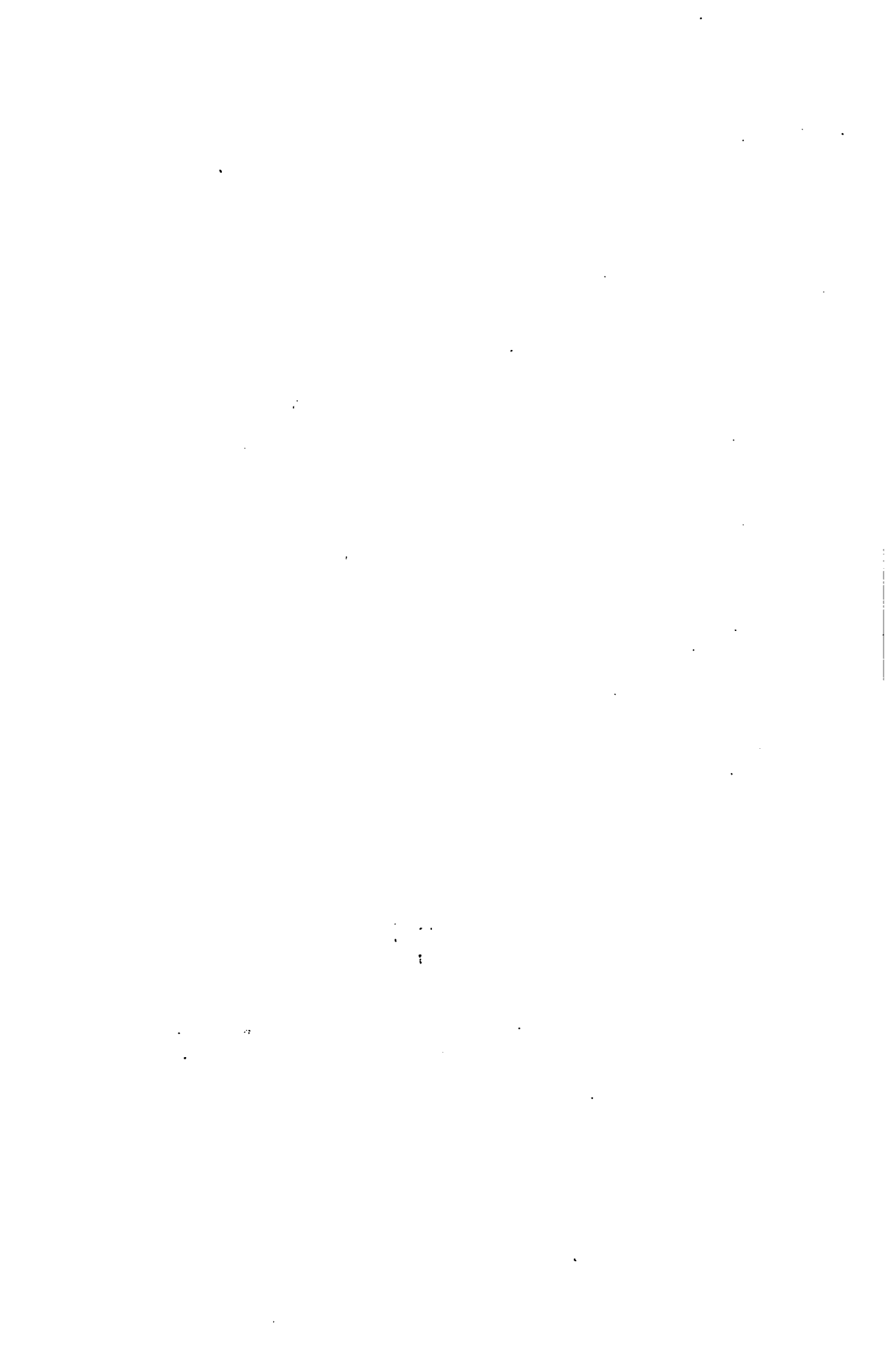
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FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. VIII.

CONTRACTS — CONVERSION.

ST. LOUIS, MO.:
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EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *Doe v. Roe*.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

CERTIFICATE OF APPROVAL.

Boston, October 26, 1885.

I have examined the digest of the cases on Contracts prepared for Myer's Federal Decisions, and am of opinion, considering the mass of material on that subject, that those cases, of which only a digest is published, are wisely presented in that form only.

EDMUND H. BENNETT.



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Abbott's U. S.	Abb.	McAllister.....	McAl.
Albany Law Journal.....	Alb. L. J.	McCahon.....	McCahon.
American Law Register...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee.....	Bee.	MacArthur	MacArth.
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Bond	Bond.	ter	N. B. R.
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Hoffman.....	Hoff.	Woods.....	Woods.
Holmes	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyon. T'y.
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CONTRACTS.*

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- II. KINDS OF CONTRACTS, §§ 166-330.
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 - 5. *Rescission*, §§ 1566-1644.
 - 6. *Waiver, Merger and Discharge*, §§ 1645-1677.
- VII. ALTERATION OF CONTRACTS, §§ 1678-1716.
- VIII. CONTRACTS AS AFFECTED BY THE STATUTE OF FRAUDS, §§ 1717-1854.
- IX. RIGHT OF ACTION; ACCRUES, WHEN, §§ 1855-1885.
- X. MEASURE OF DAMAGES, §§ 1886-2012.
 - 1. *In General*, §§ 1886-1984.
 - 2. *Liquidated Damages and Penalties*, §§ 1985-2012.

I. IN GENERAL. WHAT CONSTITUTES A CONTRACT. PARTIES.

SUMMARY—*Drafts drawn against consignments; contracts by letter, § 1.—Acceptance of plans for public buildings, § 2.—Acceptance of offer not sent to proper place, § 3.—Acceptance, what necessary, § 4.—Submission to arbitration, § 5.—Party not properly authorized to act, § 6.—No implied contract to pay for services, § 7.—Principal liable to surety for expenses in legal proceedings, § 8.—Parol contract by agent of corporation, § 9.—Estoppel; consideration, § 10.*

§ 1. H. wrote B: "Hereafter we will pay drafts only on actual consignments. The stock must be in transit so as to meet draft same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to M." B. replied: "We have never knowingly advanced money to M. on stock to come in. Have always sup-

* Edited by SAMUEL C. BENNETT, Esq., of Boston, Massachusetts.

posed it was in transit. Have always taken his word. After this shall require shipping bill." Afterwards M., who was buying agent for H., drew upon H.; the drafts were cashed by B. and paid by H., without bills of lading being attached. Still later M. drew two fraudulent drafts upon H., for which he forwarded no stock. B. cashed these drafts in good faith, assuming that the stock referred to in them was in transit, and the drafts were accepted and paid by H. In an action by H. against B. to recover back the amount, it was held that no contract was created by the above letters, and that B. was not liable. *National Bank v. Hall*, §§ 11-14.

§ 2. A resolution by county commissioners and a city council to erect public buildings after plans submitted by plaintiff does not make a contract upon which the city and county are liable, no use ever having been made of the plans and no buildings erected. *Tilley v. County of Cook*, §§ 15-19. See § 66.

§ 3. E. offered to purchase flour of H., and requested that an answer be sent by return of wagon to the place where E. then was. H. sent by mail an acceptance of the offer to E.'s usual place of business. *Held*, that the place to which the answer was to be sent constituted an essential part of plaintiff's offer, and that there was no contract. *Eliason v. Henshaw*, § 20.

§ 4. A valid acceptance must go to the whole of the offer, and must not attempt to qualify or vary any of its terms. A party cannot accept an offer conditionally, and, when his offer of acceptance is refused, claim a right to return to the original offer and accept it unconditionally. If no definite time is fixed for acceptance, then the offer must be accepted within a reasonable time. *Ortman v. Weaver*, §§ 21-23. See §§ 59, 68.

§ 5. An agreement between K. and C. recited that whereas K. was indebted to C., the exact amount of which was to be ascertained from the books of K. by one Q., under the supervision of K. and C., such amount to be final. *Held*, that nothing was submitted to Q.'s judgment by the agreement, and that it could not be regarded as a submission to arbitration. *Kelly v. Crawford*, §§ 24-26.

§ 6. L. made an offer by letter to B., also stating that he (L.) would authorize M. to act for him. B. made known his acceptance of the offer to M., but was informed by M. that no instructions had been received by him, and that he accordingly declined to act. *Held*, that there was no complete agreement between L. and B. which could be specifically enforced in equity. *Barr v. Lapsley*, § 27.

§ 7. No contract to pay for services can be implied where an express contract between the parties exists as to those services. *Nutt v. Minor*, §§ 28, 29. See § 70.

§ 8. A principal is bound to repay to his surety all reasonable expenses incurred by him in contesting in a court of competent jurisdiction a claim on which the principal was primarily liable; and it is not competent for the principal to show that the judgment rendered in the former suit was erroneous. *Ruppel v. Patterson*, §§ 30, 31.

§ 9. A parol contract, made by agents of a corporation for its sole benefit, and upon which it makes payments, is binding upon the corporation. *Bank of Columbia v. Patterson*, §§ 32-39.

§ 10. Defendant covenanted by deed that the sum due on a certain note from himself and A. jointly to plaintiff should be paid at plaintiff's residence in Missouri, or else he would pay ten per cent. interest and expenses of plaintiff in coming to Indiana to collect the note. *Held*, that by his deed defendant was estopped from saying that he was not indebted; that the obligation to pay ten per cent. was without consideration and could not be enforced; that the promise to pay plaintiff's expenses was not without consideration and could be enforced. *Shirley v. Harris*, §§ 40-42.

[NOTES.— See §§ 48-165.]

NATIONAL BANK v. HALL.

(11 Otto, 48-51. 1879.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.— This is an action of tort growing out of a contract. The bill of exceptions is well drawn, and reflects clearly the points in issue between the parties. A brief statement of the case, as it appears in the record, will be sufficient for the purposes of this opinion. During the years 1874, 1875, and up to April 1, 1876, a firm under the name of Hall, Patterson & Co. had existed at Chicago. It consisted of S. Frank Hall, Frank D. Patterson and Augustus L. Patterson, three of the five defendants in error. Their business was selling live stock on commission at the Chicago stock-yards. William G.

Melson was their agent at Quincy. To secure consignments at that point to his principals it was frequently necessary to make advances there. Hall, Patterson & Co. arranged with the First National Bank of Quincy to cash Melson's drafts on them for this purpose. The drafts were numerous, and were all payable at sight. Penfield was the cashier of the bank. A draft for \$125 was returned to the bank unpaid. This gave rise to some controversy between the bank and the drawees, but the matter was satisfactorily adjusted. Thereafter Hall, Patterson & Co. addressed a letter to the cashier, which was as follows:

"CHICAGO, January 15, 1876.

"U. S. Penfield, Cashier, Quincy, Ill.:

"DEAR SIR—Hereafter we will pay drafts only on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet dr'ft same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to G. W. Melson. Please acknowledge receipt of this, and oblige,

"Yours respectfully,

"HALL, PATTERSON & Co."

Penfield replied as follows:

"QUINCY, ILL., January 17, 1876.

"Messrs. Hall, Patterson & Co., Chicago:

"DEAR SIR—Your favor of the 15th received. I note what you say. We have never knowingly advanced any money to Melson on stock to come in. Have always supposed it was in transit. Have always taken his word. After this we shall require ship'g bill.

Very truly yours,

"U. S. PENFIELD, Cashr."

This letter closed the correspondence. On the 1st of April, 1876, two of the defendants in error, Frazee and Greer, were added as partners to the firm of Hall, Patterson & Co., as it had before existed. They had previously been employed as clerks, and knew of the writing of the letter to Penfield of the 17th of January, 1876. The new firm continued to do business under the name of Hall, Patterson & Co., until after this suit was commenced. Melson acted as the agent of the new firm as he had acted for the old one. Between the 1st of April, 1876, and the happening of the loss out of which this controversy has arisen, he, as such agent, drew thirty-one drafts on his principals, amounting in the aggregate to \$50,000. They were all at sight, were cashed by the bank, and were duly accepted and paid by Hall, Patterson & Co. There was no communication personally or by letter between any officer of the bank and any member of the firm, from the date of the cashier's letter of the 17th of January, 1876, until after the loss before mentioned. In the mean time, the bank was wholly ignorant of the change which had been made in the firm, and the drafts were cashed without such knowledge.

On the 7th of December, 1876, Melson drew drafts as follows:

"\$2,505.

QUINCY, ILL., December 7, 1876.

"Pay to the order of U. S. Penfield, Cas., twenty-five hundred and five dollars on account Jos. Hunnele 5 l'ds stock.

W. G. MELSON.

"To Hall, Patterson & Co., Stock-yards, Chicago, Ill."

"\$2,004.00.

QUINCY, ILL., December 7, 1876.

"Pay to the order of U. S. Penfield, Cas., two thousand and four dollars on account S. C. Fooley 4 l'ds hogs and cattle.

W. G. MELSON.

"To Hall, Patterson & Co., Stock-yards, Chicago, Ill."

Both these drafts were cashed by the bank on the day of their date, and the proceeds were paid to Melson. They were taken in the usual course of business and in entire good faith. The cashier testified that by "ship'g bill," in his letter of the 17th of January, 1876, he meant bill of lading, but that no bill of lading was taken by the bank after the date of that letter, and that all Melson's drafts—being thirty-one after the 1st of April, and ten or twelve between January 17th and April 1st of that year—were paid by Hall, Patterson & Co. without bills of lading being attached, and without inquiry by the bank or its cashier concerning such securities. When the two drafts last mentioned were cashed the cashier had no knowledge whether they were drawn against stock or not. It was a rule of the bank, understood by all the stock agents doing business there, that no draft should be drawn unless the stock was in transit. Agents, when drawing, were therefore not usually questioned upon the subject. Their compliance with the rule was assumed by the bank. The two drafts last mentioned were indorsed and transmitted by the cashier to his correspondent in Chicago for collection. They were accepted and paid by Hall, Patterson & Co., and the plaintiff in error received the money. No stock was forwarded by Melson. The transaction was a fraud on his part. Upon receiving the proceeds of the drafts he fled the country. He was diligently sought for, but could not be found. Hall, Patterson & Co. brought this suit against the bank to recover the amount they had paid. A verdict and judgment were rendered in their favor in the court below, and the bank has brought the case here for review.

The bill of exceptions contains all the evidence given upon the trial. It discloses nothing which affords the slightest ground for any imputation against the bank or its officers with respect to their good faith and fair dealing in the transaction out of which this controversy has arisen. The defendants in error claimed nothing in that respect in the court below, and they have made no such claim here. The counsel for the bank has assigned twenty-seven errors. Some of them are repetitions of the same objections in different forms. None of them are frivolous, and many of them, if the exigencies of the case required it, would be entitled to grave consideration by this court.

§ 11. *Construction of the two important letters in the case.*

The two letters between the parties, of the 15th and 17th of January, 1876, are the heart of the controversy. The stress of the case is upon their construction and effect. Passing by the other points raised in the record, we shall first give our attention to this subject, and our remarks will be confined to that and one other of the errors assigned. By this letter, Hall, Patterson & Co. advised the bank: 1. That thereafter they would pay drafts only on actual consignments of stock; 2. That they would not pay money a week in advance of shipments; 3. That the stock must be in transit, so as to meet the draft the same day or the day after it was presented to them; 4. That this letter was to cancel all previous letters of credit as to W. G. Melson; 5. They asked an acknowledgment of the receipt of the letter.

These terms were clear and explicit. What was the reply of the bank? The cashier answered: 1. That the letter of the other party was received; 2. That its contents were noted; 3. That the bank had never knowingly advanced money to Melson on stock to come in; 4. That the cashier had always taken Melson's word; 5. That thereafter the bank would require a "ship'g bill," meaning a bill of lading. This letter Hall, Patterson & Co. never answered.

What was its effect, as to them? It certainly did not accept their proposi-

tion, nor accede to their terms that "the stock must be in transit to meet the draft on the same day or the day after presented." They made this expressly the condition of their accepting. The letter made no allusion to the requirement, and was wholly silent on the subject. Upon this point the parties were as wide asunder as if the letters had not been written.

For whose benefit was the shipping bill mentioned by the cashier to be taken? *Prima facie* the point is left in uncertainty. Here again the cashier is silent. But the interpretation is reasonable that Hall, Patterson & Co., having in advance refused to accept, except upon the condition mentioned, the bank notified them in reply that it would thereafter take a bill of lading, not for their protection, but for its own. This view is strengthened by the conduct of the defendants in error, and the practical construction which they seem to have thus given to the clause. They did not say in reply that they understood the shipping bill was to be for their benefit, and that they should expect it to accompany the draft. No such bill was ever required by them or sent by the bank. They went on accepting and paying in silence exactly as before. The large number of drafts so accepted and paid by them has been already stated. If they relied on the shipping bills their conduct is inexplicable. If the understanding of the cashier had been different from what we have suggested, it is hardly to be supposed he would, from the date of his letter, have constantly disregarded his promise. Such conduct would have been worse than negligence. It would have been a gross breach of good faith to the other party. If, on the other hand, he meant by the clause that the bill of lading, if taken, was to be solely for the security of the bank, then it was for the bank to determine whether it should be required or not. If the cashier had confidence in Melson, and chose to exercise it, he exposed the bank to the hazard of the consequences; but there was certainly no responsibility to Hall, Patterson & Co.

It is a remarkable feature of the case that, when the loss occurred, the defendants in error attached no importance to their own letter, but fell back upon the letter of the cashier which they had not answered, and which they had not before in any manner recognized as concerning them, much less as constituting a contract by the bank for their protection and benefit. To give it that effect, early and explicit notice to the bank was necessary. The afterthought of Hall, Patterson & Co., when the loss occurred, came too late, and cannot avail them. *Adams v. Jones*, 12 Pet., 207 (§ 214, *infra*); *McCullum v. Cushing*, 22 Ark., 540; *White v. Corlies*, 46 N. Y., 467; *Story, Contr.*, sec. 1130.

§ 12. *The meeting of minds necessary to create a contract did not exist.*

The minds of the parties, as shown by these letters, moved on parallel, not on concentric, lines. There was not the meeting of minds, and the mutuality of assent to the same thing, which are necessary to create a contract. It is not pretended that the bank ever agreed to the proposition — if it may be considered such, and not the mere announcement of a purpose — contained in the letter of Hall, Patterson & Co., and there is no evidence that the proposition of the bank — if the letter of the cashier can be regarded in that light — was ever accepted and acted upon by the parties to whom it was addressed. We are satisfied, however, that no proposition or promise was intended to be made by the bank, and that this was the understanding of the defendants in error. Their letter revoked the letter of credit they had before given to Melson. The bank announced, in reply, the manner in which it should thereafter do business with him. Thereafter, each occupied a position independent of the other. If the bank discounted drafts for Melson, the defendants in error, like any other

drawees, had the option to accept or not, and in the latter event the bank could have had no redress against them, whether it had, or had not, taken a bill of lading. The destruction of the stock, after the bank took such a bill, would not have changed the relations of the parties. In our view, it was a thing with which the defendants in error had nothing to do.

§ 13. *There is no contract where the terms are understood differently by the parties.*

If it be said they were obliged to accept if the bank took a shipping bill, it may be asked in reply, Where is the evidence of such an understanding on their part? There is nothing in the record that gives the slightest support to such an assumption. If they were not bound, where is the consideration for the alleged promise of the bank? The true view of the subject is that neither was in anywise bound or liable to the other. The defendants in error notified the bank that thereafter they would accept only on the condition specified. The cashier answered that the bank would protect itself. This is the sole effect of the letters. Thereupon the correspondence of the parties ceased, because there was nothing left for either to add.

Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity. *Baldwin v. Mildeberger*, 2 Hall (N. Y.), 176; *Coles v. Bowne*, 10 Paige (N. Y.), 526; *Utley v. Donaldson*, 94 U. S., 29 (§§ 998-1000, *infra*). Where a contract is a unit, and left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been *ad idem*, and, therefore, neither is bound. *Appleby v. Johnson*, Law Rep., 9 C. P., 158. A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer. *Baker v. Johnson County*, 37 Ia., 186; See, also, *Jenness v. Mount Hope Iron Co.*, 53 Me., 20; *Chicago & Great Eastern R'y Co. v. Dane*, 43 N. Y., 240; and *Suydam v. Clark*, 2 Sandf. (N. Y.), 133. The learned judge who tried the case below instructed the jury that the letters constituted a binding contract, and that if the bank cashed any bills not based on actual consignments to the plaintiffs, and the plaintiffs sustained any injury by such failure, the bank is responsible. This instruction was erroneous.

§ 14. *A contract between a bank and a firm is terminated if new partners are admitted to the firm without the consent of the bank.*

In making a contract, parties are as important an element as the terms with reference to the subject-matter. Mutual assent as to both is alike necessary. If, in fact, there were here, as claimed, a contract with reference to the latter, it was made on the 17th of January, 1876, with Hall and the two Pattersons, then constituting the firm known as Hall, Patterson & Co. The change of the firm on the 1st of April following, by taking in Frazee and Greer as new members, without the knowledge or consent of the bank, put an end to the contract as to the latter. The proof is conclusive that the bank had no knowledge of the change until after commencement of this suit. The alleged cause of action arose more than eight months after the new partnership was formed, and nearly a year after the date of the letters by which the contract is claimed to have been made. There was no privity between the bank and the new firm. There was no binding acquiescence by the bank. There could be none without knowledge, and it is not claimed or pretended that such knowledge existed. A new party could no more be imported into the contract and imposed upon the bank without its consent, than a change could be made in like manner in the other pre-existing stipulations. The bank might have been willing to contract

with the firm as it was originally, but not as it was subsequently. At any rate, it had the right to know and to decide for itself. Without its assent a thing was wanting which was indispensable to the continuity of the contract. *Barns v. Barrow*, 61 N. Y., 39; *Grant v. Naylor*, 4 Cranch, 224 (§§ 240, 241, *infra*); *Bleeker v. Hyde*, 3 McL., 279 (§§ 215, 216, *infra*); *Taylor v. Wetmore*, 10 Ohio, 490; *Taylor v. McClung*, 2 Hous. (Del.), 24; *Hunt v. Smith*, 17 Wend. (N. Y.), 179; *Cremer v. Higginson*, 1 Mason, 323 (§§ 257-266, *infra*); *Russell v. Perkins*, id., 368. The court refused an instruction asked for in accordance with this view of the subject. This, also, was an error.

The judgment will be reversed, and the cause remanded to the court below with directions to proceed in conformity to this opinion; and it is so ordered.

TILLEY v. COUNTY OF COOK.

(18 Otto, 155-164. 1880.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE WOODS.

STATEMENT OF FACTS.— This was an action of *assumpsit*, brought by Tilley against the county of Cook and the city of Chicago. The declaration consists of the common counts for work and labor done, goods sold and delivered, money lent and advanced, and upon account stated. The following is a copy of the account sued on, which was appended to the declaration:

THE COUNTY OF COOK AND THE CITY OF CHICAGO TO THOMAS TILLEY, Dr.

For services as architect in preparing plans, drawings, specifications, diagrams, estimates, and details for the new court-house and city hall, and superintendence of erecting the same, five per cent. on \$2,909,629, the estimated cost of the building, the plan being that known as "Eureka"..... \$145,481 45

The defendants pleaded the general issue.

By provision of the constitution and laws of the state of Illinois, the county affairs of Cook county are managed by a board of commissioners of fifteen persons. Ill. Const. 1870, art. 10, sec. 7. The affairs of the city are controlled by the common council. Private Laws of Illinois, 1863, p. 40. The county of Cook was the owner of a block of ground in the city of Chicago, known as the court-house square, on which it was proposed to erect a building to be used as a city hall and county court-house, in which the business of the city and county might be conducted. On July 10th, the board of county commissioners, and on July 15, 1872, the common council, adopted, each for itself, the following resolution:

"Resolved, That it is the sense of the joint meeting that they recommend to the common council of the city of Chicago and the board of commissioners of Cook county that the city of Chicago and the county of Cook will authorize the building committees of the several boards to offer a prize of five thousand dollars (\$5,000) for the best plan, two thousand dollars (\$2,000) for the second, and one thousand dollars (\$1,000) for the third best plan for a court-house and city hall, to be erected jointly by the county of Cook and the city of Chicago, upon the public square in the city of Chicago, the said plans to be submitted to respective boards, in conjunction with the board of public works of the city of Chicago."

On August 5, 1872, the common council of the city and the board of county commissioners passed an order providing for a joint contract between the city

and county for the erection of a building on the court-house square, and on August 28, 1872, the contract was executed. It declares that it was for the public convenience that the courts and the offices of the city "should be located at some one convenient point and readily accessible to each other," and provides for the erection, by the city and county, of a public building on the court-house square, for the use of the county and city governments respectively, and the courts of record; that the general exterior design of the building shall be of such uniform character and appearance as may be agreed upon by the board of county commissioners and the common council of the city.

The contract further provides as follows: "3. That portion of the said building situate west of the north and south center line of said block shall be erected by the city of Chicago at its own expense. 4. The city of Chicago shall occupy that portion of said block west of the said center line for a city hall and offices incidental to the administration of the city government, and for no other purpose whatever, except as hereinbefore provided. 5. Each of the parties will heat, light, and otherwise maintain and furnish its own portion of said building."

On November 25, 1872, the building committees of the common council and the county commissioners published an advertisement calling for designs for the proposed building. The advertisement declared that, in order to secure suitable designs, the city and county jointly offered the following premiums: For the best design, \$5,000; for the second best, \$2,000; and for the third best, \$1,000. It provided as follows: "Each design must have a device or motto marked on each drawing and be accompanied by a sealed letter giving the name of the author, which will be opened after the final award is made, only for the purpose of ascertaining the names of the successful architects and for the return of the unsuccessful drawings to their authors. Each competitor will give the cubical contents of his building, and an estimate of the cost of the same complete."

Designs were submitted by a large number of architects, and the building committees of the city council and the board of county commissioners made a report awarding the prizes. Tilley, who had adopted for his drawing the word "Eureka" as the device or motto to distinguish it, was awarded the third prize of \$1,000. On August 4, the county board, and on August 18, 1873, the city council, adopted the following resolution: "That the report of the majority of the joint committee awarding the prizes for plans of court-house and city hall shall be concurred in and the award confirmed, provided that nothing herein or in said report contained shall be construed as indicating a preference for either of said plans as to which shall be finally adopted, from which the said building shall be erected."

Tilley was paid the thousand dollars awarded to him as a prize. Afterwards, on August 25th, the county commissioners, and on October 10, 1873, the city council, adopted the following resolution: "That the plan known as Eureka, or number 5 (five) in the collection, submitted for court-house and city hall, be, and is hereby, selected and adopted as the plan after which to build such court-house and city hall (the board of commissioners of Cook county concurring), subject to such change and modifications as may hereafter be determined upon by the common council of the city of Chicago and the county board, provided the estimate of the architect who presented said plan as to the cost of construction of the building shall be verified."

Upon the trial of the case, the testimony tending to establish the facts above

recited having been given in evidence by the plaintiff, he was sworn as a witness in his own behalf, and testified that he was an architect of fifteen years' standing, that he had made the design designated by the word "Eureka," and that, after the passage by the city council and board of county commissioners of the resolution last above mentioned, he had verified the cost of the construction of the proposed building in the way customary and usual with architects, which was made up at the rate of thirty-five cents per cubic foot for the building, and was indorsed by fourteen or fifteen architects.

The plaintiff produced before the jury all his plans for which the prize had been awarded him. He offered to prove their value, the time employed and the expense incurred in the preparation of them. The court excluded the evidence so offered. He further offered evidence to establish that by the usage and custom of architects, in the absence of a special contract, the superintendence of the construction of a building belonged to the architect whose plans were adopted. This was also excluded. He also offered evidence to prove that by the usage and custom of architects, where prizes for plans were offered, the plans of the successful competitors belonged to them, and, if subsequently adopted as the plans to build by, were always paid for in addition to the prize itself. To this the defendants objected, and the court sustained the objection. He also offered evidence to establish the value of the services rendered in verifying the cost of the proposed building according to the "Eureka" plans; to which the defendants objected, and the court sustained the objection.

This was all the evidence given or offered to be given in the cause. The plaintiff then rested his case; whereupon the court directed the jury to find for the defendants. The jury returned a verdict for the defendants, and judgment was entered thereon. To reverse this judgment this writ of error was brought.

It will be observed that no evidence was introduced or offered to show that the plans of the plaintiff were used by the defendants, or either of them, or that the building for which they were used was ever erected. It is clear that if the plaintiff has any right of action it must arise on the resolutions adopted by the board of county commissioners, August 25, and the city council, October 10, 1873. All that had taken place before those dates was the making of a contract between the city and the county, by which they agreed to join in the erection of a public building in the court-house square, each party to build and pay for its own part of the structure; an offer by the city and county of three prizes for the best plans; an award of the prizes, by which the third prize of \$1,000 was given to the plaintiff in error, with the distinct notice that "the award should not be considered as indicating a preference for either of said plans as to which should be finally adopted from which the said building should be erected;" and the payment to and the receipt by the plaintiff of the prize awarded him.

By the payment to the plaintiff in error of the prize, the defendants discharged every obligation due from them to him arising out of the preparation of plans for the proposed building. Upon that payment being made, no contract whatever, either express or implied, existed between the plaintiff and the defendants. If, therefore, the plaintiff had any right of action against defendants, it must have arisen by reason of the adoption of the resolution just mentioned, and what was done by plaintiff after its adoption. The resolution was the voluntary act of the city council and county commissioners. It was not a proposition, but simply the expression of a purpose to build their struct-

ure after the plans of the plaintiff, subject to such changes and modifications as might thereafter be determined upon by the common council and the county board. The resolution was not adopted at his instance or suggestion. Suppose that the day after its adoption the resolution had been reconsidered and rescinded, would the defendants nevertheless have been liable for the value of the plans and for five per cent. on the estimated cost of the building for superintendence, amounting in the aggregate to near \$146,000? Suppose a private person should announce his purpose to build a house after a design which he had seen in an architect's office, but before he begins the execution of his purpose changes his mind, never calls for or uses the plans, or even builds the house, is he liable to the architect for the value of the plans and for superintendence? In such a case there certainly is no contract between him and the architect upon which a recovery can be based.

The claim of the plaintiff is that by the adoption of the resolution by the city council and the county board, without any act done or assent on his part, they were bound to go on and erect the building on his plans and expend \$2,909,000, its estimated cost. The resolution did not bind the plaintiff to furnish his plans and superintend the building. There was no mutuality, and, therefore, no consideration,—both of which are essential to a contract. Notwithstanding the resolution, the plaintiff might have said, I will not furnish my plans, and I will not superintend the building, and the defendants would have had no claim on him.

§ 15. *A party making a proposition is not bound if the other party does not accept.*

If one does not accede to a promise as made, the other party is not bound by it. *Tuttle v. Love*, 7 Johns. (N. Y.), 469. When A. signs a writing by which he declares he will sell to B. his house at a certain price, this is a mere proposition and not a contract. *Tucker v. Woods*, 12 id., 189. In *Wood v. Edwards*, 19 id., 205, where A. wrote that he had agreed to a substitute for an existing agreement which he would execute, Spencer, C. J., said the proposition of A. to execute the new agreement was not binding on him, as well on the ground of want of consideration as want of mutuality, since the plaintiffs on their part were not bound to execute the agreement. In the case of *Kington v. Phelps*, Peak. N. P. C., 299, the plaintiff proved that the defendant consented to be bound by an award to be made on a submission by other underwriters on the same policy, but the witness proved no agreement on the part of the plaintiff to be bound by the award. Lord Kenyon held that there was no mutuality, and therefore the defendant's agreement was a mere *nudum pactum*. An offer of a bargain by one person to another imposes no obligation upon the former, unless it is accepted by the latter upon the terms on which it was made. Any qualification of or departure from them invalidates the offer, unless the same be agreed to by the party who made it. *Eliason v. Henshaw*, 4 Wheat., 225 (§ 20, *infra*). See, also, *Webb v. Alton Marine & Fire Ins. Co.*, 8 Ill., 225; *Maclay v. Harvey*, 90 id., 525.

§ 16. *There was no contract in this case.*

In this case, there being only an expression of purpose by one party to erect a building according to plans antecedently made by another, and no obligation entered into by the other party, and no plans used or building erected, there was no contract between the parties, either express or implied. If we are correct in this conclusion, then all the evidence offered by the plaintiff to prove the value of the plans, and the time employed, and the expenses incurred in their

preparation, was irrelevant and immaterial. The only purpose for which such evidence could be admitted would be to prove the damage sustained by the plaintiff by the breach of his alleged contract with the defendants. But if he had no contract, express or implied, he was entitled to no damage, and could show none.

§ 17. *Proof of usage which might affect a contract is immaterial if no contract is shown.*

It is complained that the evidence offered to prove the custom of architects was excluded. We think it was rightly excluded. Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract. *Hutchinson v. Tatham*, Law Rep., 8 C. P., 482; *Field v. Lelean*, 30 L. J., Ex., 168; *Baywater v. Richardson*, 1 Ad. & Ell., 508; *Robinson v. United States*, 13 Wall., 363. In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract. *Holding v. Pigott*, 7 Bing., 465, 474; *Clarke v. Roy-stone*, 13 Mees. & W., 752; *Yeats v. Pim*, Holt, N. P., 95; *Trueman v. Loder*, 11 Ad. & Ell., 589; *Bliven v. New England Screw Co.*, 23 Hqw., 420 (§§ 1306-1308, *infra*). The inference from these principles is inevitable, that, unless some contract is shown, evidence of usage or custom is immaterial. The plaintiff says he was ready to prove a custom of architects, that, when prizes were offered for plans of a building, the successful competitor remained the owner of his own designs, and if they were adopted he was entitled to compensation therefor in addition to the prize, and that, by the same custom, the adoption of his plans entitled him to superintend the erection of the building, and to the usual remuneration therefor. He claims, therefore, that, in view of this custom, the adoption of his plans by the passage of the resolution referred to by the city and county boards amounted to a contract, on the part of the defendants, to pay for the plans and employ him to superintend the erection of the building, and pay him therefor.

The offer of the plaintiff to prove certain facts having been rejected, he must be presumed to be able to prove what he offered to prove. We must, therefore, assume that the custom which he offered to prove did, in fact, exist. But what was that custom? Clearly, that if the building was erected according to the successful plans, the architect was entitled to pay therefor. That was such an acceptance and adoption of his plans as would give him the right to compensation therefor, and the right to superintend the erection of the building and receive the usual remuneration. The custom certainly did not bind the party who offered prizes for plans, after having paid the prizes, to pay also for plans that he never used, and for superintendence of a building that he never erected, merely because he had selected a particular plan and announced his purpose to build in accordance with it. If such were the custom and usage of architects in Chicago, it was an absurd and unreasonable custom, and, therefore, not binding. *United States v. Buchanan*, 8 How., 83. If the plaintiff had offered to show that, after the passage of the resolution by which his plan was accepted, the defendants had erected their building according to his plans, then the evidence of the custom would have been pertinent. But he made no such offer, and it is to be presumed no such fact existed. The evidence of this custom was, therefore, properly excluded.

§ 18. *There is no implied contract to pay for services voluntarily rendered by plaintiff and of which no use is made by defendant.*

The plaintiff complains that he was not allowed to prove the value of his

services in verifying the cost of the proposed building according to his plans. We think the court was right in excluding this evidence. There was no proof nor any offer of proof to show that the services of the plaintiff were rendered at the instance or request of the defendants or either of them. From all that appears, the services were voluntarily rendered by the plaintiff, and no use whatever was made of the results of his investigation. The law, therefore, does not imply a contract to pay for them, and proof of their value was quite immaterial.

§ 19. *Evidence which tends to show a several liability is not admissible in an action which charges a joint liability.*

The evidence rejected was properly excluded on another ground. The defendants were charged in the declaration with a joint liability, but there was no privity between them, either by law or contract. The evidence offered was to show a joint liability. So far as it went it failed to do this; on the contrary, it was made to appear that each of the defendants was building its own part of the structure at its own expense, and for its own use. After the award and payment of the prizes they assumed no joint liability, as the evidence admitted clearly showed. And the evidence offered did not tend to establish a joint liability. It did not, therefore, support the case made in the declaration, and was properly excluded from the jury. As the plaintiff asked no leave to amend, this ruling of the court is not a ground of error. We find no error in the record.

Judgment affirmed.

ELIASON v. HENSHAW.

(4 Wheaton, 225-230. 1819.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—This is an action brought by the defendant in error to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract given in the court below is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Captain Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you \$9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distant about twenty miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs at Georgetown, and dispatched by a mail

which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage three hundred barrels of flour delivered in Georgetown, by the first water, at \$9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river. As to any advance, will be unnecessary — payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted." The wagoner by whom the plaintiffs' first letter was sent informed them when he received it that he should not probably return to Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused. Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury that if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the three hundred barrels of flour, at the rate of \$9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given. The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for? If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

§ 20. *An offer imposes no obligation on the offerer unless accepted by the other party according to its terms.*

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either. In this case the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same \$9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon by which the letter was dispatched. This wagon was at that time in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate by the usual length of time which was employed by this wagon in traveling from Harper's Ferry to Mill Creek and back again with a load of flour, about what time they should receive the desired answer, and, therefore, it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the

mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent constituted an essential part of the plaintiffs' offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. It is no argument that an answer was received at Georgetown. The plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and, unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties; and the court ought, therefore, to have given the instruction to the jury which was asked for.

Judgment reversed. Cause remanded with directions to award a *venire facias de novo*.

ORTMAN v. WEAVER.

(Circuit Court for Michigan: 11 Federal Reporter, 358-362. 1882.)

STATEMENT OF FACTS.—This was a bill by Ortman against Weaver for the specific performance of an offer to sell a lot of standing timber. A supplemental bill sought compensation for a breach of the contract, alleging that the defendant had sold to one Hollenbeck, and that the latter had removed the timber. The answer denied the making of the contract with the complainant, admitting the sale to Hollenbeck and the removal of the timber by him, but alleging that such sale was made subsequent to the offer made to the complainant. Whether any contract existed between the complainant and defendant depended entirely on a correspondence between them. The first of the letters contained the offer of the defendant. It bore date July 12th, and was in the following language: "I will sell the pine and hemlock on the lands in question for \$3,200, if it can be arranged to make a finish of it now. The note of yourself, with indorser or maker of the note, which paper may be six months, with interest at seven per cent., and such as a good man I will name in Detroit will say is good. I will give you a deed or contract."

On July 17th, the complainant replied to this by letter as follows: "In reply to your favor of the 12th inst., I ask you to make deed for the pine and hemlock timber now standing, lying and being upon [describing the lands], in the names of M. E. Ortman and De Forest Paine, of Detroit, Michigan, and forward the same to M. W. O'Brien, Esq., cashier of People's Savings Bank of this city, with instructions, if you please, to collect at sight \$500 or \$700, and also accept for the balance a note made by M. E. Ortman and De Forest Paine jointly, indorsed by me, for six months from date of deed, with seven per cent. interest, and upon the payment of said note permit me to deliver said deed to them; otherwise at maturity, if not paid, return said deed to you. Please advise at your earliest convenience, and oblige."

No reply being received to this, the Mr. Paine mentioned therein, on July 31st, wrote the defendant the following letter: "Mr. Ortman informed me

about two weeks ago that he had written you, accepting your proposition and requesting you to forward papers to M. W. O'Brien, cashier of the People's Savings Bank. Mr. Ortman has been ill, and not hearing from you I take the liberty to write you in his stead. The money and papers are ready for you. Please send deed as requested, or to any man you see proper to name to pass upon the paper, and deliver your deed, and oblige."

The complainant, on August 4th, sent the defendant a telegram as follows: "Yours to Mr. Paine is here. I accepted your proposition in yours of the 12th ultimo, and bought the timber. I am and always have been ready to fulfil. I demand fulfilment on your part. Answer by telegram on receipt of this, and failure to so answer I shall take as a refusal. If sold, to whom?"

It seems that Hollenbeck accepted defendant's proposition on July 28th, and received a contract on August 2d.

§ 21. *The acceptance of a proposition, to be binding, must be comprehensive and unconditional.*

Opinion by BROWN, J.

It is entirely clear that complainant's letter of July 17th was not an acceptance of the proposition contained in defendant's letter of the 12th. It is well settled that while the acceptance of an offer may be very brief, it must be comprehensive and unconditional. It must go to the whole of the offer, and must not attempt to qualify or vary any of its terms. 1 Parsons, Cont., 475; Waterman, Cont., 174. If any further correspondence or action is required by either of the parties to determine whether the offer shall be accepted, the contract is incomplete. While the letter of July 12th contained the simple proposition, viz., to sell for \$3,200, if closed at once, for which defendant offered to accept complainant's note for six months, with interest at seven per cent., with a good indorser, to be approved by defendant, or some person named by him, the letter of July 17th qualified this offer in the following particulars:

(1) That \$500 or \$700 should be paid in cash, upon delivery of the deed. (2) That the note for the residue should be given by M. E. Ortman, complainant's wife, and De Forest Paine, jointly, indorsed by complainant. (3) That the deed should be made to M. E. Ortman and De Forest Paine, jointly. (4) That it should be forwarded to O'Brien and held by him until the note matured, and if the note were not paid it should be returned to defendant.

Bearing in mind that defendant was desirous of "making a finish of it now," and of assuring himself that the paper should be good and collectible, it will be seen that in complainant's reply he proposed to give security selected by himself, and to have the matter remain open until the maturity of the note, when, if it were not paid, the deed should be returned. It is also clear that nothing can be claimed upon complainant's telegram of August 4th, since complainant had sold the lands two days before to Hollenbeck.

§ 22. *Where a proposition is accepted with modifications, which are declined by the other party, the latter cannot be held to his original proposition by a subsequent acceptance without condition.*

The bill, then, if sustained at all, must rest upon Mr. Paine's letter of July 31st, which is claimed to have been an unequivocal acceptance of defendant's proposition. Assuming it to be such, the question arises whether, after having once declined defendant's proposition of July 12th, he was at liberty to accept it, and whether his acceptance was not too late. The letter of July 17th, not being an acceptance of defendant's proposition, he was entitled to treat it, and

did treat it, as a rejection. Complainant therein made certain qualifications, which amounted to an offer on his part, and required a reply from the defendant. Receiving no reply, he was not at liberty to accept the original proposition unconditionally. Mr. Parsons, in his work upon Contracts, vol. 1, p. 477, states the proposition as follows: "The party making the offer may renew it, but the party receiving it cannot reply, accepting with modifications, and, when these are rejected, again reply, accepting generally, and, upon his acceptance, claim the right of holding the other party to his first offer."

No cases are cited by him; but the case of *Hyde v. Wrench*, 3 Beav., 384, supports this proposition. In this case the defendant, on the 6th of June, offered in writing to sell his farm for a thousand pounds. The plaintiff offered £950, which the defendant, on the 27th of June, after consideration, refused to accept. On the 29th the plaintiff, by letter, agreed to give a thousand pounds, but there appeared to be no assent on the part of the defendant, though there had been no withdrawal of the first offer. *Held*, that there was no binding contract within the statute of frauds. This case varies from the one under consideration only in the fact that in *Hyde v. Wrench* the plaintiff's modification of defendant's offer was expressly rejected by defendant. In this case the rejection can only be inferred from the fact that defendant declined to reply to complainant's letter and proceeded to sell the land to another party.

The case of *Fox v. Turner*, 1 Bradw., 153, is still more directly in point. It was there held that a proposal to accept an offer on terms varying from those proposed amounts to a rejection of the offer, and a substitution in its place of a counter proposition. This cannot become a contract until assented to by the first proposer. The original offer thereby loses its vitality, being, so to speak, passed by in the course of the negotiation so as to be no longer binding between the parties. It becomes an open proposition again only when renewed by the party who first made it. Hence the party who submitted the counter proposition cannot, without the assent of the other party, withdraw or abandon the same and then accept the original offer which he has once virtually rejected. I would not say that a person might not accept an offer with qualifications upon one day, and upon the next day, and before his counter proposition is rejected, accept unconditionally. But where the qualified acceptance is rejected, or sufficient time has elapsed from which a refusal should be inferred, the party to whom the offer is made cannot then treat it as still in force and accept it. In the case under consideration there was a total neglect on the part of defendant to answer or notice complainant's letter for two weeks. The inference was inevitable that he declined the modifications proposed.

§ 23. *An offer must be accepted within a reasonable time.*

2. But I think the letter of July 31st is open to the further objection that it was not seasonable. Assuming that after the letter of July 17th it was still within his power to accept, it is entirely clear that the acceptance must have been made within a reasonable time. If, by the original proposition, a time is limited within which the other party may accept, he must mail his letter of acceptance within that time, and if a reply is requested by return mail he must at least mail his reply within twenty-four hours from the time the offer is received. *Maclay v. Harvey*, 90 Ill., 525; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill., 435 (§§ 181, 182, *infra*); *Dunlop v. Higgins*, 1 H. of L., 381.

If no definite time is stated then the offer must be accepted within a reasonable time under all the circumstances of the case. Now, bearing in mind that other parties were seeking to buy this land, and that defendant was desirous of

making an immediate disposition of it, it seems to me that the delay of over two weeks was much longer than the offer warranted. I think the defendant was authorized to treat the letter of July 17th as a rejection of his offer, and was at liberty to proceed and dispose of the land to other parties. A decree will be entered dismissing the bill.

KELLY v. CRAWFORD.

(5 Wallace, 785-791. 1866.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—Crawford & Co., of Cleveland, in 1860 made a contract with Kelly & Maher, of Chicago, to furnish them with coal. On September 13, 1861, an agreement was entered into, in substance as follows: "That whereas Kelly & Co. are indebted to Crawford & Co. upon joint account, the exact amount to be ascertained from the books of Kelly & Co. by one G. H. Quigg, under the supervision of the parties to this agreement, etc. In consideration of such indebtedness, etc., the said Kelly & Co. hereby assign to the said Crawford & Co. all the accounts hereunto attached, and marked 'Exhibit A,' together with, etc. [enumerating certain personal property], and all other accounts due and owing to said Kelly & Co. upon their coal books, except the accounts now enjoined in chancery. Further: that Crawford & Co. are to put the said accounts into speedy collection; and after paying the expenses of collecting, the balance shall be applied to the extinguishment of the debt of said Kelly & Co. to Crawford & Co., as ascertained by the aforesaid G. H. Quigg. It being distinctly understood that the said Quigg is to ascertain the amount due, which the parties hereto now agree is to be the actual amount. Should there be any balance left after collecting the sums herein referred to, the said Crawford & Co. agree to pay the same over to Kelly & Co.; and should the said sum of accounts, and the personal property herein referred to, be insufficient to pay the sum found (hereafter) to be due to Crawford & Co., then Kelly & Co. agree to pay the balance remaining unpaid to Crawford & Co." The exhibit referred to was never annexed to the contract.

Quigg found a balance due Crawford & Co., for which they brought suit, declaring on the agreement and the award of Quigg. Maher, one of the firm of Kelly & Co., pleaded (1) the general issue; (2) that he did not execute the agreement; (3) that the agreement was executed by Kelly, in the name of Kelly & Co., after the dissolution of the firm, and without the consent of Maher. The agreement was admitted in evidence over the objections of the defendants.

Opinion by MR. JUSTICE FIELD.

On the trial of this cause the agreement of September 13, 1861, was admitted in evidence, without the exhibit to which it refers, against two objections of the defendants: 1st, that it was incomplete without the exhibit; 2d, that it was invalid, because executed by one of the firm of Kelly & Co. after its dissolution.

§ 24. *When an agreement has been executed and acted upon by parties, it cannot be treated as incomplete because a certain exhibit mentioned in the agreement was never attached to it.*

The answer to the first objection consists in the fact that no exhibit, though mentioned in the agreement as annexed to it, was in truth annexed. The parties executed the agreement, and acted upon it without this document being

attached. The agreement cannot, therefore, be treated as incomplete in the absence of the exhibit; it was only ineffectual to pass the amounts specified in that paper; it was effectual to pass all other matters mentioned. The contract was not intended merely to transfer certain assets; it had for a further object to ascertain the amount of the indebtedness of the defendants from the examination of their books by an accountant. It was clearly admissible in connection with the statement of the accountant to show the amount of such indebtedness.

§ 25. *An agreement signed by one partner, and afterwards ratified by the other, is admissible in evidence as the agreement of both.*

To the second objection the answer is equally brief and conclusive. The agreement was admitted, "subject to the proof to be given thereafter," and it was subsequently proved that the agreement was ratified by the other partner of the firm of Kelly & Co., and the fact of ratification is specially found by the jury.

§ 26. *Submission of accounts to an accountant to ascertain the amount due, not an arbitration.*

The principal objections urged for a reversal of the judgment rest upon the idea that the agreement of September 13, 1861, was a submission to arbitration, and the report or statement of Quigg was the award of an arbitrator; and that both are to be judged by the strict rules applicable to arbitrations and awards. This is, however, a mistaken view of the agreement and report. As observed by counsel, there was no dispute or controversy between the parties to be submitted to arbitration; nor was anything to be submitted to the judgment or discretion of Quigg. The books of account of the defendants were to determine the amount due; about these there was no controversy. The only duty of Quigg was to examine them as an accountant and to state what they exhibited.

The objection that the report was not made from the accounts as they stood on the books at the time they were placed in the hands of Quigg is not one which can affect the result. The object of submitting the books to him for examination was to ascertain the exact amount of the indebtedness of the defendants to the plaintiffs. For this purpose it was in his power to write up the books, to correct errors discovered, and make entries of what had been omitted by oversight or mistake. It is to be presumed that the parties desired to arrive at a just result, not to have a balance struck from the books without regard to their correctness. The agreement provides that the amount due was to be ascertained by Quigg, under the supervision of the parties, and the proof shows that this was done under the immediate supervision of one of the defendants. Besides, Quigg was examined as a witness in the case, and exhibited the books, and testified as to the balance they showed and the entries made by him. These books were, of themselves, admissible as evidence of the balance due by the defendants, independent of the agreement of September 13, 1861. Upon the evidence they furnished, taken in connection with the testimony of Quigg, the verdict of the jury may be sustained without reference to his report. They showed the amount received from the sales of coal furnished to the defendants to which the plaintiffs were entitled; and for such amount the recovery can be upheld under the common counts, for money had and received.

Judgment affirmed.

BARR v. LAPSLEY.

(1 Wheaton, 151-154. 1816.)

APPEAL from the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—The object of this bill is to obtain a specific performance of an alleged agreement to receive a quantity of cotton bagging, at a specified price, in satisfaction of certain judgments at law. The defendants deny that the circumstances proved ever rendered the agreement final and obligatory upon them; and this is the principal, perhaps the only, question the case presents.

It appears that the complainants were indebted to one West, who assigned this debt (then unliquidated), together with the residue of his estate, to Lapsley *et al.*; that Lapsley liquidated the debt with the Barrs, and took their notes, payable at different periods, making up, together, the amount due. These notes having become due, and judgment being recovered on some of them, in October, 1811, the Barrs addressed a letter to Lapsley, in which they offer to pay him in cotton bagging, at thirty-three cents per yard, by instalments, at certain periods. On the 17th of December, in the same year, Lapsley answered their communication, and the following words, contained in that letter, are all that the court deem material to the point on which they propose to found their decision: "We are willing to take cotton bagging in liquidation of the last three notes, delivered at the period you propose, but not at the price you offer it." "We expect that you give us satisfactory accounts for the punctual performance of your engagements, and to this effect we shall direct Mr. M'Coun, to whom we propose to write by the next mail." On another passage of this letter, and a letter written by West, on the 18th of December, it has been contended that certain conditions were imposed upon the Barrs, which it was incumbent upon them to comply with, before they could claim the benefit of the offer contained in Lapsley's letter. But as the opinion of this court is made upon a ground wholly unaffected by this question, we deem it unnecessary to notice this point. It appears that Lapsley never, in fact, instructed M'Coun on the subject of this letter of the 17th of December. But Warfield, the agent of the Barrs (who were absent from home on the receipt of that letter), supposing his principals to be referred to, M'Coun, as the authorized agent of Lapsley, notified to him the acceptance of Lapsley's offer, and remained under the impression that the agreement had become final, notwithstanding M'Coun's declining altogether to act for want of instructions. Lapsley, on the other hand, alleges that the notification of acceptance ought to have been made to himself, and assigns the want of an answer from the Barrs as his reason for never having given instructions to M'Coun.

§ 27. *A contract is incomplete when the agent of one party refuses for want of instructions to act on the acceptance by the other party of his principal's offer.*

This state of facts presents an alternative of extreme difficulty. On the one hand, Lapsley, by writing that he shall direct M'Coun by the next mail, plainly pointed to a mode of expediting the conclusion of the agreement, through the agency of a representative on the spot, and, when he intimated his intention to write by the next mail, showed that it was not his intention to await Barr's answer. This was well calculated to delude Barr into the idea that Lapsley would recognize no notification but that which should be made to M'Coun. On

the other hand, how far could M'Coun, unimpowered, uninstructed as he was, legally act, to bind Lapsley by his acceptance of the notification? Or, if he had received instructions from Lapsley, what obligation was he under to have undertaken the agency? Under the pressure of this dilemma, there is but one principle to which the court can resort for a satisfactory decision. Something remained for Barr to do. The notification of his acceptance was necessary to fasten the agreement upon Lapsley. For this purpose, he very rationally addressed himself, in the first place, to M'Coun; and the reference to Lapsley's letter would have been a sufficient excuse for not returning an answer until a reasonable time had elapsed for M'Coun to receive the expected communication from Lapsley. But when he found M'Coun uninstructed and unwilling to act under the letter addressed to Barr, his course was plain and unequivocal. A letter to Lapsley, transmitted by the mail, would have put an end to all doubt and difficulty. This is the method he ought to have pursued, and for not having pursued this course, we are of opinion that the bill was properly dismissed below.

Decree affirmed.

NUTT v. MINOR.

(14 Howard, 464-467. 1852.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—Alexander Hunter was appointed marshal of the District of Columbia in 1834, and continued to fill that office by reappointments until June, 1848, at which time he died. Shortly after he entered on the duties of his office, in 1834, he appointed Daniel Minor his deputy for the county of Alexandria, where a separate court was held and jurisdiction exercised; and for that county Daniel Minor was practically marshal. Philip H. Minor, the plaintiff below, was the brother of Daniel Minor, who, being desirous to obtain the office of clerk to the marshal for Philip H., applied to Hunter for this purpose, and advised him to employ Philip H. as his clerk, and Hunter agreed to do so; Daniel and Philip came up from Alexandria to Washington, and in the marshal's room a conversation took place between Philip H. Minor, Hunter, the marshal, and Daniel Minor, the deputy. Hunter proposed to give, as salary for the service, \$200 per annum, and that Daniel Minor, as deputy for Alexandria county, should give \$100, making the salary \$300. Daniel Minor insisted that the salary should be larger; Hunter replied that he was just in office and did not know what the profits would be, nor what the value of the duties to be discharged by the clerk would be; and that he did not feel justified in giving a larger salary. Daniel Minor then offered that if Hunter would pay two hundred and fifty dollars, he would pay one hundred and fifty towards the salary, which was agreed to by Hunter and Daniel Minor on the one part and by Philip H. Minor on the other.

Daniel Minor, who was the principal witness, testified to the foregoing facts for the plaintiff below on the trial, and further deposed that he took his brother Philip aside and conversed with him out of the hearing of Hunter, and advised him to take the offer for a year, small as it was; and accordingly Philip H. assented; that nothing was said about a continuance of the agreement after the first year. Daniel Minor further deposed that he told his brother Philip in the foregoing conversation "that the substance of the matter was an agreement confined to one year, and that the compensation would be afterwards made

adequate to the services and the value of the office; and that this was urged upon Philip as an inducement to agree to the engagement for the year; but that Hunter did not authorize the witness, Daniel Minor, to promise Philip H. that he would be engaged after the first year at a higher compensation."

Daniel Minor also deposed that he suggested to Hunter during the first year's service that the salary of Philip H. should be increased, but Hunter declined doing so. The agreement was precise; Hunter was to pay \$250 and Daniel Minor \$150, as clerk hire, per annum; nor was the contract limited to one year, so far as Hunter entered into it; it was general, at the rate stipulated, for any length of time that Hunter might remain in office, or that Philip H. Minor might see proper to serve, and Hunter and Daniel Minor see proper to retain him as clerk. It is most obvious that the court and jury held Hunter bound by what Daniel Minor promised in the absence of Hunter, and without his knowledge, and contrary to his consent. There is an entire absence of proof that Hunter ever assented, by word or act, to raise the salary of Philip H. Minor as clerk; nor does it appear that the latter at any time applied to Hunter in person, and insisted, or even suggested, that his salary should be increased, until February, 1847, when the letter offered in evidence was written; on the contrary, he received the salary of \$400, as at first stipulated, for fourteen years, regularly crediting himself with it on the marshal's books, each year.

If we reject Daniel Minor's evidence as incompetent to bind Hunter, so far as he used persuasions in Hunter's absence to induce Philip H. Minor to hope, and probably believe, that Hunter would raise his salary, then the case, as proved by the plaintiff below, rests alone on the special agreement made in 1834; and we think it must be stripped of all these conversations between Daniel Minor and his brother, to which Hunter never assented. Nutt was sued as Hunter's executor, for work and labor, care and diligence, done and performed by Minor in and about the business of Hunter in his life-time, and at his special instance and request. And also for sundry matters and things properly chargeable in an account therewith filed; and on these allegations of a *quantum meruit*, Hunter's estate was charged for \$400 per annum, in addition to the \$400 annually paid on the special agreement running through the whole time of Minor's service; and a verdict was had, and a judgment rendered for \$5,055.73, against the estate, which was held responsible, regardless of the fact that Daniel Minor was bound to pay \$150 of the \$400, from April, 1834, to June, 1847, when Alexandria county was retroceded to Virginia by congress (9 Stats. at Large, 35).

§ 28. *Where a contract is made for services, and a stipulated salary agreed upon, the rate of compensation will be presumed to continue indefinitely, in the absence of proof to the contrary.*

On this state of facts, the court was asked to instruct the jury (among other things) that "if, from the whole evidence aforesaid, the jury shall find that in April, 1834, the plaintiff entered into the employment of the deceased to serve him as clerk at a salary of \$400 for a single year, and thereafter continued to serve the said Hunter as clerk aforesaid, during the whole time mentioned in said account and declaration, and that no new agreement was made between the said plaintiff and said Hunter, for a compensation different from that which was as aforesaid first agreed upon between them; and if they shall further find that said Hunter in his life-time fully paid said plaintiff for his said services, at the rate aforesaid, then the plaintiff is not entitled to recover in this action; which instruction the court refused to give as prayed, but did modify

the same by inserting the words "express or implied" between the words "agreement" and "was made." By thus modifying the instruction, the court told the jury, in substance, that they might find on the allegation of a *quantum meruit*, for work and labor done, and for services performed, and hold that an agreement to pay on Hunter's part might be "implied," because of the performance of the services; and that a verdict might be found equal to the value of such services, according to the proof, deducting therefrom the amount already paid on the special agreement; and that such agreement did not preclude the plaintiff below from recovering additional compensation, to any amount that the jury should think he was entitled to. That the instruction as given did reject the special agreement, and leave the jury free to imply a new promise arising on the *quantum meruit*, for labor and services, is manifest; and therefore we are of opinion that the instruction as propounded ought to have been given without an addition of the words "express or implied," as inserted by the circuit court.

§ 29. *Where an employee notifies his employer that after a certain time he shall require increased pay, to which the employer objects, if the employee continues in the service it will be held to be under the original contract.*

The letter, offered in evidence, was a plain attempt on the part of the plaintiff to make evidence for himself. It could only be offered for the purpose of showing that Hunter was thereby notified of Minor's unwillingness to act as clerk after the notice, unless his compensation was increased, and that he would quit unless there was an increase; or as evidence to be taken in connection with other subsequent proof, showing that Hunter assented to the propositions contained in the letter. But as Hunter not only refused to sanction the demand set up, but indignantly resisted and resented it, the letter could be of no value to establish a new promise; nor can it be of any value as notice that additional compensation would be claimed for services rendered thereafter, because the plaintiff, with full knowledge of Hunter's determined rejection of the claim, continued to perform his duties as clerk, and to receive his salary of \$400 as usual, and thereby submitted to Hunter's assumption that the salary was governed by the special agreement made in 1834. We are of opinion that this letter should have been objected to as evidence, and the party offering it compelled by the court to state for what purpose it was offered; so that it might have been inspected and passed on by the court, without being read to the jury. As, however, this course was not pursued at the trial by the defendant's counsel, and a general objection made to reading the letter for any purpose, we do not think the court erred in admitting the evidence in the first instance, although it ought certainly to have been rejected and taken from the jury, after the evidence was closed, had a motion been made to this effect, because it was unsustained by other evidence that Hunter assented to the claim made by the letter. But as no motion was made to withdraw this piece of evidence, the court properly left it with the jury. We order that the judgment of the circuit court be reversed and that the cause be remanded for another trial.

RUPPEL v. PATTERSON.

(Circuit Court for Pennsylvania: 1 Federal Reporter, 220-222. 1880.)

STATEMENT OF FACTS.—Plaintiff held a lease of land belonging to one Stewart, and assigned the lease to defendants. Stewart sold the land and recovered from plaintiff, by suit, rent accruing after the assignment of the lease.

Plaintiff then brought this suit to recover of the defendants the amount he had been compelled to pay.

§ 30. *Liability of a principal to his surety.*

Opinion by the COURT.

The relation of principal and surety imports an obligation on the part of the principal to indemnify the surety as against every liability growing out of that relation, and so to reimburse him whatever sum he may pay necessarily by reason of his vicarious engagement. Especially is this obligation imperative where payment has been made involuntarily by the surety under the coercion of a legal proceeding, which he exhaustively, though unsuccessfully, contested. It is no answer to his demand for reimbursement to say that questions which he fairly presented in the creditor's suit, and were decided against him by a court of competent jurisdiction, were decided erroneously, and ought to be reconsidered and rejudged, because the only duty which the law imposes upon him, as between him and the principal debtor, is to oppose to the creditor's action every proper defense known to him, or to cast the burden of defense entirely upon the principal by giving him notice to that effect. In either case the result is decisive as to the principal and surety alike, in a subsequent controversy between them. This is the purport of the instruction to the jury, and we are unconvinced that there was any error in it. As it is practically decisive of the defendants' liability it is immaterial to consider whether the alleged release by Stewart to the defendants discharged the debt claimed here, and so released the plaintiff, as surety, or was only a covenant not to sue the defendants, with a revocation of the creditor's right of action against the plaintiff. It is not an open question.

§ 31. *The statute of limitations begins to run from the time when the surety pays his principal's debt.*

The remaining reason for a new trial is the alleged error of the court in instructing the jury that the statute of limitations began to run against the plaintiff from the time when he paid the debt for which he was liable as surety, and not from the time when the defendants made default in the payment of it to their creditor. It is obvious that, until the plaintiff paid the debt, he had no legal demand against the defendants, nor could he maintain an action at law to recover it. Now the statute of limitations operates imperatively upon legal remedies only, precluding a resort to them after six years from the date when the right to maintain them accrued. Until the plaintiff was in a position to maintain an action against the defendants the statute did not begin to run against him. This is too clear to need amplification.

It is argued, however, that upon the defendants' omission to pay the debt at its maturity the plaintiff might then have required them to exonerate him from his liability, and that hence from that time the statute of limitations began to run. *Ardesco Oil Co. v. North American Oil & Mining Co.*, 16 P. F. Smith, (66 Penn. St.), 375, is referred to to sustain this argument. It is there held to be "well settled, that as soon as the surety's obligation becomes absolute he is entitled in equity to require the principal debtor to exonerate him" (381), and that this right is enforceable by an action, in which the measure of damages is the amount of the debt for which the surety is liable. It is distinctly recognized as strictly an equity, which may be thus enforced only because, under the peculiar system which exists in Pennsylvania, equity is administered through common law forms. But this exceptional mode of administration does not change the character of the right. It is still an equitable incident to the rela-

tion of principal and surety, which entitles the latter to demand protection against the former's possible default, and is in its nature distinct from and independent of the surety's *legal* remedy where the burden of payment has been actually cast upon him. Out of the payment of the debt the surety's right to employ such remedy springs, and hence it is clear that the statute of limitations has no relation to it until it accrues. The motion for a new trial is, therefore, denied, and judgment is directed to be entered on the verdict.

BANK OF COLUMBIA v. PATTERSON.

(7 Cranch, 299-307. 1813.)

ERROR to the Circuit Court for the District of Columbia.

STATEMENT OF FACTS.—Action of *indebitatus assumpsit*, brought by the defendant in error against the president, directors and company of the Bank of Columbia, in their corporate capacity. There were four counts only in the declaration. 1st. *Indebitatus assumpsit*, for matters properly chargeable in account. 2d. *Indebitatus assumpsit*, for work and labor done. 3d. *Quantum meruit*; and 4th. *Insimul computassent*. The defendant pleaded *non assumpsit*, and a tender.

On the trial below the defendant took three bills of exceptions. The first stated that the plaintiff read in evidence a sealed agreement, dated 10th December, 1807, between Patterson and a duly authorized committee of the directors of the bank, under their private seals. It recites that a difference of opinion had arisen between Patterson and the committee for building the new banking-house, as to certain work extra of an agreement made between Patterson and the said committee, in 1804, and thereto annexed; whereupon it was agreed that all the work done by Patterson should be measured and valued by two persons therein mentioned, according to certain rates, called in Georgetown old prices, and the sum certified by them should be taken by both parties, in their settlement, as the amount thereof. It was also thereby agreed that the outhouses, respecting which there had been no specific agreement, should be measured and valued by the same persons in the same manner. The agreement of 1804, referred to in and annexed to the agreement of 1807, was also offered in evidence by the plaintiff, and states that Patterson had agreed with the committee to do all the carpenter's work required, agreeably to the plan of the new bank, and states particularly the manner in which it was to be done; and that, "in consideration of the work being done" as stated, the committee agreed to pay Patterson \$3,625, as full consideration; and that, if, when the work should be finished, the committee should be of opinion that that sum was too much, Patterson agreed to have the work measured, at the expense of the bank, by two persons mutually appointed, who should take the old prices as the standard, and, in case the bill of measurement did not amount to the sum of \$3,625, Patterson agreed to take the amount of measurement for full satisfaction. The plaintiff then read in evidence a paper of particulars of the work, certified by the persons named in the agreement of 1807. The defendants offered in evidence the plan of the building, and that it was built principally according to that plan and the agreement; and that any work other than that stated in the plan and agreement was to be charged separately as extra work, and that it was so charged by Patterson before the 10th of December, 1807, the date of the second agreement, who presented the account (so charged) to the defendants, claiming the amount of the same, and claiming also

for the work done under the agreement of 1804 the sum of \$3,625, and proved that, while the work was going on, the defendants paid Patterson sundry large sums of money on account thereof.

The court was thereupon prayed by the defendants to instruct the jury that if they believed that the agreement of 1804 was assented to by Patterson and the committee as binding between them, and that the work therein contracted for was done by Patterson, and that the sum of \$3,625 therein mentioned was claimed by him on account of the same, then the plaintiff could recover for no such work, but could only recover for the work done extra of the said agreement; which instruction the court refused to give.

The second bill of exceptions states that the defendants, upon the same evidence, prayed the court to instruct the jury that the plaintiff was not entitled to recover under any of the counts; which instruction the court refused to give, but declared that the evidence was competent. The third bill of exceptions states that the defendants prayed the court to instruct the jury, upon the same evidence, that the plaintiff could not recover, unless he should prove that the defendants, after the measurement and valuation, expressly promised to pay the amount thereof to the plaintiff; and that the jury could not, from the evidence offered, presume any such promise. This instruction the court also refused.

Opinion by MR. JUSTICE STORY.

Several exceptions have been taken to the opinion of the court below, which will be considered in the order in which the objections arising out of them have been presented to us. We are sorry to say that the practice of filing numerous bills of exceptions is very inconvenient; for all the points of law might be brought before the court in a single bill with a simplicity which would relieve the bar and the bench from every unnecessary embarrassment.

§ 32. *Indebitatus assumpsit may be maintained upon a special contract not under seal and completely executed.*

As the argument on the first exception has proceeded upon the ground that the agreement of 1804 was completely executed and performed, and the objection relates only to a supposed mistake in the form of the declaration, it will at present be considered in this view. And we take it to be incontrovertibly settled that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed; and that it is not, in such case, necessary to declare upon the special agreement. *Gordon v. Martin*, Fitzgibbon, 303; *Mussen v. Price*, 4 East, 147; *Cooke v. Munstone*, 4 Bos. & Pull., 351; *Clarke v. Gray*, 6 East, 564, 569; 2 Sand., 350, note 2. In the case before the court we have no doubt that *indebitatus assumpsit* was a proper form of action to recover, as well for the work done under the contract of 1804, as for the extra work. It may, therefore, safely be admitted (as is contended by the plaintiff in error) that, where there is a special agreement for building a house, and some alterations or additions are made, the special agreement shall, notwithstanding, be considered as subsisting so far as it can be traced. *Pepper v. Burland*, Peake, 103. The first exception, therefore, wholly fails.

§ 33. *A simple contract is not merged in a sealed instrument which merely recognizes the debt and fixes the mode of ascertaining the amount.*

Under the second exception the plaintiff in error has made various objections. 1. The first is, that, though a promise would be implied by law for the extra work against the corporation, yet that such promise was extinguished, by oper-

ation of law, by the provisions of the sealed contract of 1807. It is undoubtedly true that a security under seal extinguishes a simple contract debt, because it is of a higher nature. Cro. Car., 415; Raym., 449; 2 Jones, 158; 1 Bur., 9; 5 Com. Dig., tit. Plead., 2 G., 12. But this effect never has been attributed to a sealed instrument which merely recognizes an existing debt, and provides a mode to ascertain its amount and liquidation. At most, the sealed agreement of 1807 could not be construed to extend beyond this import. In no sense could it be considered as a higher security for the money originally due. This objection, therefore, cannot prevail, even supposing that the agreement were the deed of the corporation.

§ 34. *Upon general counts a special agreement executed may be given in evidence.*

2. A second objection is that the special agreements, connected with the certificates of admeasurement, were inadmissible evidence under the general counts, and could be admissible only under counts framed on the special agreements. To this objection an answer has already in part been given. And we would further observe that if the agreements connected with the admeasurements were the means of ascertaining the value of the work, the evidence was pertinent under every count. 2 Saund., 121, note 2. And if the certificates of admeasurement were of the nature of an award, they were clearly admissible under the *insimul computassent count*. Keen v. Batshore, 1 Esp., 194.

§ 35. *An executed agreement is not extinguished by the mere recital of it in a later one, although the latter be under seal.*

3. Another objection is that, as the agreement of 1807 is sealed, and is connected by reference with the prior agreement, they are to be construed as one sealed instrument, and *assumpsit* will not lie upon an instrument under seal. The foundation of this objection utterly fails, for the agreement is not under the seal of the corporation, but the seals of the committee; and if it were otherwise, it is too plain for argument that the original agreement was not extinguished, but referred to as a subsisting agreement. It is quite impossible to contend that the mere recital of a prior, in a later agreement, after it has been executed, extinguishes the former. Two other objections are made under this exception, but as they are answered in the preceding observations, it is unnecessary to notice them farther.

§ 36. *Of the power of a corporation to make contracts not under the corporate seal.*

Under the third exception, the only objections relied on are in principle the same as the objections urged under the former exceptions, and they admit the same answers. The case has thus been considered all along as though the contracts were made between the plaintiff's administrator and the corporation, and, indeed, some points in the argument have proceeded upon this ground. It is very clear, however, that neither the first nor second agreements were made by the corporation, but by the committee, in their own names. In consideration of the work being done, the committee, and not the corporation, personally and expressly agree to pay the stipulated price. A question has therefore occurred, how far the corporation were capable of contracting, except under their corporate seal; and if it were capable, as no special agreement is found in the case, how far the facts proved show an express or an implied contract on the part of the corporation.

Anciently, it seems to have been held that corporations could not do anything without deed. 13 How., 8, 12; 4 How., 6, 7; 7 How., 7, 9. Afterwards

the rule seems to have been relaxed, and they were, for expediency's sake, permitted to act in ordinary matters without deed, as to retain a servant, cook or butler. *Flow.*, 91, b.; 2 *Sand.*, 305. And gradually this relaxation widened to embrace other objects. *Bro. Corp.*, 51; 1 *Salk.*, 191; 3 *Lev.*, 107; *Moore*, 512. At length, it seems to have been established that, though they could not contract directly, except under their corporate seal, yet they might by mere vote, or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation (*Rex v. Bigg*, 3 P. Wms., 419); and courts of equity, in this respect seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. 1 *Fonb.*, 296, *Phil. ed.*, note (o). The sole ground upon which such an agreement can be enforced must be the capacity of the corporation to make an unsealed contract. As it is conceded, in the present case, that the committee were fully authorized to make agreements, there could then be no doubt that a contract made by them in the name of the corporation, and not in their own names, would have been binding on the corporation. As, however, the committee did not so contract, if the principles of law on this subject stopped here, there would be no remedy for the plaintiff, except against the committee.

§ 37. *Rule as to when a corporation is bound by parol contracts made by its agents.*

The technical doctrine that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. And it seems to the court that adjudged cases fully support the position. *Bank of England v. Moffat*, 3 *Bro. Ch.*, 262; *Rex v. Bank of England*, *Doug.*, 524, and note *id.*; *Gray v. Portland Bank*, 3 *Mass.*, 364; *Worcester Turnpike Corp. v. Willard*, 5 *Mass.*, 80; *Gilmore v. Pope*, 5 *Mass.*, 491; *Andover & Medford Turnpike Corp. v. Gould*, 6 *Mass.*, 40.

In the case before the court, these principles assume a peculiar importance. The act incorporating the Bank of Columbia (Act of Maryland, 1793, ch. 30) contains no express provision authorizing the corporation to make contracts. And it follows, that, upon principles of the common law, it might contract under its corporate seal. No power is directly given to issue notes not under seal. The corporation is made capable to have, purchase, receive, enjoy and retain lands, tenements, hereditaments, goods, chattels and effects, of what kind, nature or quality soever, and the same to sell, grant, demise, alien or dispose of,—and the board of directors are authorized to determine the manner of doing business, and the rules and forms to be pursued; to appoint and pay the various officers, and dispose of the money or credit of the bank in the common course of banking for the interest and benefit of the proprietors.

§ 38. *A banking corporation may issue notes not under seal.*

Unless, therefore, a corporation not expressly authorized may make a promise, it might be a serious question how far the bank-notes of this bank were legally binding upon the corporation, and how far a depositor in the bank could possess a legal remedy for his property confided to the good faith of the corporation. In respect to insurance companies also, it would be a difficult question to decide, whether the law would enable a party to recover back a premium, the consideration of which had totally failed. Public policy, therefore, as well as law, in the judgment of the court, fully justifies the doctrine which we have endeavored to establish. Indeed, the opposite doctrine, if it were yielded to, is so purely technical that it could answer no salutary purpose, and would almost universally contravene the public convenience. Where authorities do not irresistibly require an acquiescence in such technical niceties, the court feel no disposition to extend their influence.

§ 39. *Where contracts for the exclusive benefit of a corporation are made by its agents in their own names, but the corporation makes payments on the contracts, a jury is authorized to infer that the corporation has adopted the contracts.*

Let us now consider what is the evidence in this case, from which the jury might legally infer an express or an implied promise of the corporation. The contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter. The corporation proceeded, on the faith of those contracts, to pay money from time to time to the plaintiff's intestate. Although, then, an action might have laid against the committee personally, upon their express contract, yet as the whole benefit resulted to the corporation, it seems to the court that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement. As to the extra work respecting which there was no specific agreement, the evidence was yet more strong to bind the corporation. In every way of considering the case, it appears to the court that there was no error in the court below and that the judgment ought to be affirmed.

SHIRLY v. HARRIS.

(Circuit Court for Indiana; 3 McLean, 330, 331. 1844.)

Opinion by the COURT.

STATEMENT OF FACTS.—This action is brought on a sealed obligation in which was recited that "the defendant had given a joint note with Beverly Wallace for the sum of \$400, payable to the plaintiff, or order, on 3d October, 1842, dated December, 1840." And the defendant covenanted that the money should be paid to the plaintiff, in Missouri, at his residence, when due, or he would pay ten per cent. interest and the expense of plaintiff in coming to Indiana for the money. And the plaintiff averred that the money was not paid, and the expenses in coming for the money is averred, etc. The defendant pleaded, 1. *Nil debet*; and 2. That the instrument was given voluntarily and without consideration.

§ 40. *A defendant's deed which recites that he is indebted estops him from afterwards saying that he is not indebted.*

To the first plea the defendant demurred. The demurrer must be sustained. By his deed the defendant is estopped from saying that he is not indebted.

The plaintiff tendered an issue to the second plea. A statute of Indiana authorizes the second plea. The plaintiff proved to the jury that the money not being paid when due, the plaintiff came from Missouri to Indianapolis to collect it; and he proved the amount of his expenses. It is not pretended that this contract was not a *bona fide* one. It was entered into fairly, and the only question which is raised is, whether it is legal and can be enforced.

§ 41. *An agreement to pay ten per cent. if a note already executed shall not be paid at maturity is without consideration and void.*

As regards the ten per cent. we think it cannot be recovered. There was no consideration to support the obligation. Six per cent. is the legal rate of interest in Indiana, though a higher rate, not exceeding ten per cent., will be valid, if agreed to be paid in writing. The note on which this interest was to be paid had been given before the date of the agreement on which this action is brought. There is no consideration, then, for the payment of the ten per cent. interest. It was a voluntary undertaking, and cannot be enforced.

§ 42. *A contract to pay expenses of travel to collect a note, if it should not be paid at maturity, is valid.*

But that part of the agreement which regards the expenses of the plaintiff is not without consideration. By the note he was bound to pay the money at the time stipulated, and if he failed to do this, and the plaintiff was under the necessity of making a trip to Indiana, he bound himself to pay his expenses. Here is an expenso incurred, by reason of the default of the defendant, and which he agreed to pay. We see no principle which forbids such a contract, it being *bona fide*, and the jury will find for the plaintiff such expenses as the plaintiff incurred on the trip and has proved.

§ 43. *Bill of parcels not a contract.*—A bill of parcels was headed "H. bought of D. & J.," etc. In a suit by J. against H. for the goods it was held that the bill of parcels was not a contract; that it was not conclusive evidence of the joint ownership of the property sold, or of a joint sale, but that evidence was admissible to show by whom the sale was made and to whom the property belonged. *Harris v. Johnston*, 8 Cr., 817.

§ 44. *The mere settlement of an account does not in itself constitute an agreement, or amount to a contract, though it may be evidence of a contract.* Thus the debiting of a share in a vessel in an account might be evidence of a transfer of such share, but it would not of itself amount to a transfer. *Peterson v. United States*, 2 Wash., 39.

§ 45. *An account stated is a new contract between the parties.* A balance is found against one and he agrees to pay it, and not the items of which it is composed. No inquiry is permitted in regard to the items unless there has been fraud or a clear mistake. The promise implied from the account stated is a new one to pay a definitely ascertained amount. *Marye v. Strouse*, 6 Saw., 217; 5 Fed. R., 496.

§ 46. *Subject-matter necessary.*—In order to constitute a valid contract there must have been not only an agreement of the parties, but there must have been a subject-matter for the agreement to operate upon. So if the subject-matter of the contract, contrary to the supposition of the parties, has no existence, there is no contract. *Scriba v. Insurance Co. of North America*, 2 Wash., 110.

§ 47. *Privity.*—An attorney employed solely by A. to examine his title to a certain tract of land gave a certificate to A. that his record title was good. B., relying thereon, lent A. a sum of money, taking as security a deed of trust on the land. A. had, as a matter of fact, conveyed this land by a deed which was on record at the time. The loan was lost, as A. was insolvent. *Held*, that there was no privity of contract between the attorney and B. which would enable the latter to bring an action to recover the loss occasioned by the falsity of his certificate. *Savings Bank v. Ward*, 10 Otto, 197.

§ 48. *Must be an obligation on both sides.*—In order to make a contract binding there must be a duty or obligation on both sides. If it is optional on a party to pay money or not, the other party is not bound. *Tufts v. Tufts*, 3 Woodb. & M., 472.

§ 49. *In order to give a contract binding force it must bind the parties thereto mutually.* If it binds only the party which promises, and imposes no obligations on the party to whom the promise is made, it is a *nudum pactum*. *Dorsey v. Packwood*, 12 How., 136.

§ 50. In order for a contract to have binding force its obligations must be mutual and binding on both. If both parties are not bound there is no contract. So where an insolvent debtor, pursuant to a contract entered into between him and one of his creditors, conveyed all his property to the creditor, who promised to pay his indebtedness *pro rata*, it was held that no action lay by a creditor against the person promising to pay such indebtedness. *McCarterney v. Wyoming National Bank*,* 1 Wyom. T'y, 384.

§ 51. Must be assent to the same terms.—Shingles were sold and delivered for \$3.25, but it was doubtful whether the price mentioned was for a thousand or for a bunch. *Held*, that in order to constitute a contract the minds of both must have assented to the same terms, and that if the seller understood the \$3.25 was for a bunch, and the buyer that it was for a thousand, there was no contract. *Greene v. Bateman*, 2 Woodb. & M., 361.

§ 52. When covenants are dependent, must be signed by both parties.—A written instrument containing mutual assignments and releases which are a condition for each other, signed by only one party, is of no binding effect on the party who did not sign it. *Ambler v. Whipple*, 20 Wall., 555.

§ 53. Mutual mistake.—Where a contract is founded on mutual mistake neither party is bound by it. In such a case there has never been an agreement to the same subject-matter in the same sense. So where the owner of a ship who lived in New York, and whose vessel was then at that place, applied to an underwriter in Boston for insurance thereon, representing that she was coppered, and the meaning of that phrase differed in Boston, so that the underwriter supposed he was insuring a ship in better condition than the ship actually was, it was held that, the parties not having understood the terms of the contract in the same way, it was not binding. *Hazard v. New England Marine Ins. Co.*, 1 Sumn., 225.

§ 54. A bargain founded on a mutual mistake of facts, constituting the very basis or essence of the contract, or founded upon representations material to the bargain, and constituting the essence thereof, although made by innocent mistake, will avoid it. *Daniel v. Mitchell*, 1 Story, 190.

§ 55. In ignorance of the fact that a claim against a foreign government had been allowed, the claimant and his agent entered into a contract by which the agent was to prosecute the claim and was to receive a large share of it if successful. *Held*, that the agreement having been entered into by both parties without knowledge of the fact of the actual allowance of the claim, it would be canceled on the ground of mistake. *Allen v. Hammond*, 11 Pet., 70.

§ 56. Promise under mistake of liability.—A promise made under a mistake as to liability is not binding. Thus where a party entered into an agreement to pay a note if it could not be collected from the maker, a request for an instruction that he was liable on such agreement though he was not liable on his blank indorsement of the note was refused. The agreement was entered into on the representation by the attorney of the holder of the note that he was liable on his indorsement, and that if he would enter into the agreement he would be indulged as to time. *Offutt v. Parrott*,* 1 Cr. C. C., 154.

§ 57. Cynalagmatic.—A contract in which only the vendor speaks, and which contains no stipulations, either express or implied, by the vendee, requiring nothing to be done by him, is not a cynalagmatic contract under the laws of Louisiana. *Zacharie v. Franklin*,* 12 Pet., 151.

§ 58. Mistake — Injunction.—A judgment creditor agreed with the debtor to look for payment to a trust fund which, though he did not know it, would not allow him to come in, owing to a limitation in the trust deed. *Held*, that he would not be enjoined from proceeding to collect his judgment unless he was enabled to avail himself of the fund. *Mechanics' Bank of Alexandria v. Lynn*, 1 Pet., 384.

§ 59. Offer — Acceptance.—An offer to sell for \$40,000 in cash is not accepted so as to make a binding contract by the deposit of \$10,000 upon condition that the purchaser may either pay the remainder within a limited time or forfeit the amount deposited and withdraw from the contract. *Stitt v. Huidekopers*,* 17 Wall., 384. See § 4.

§ 60. Where one party agrees to pay a certain sum provided the other party will do certain acts, the promise of the first party is equivalent to an offer, and performance by the second party is equivalent to an acceptance of the offer; but to have this effect there must be a complete performance. *Gray v. Hinton*, 2 McC., 167 (§§ 930-932).

§ 61. An offer of a bargain by one person to another imposes no obligation upon the former unless it is accepted by the latter in the terms in which the offer is made, and any qualification or departure from the terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open and imposes no obligation on either. The party offering to sell or buy has the right to dictate the terms in regard to the time when the proposition shall be accepted, as well as other material circumstances, nor will the court inquire after the reasons why a time was fixed. *Carr v. Duval*, 14 Pet., 83.

§ 62. Pending negotiations for a contract, either party has a right to withdraw any proposition made to the other before it is accepted; and a mere voluntary compliance with the terms of the proposition afterwards does not render the other party liable on it. *Mayer v. United States*,* 5 Ct. Cl., 328.

§ 63. Acceptance of offer by conduct.—Where a person makes a promise, the other party, though he does not accept it in express terms, may make it binding by conduct on his part corresponding with his assent thereto. *Lonsdale v. Brown*, 4 Wash., 89. See § 4.

§ 64. Express acceptance of a proposition, as to the adjustment of differences, is not necessary to bind the parties; but if they are shown to have acted upon it, and to have recognized it in subsequent dealings, this will be a sufficient acceptance. *United States v. Carlisle*,* 4 Am. L. T. Rep., 334.

§ 65. Circular acted on by insurance agent.—Where the compensation of an insurance agent is stated in a circular received by him, on which he acts for several years, and until he is discharged, and by which his compensation is adjusted and received, he is, in the absence of fraud or unfairness or illegality, estopped to deny that such circular constituted the contract. The production of a circular of previous date does not show that there was another contract. *Stagg v. Insurance Company*,* 10 Wall., 589.

§ 66. Advertisement for proposals, and acceptance of them.—If an advertisement by a city for proposals for the manufacture of fire hose is clear, and if the proposals are also clear, and are accepted in the terms in which they are made, simply and absolutely, these papers contain the contract between the parties. *Chicago v. Greer*,* 9 Wall., 726. See § 2.

§ 67. When complete.—Where a party makes a bid for the furnishing of certain merchandise, and accompanies his bid with a bond with sureties, the contract is complete at the instant on which the bid is accepted, though the formal written contract is not drawn up till later. *Adams v. United States*,* 1 Ct. Cl., 194.

§ 68. Evidence of.—A receipted bill of parcels is not evidence of an unexecuted contract to deliver the goods mentioned therein, but it is *prima facie* evidence of an executed contract. *Richardson v. Peyton*, 1 Cr. C. C., 419.

§ 69. A person went to the officer of an insurance company and requested of a person at a desk, whom he could not afterwards identify, that the policy on a vessel at sea be renewed. He was then told that the secretary had gone home, and that the matter would be attended to the first thing in the morning. *Held*, that this is not sufficient evidence of a completed contract (i. e., of an agreement assented to by both parties at any one time), to be submitted to a jury. *Insurance Co. v. Lyman*, 15 Wall., 671.

§ 70. Implied.—Reception of the price of goods sold, refusal to deliver, and conversion of the goods, constitute plenary evidence of an implied promise to refund the price. *Nash v. Towne*, 5 Wall., 689 (§§ 1039-42). See § 7.

§ 71. To constitute an implied contract with the government on which a suit may be maintained in the court of claims, there must have been some consideration moving to the United States, or they must have received money charged with a duty to pay it over, or the claimant must have had a right to it when it was received. In a case where the proceeds of property condemned under the captured and abandoned property act were paid into the treasury while the owner was unpardoned, a subsequent pardon will not raise an implied contract to repay the money. *Knote v. United States*, 5 Otto, 156.

§ 72. Where a supercargo was obliged to pay a sum to the revenue officers of a foreign government to save the vessel from condemnation for an act of his own in violation of the revenue laws of such foreign country, he may recover the same against the owners unless the payment so made was against the law of the foreign country, as, where it was a bribe. *Peyton v. Veitch*, 2 Cr. C. C., 124.

§ 73. In all suits for personal services it must appear that there was an express or implied contract. One may be liable for work done for him, although the claim for compensation depends upon the fact that he knew of the work while it was progressing, and made no objection; there the law implies an assent. *McElderry v. United States*,* Dev., 56 (165).

§ 74. If from the whole scope and design of an instrument under seal, it was the intention of the parties that certain acts should be performed by the person sought to be charged, although there is no express promise, yet the implied agreement is a binding covenant for the performance of the act. *Burton v. Smith*, 4 Wash., 525.

§ 75. Wherever there is a duty there is a corresponding obligation to perform it. Duty creates the obligation to pay back money illegally exacted by the government for duties, and from this obligation the law implies a promise on the part of the United States to pay it. *Spence v. United States*,* Dev., 60 (130).

§ 76. To constitute a promise binding in law, no form of words is necessary. An implied promise may be shown by circumstances indicating that the party intended to assume the

obligation. A party may assume an obligation by putting himself into a position which requires the performance of duties. *Webster v. Upton*, 1 Otto, 68.

§ 77. A person interested in a suit requested L. by letter to execute a *supersedeas* bond therein. L. procured M. to sign with him. *Held*, that the request implied a promise not merely to L., but to whomsoever L. might procure to execute the bond, and that both L. and M. had a cause of action against the person requesting them so to sign, on his refusal to execute a bond of indemnity as promised. *Hendrick v. Lindsay*, 8 Otto, 147.

§ 78. It seems that where a party agrees to hold money or goods subject to the order of the owner, that agreement raises an implied promise to the holder of the order on which the latter may maintain an action. *Tiernan v. Jackson*, 5 Pet., 597.

§ 79. A defendant is not bound to pay for services unless such services were rendered at his express or implied request. And if they are rendered upon an emergency, and are beneficial to him, his assent may be presumed unless evidence to the contrary is shown. *Manning v. Cox*, * 4 Cr. C. C., 693.

§ 80. Escrow.—The delivery of a bond in escrow is sufficient though the obligee is not privy to the delivery, and though the condition on which it is to be delivered is the performance of an act by a third person. *Mayor and Commonalty v. Moore*, 1 Cr. C. C., 193.

§ 81. Where a deed is delivered as an escrow, nothing passes till the condition is performed; but it seems that when the condition is performed the deed relates back to the time of its execution. *County of Calhoun v. American Emigrant Co.*, 3 Otto, 127.

§ 82. Where one obligor, at the time of signing a bond, acknowledges it on condition that others shall sign it, then such bond remains, as to him, an escrow. So, also, where a person inserts in the bond the names of others whom he wishes to have sign it, and he and two others sign it, and then he calls on witnesses to take notice that "we" acknowledge the instrument, but that there were others to sign, it seems that as to them the bond is an escrow. *Pawling v. United States*, 4 Cr., 222.

§ 83. It seems that where an instrument is delivered as an escrow, or where one surety has signed it on condition that it shall be signed by another before its delivery, no obligation is incurred before the contingency shall happen. *Duncan v. United States*, 7 Pet., 443.

§ 84. — delivery.—A bond cannot be delivered to the obligee in escrow. Nor can it be delivered to one member of a copartnership which is the obligee. Such delivery to one is a delivery to all. *Moss v. Riddle*, 5 Cr., 351.

§ 85. Deed must be delivered.—Where a deed is made and sealed by the grantor and left with a third person with no authority to deliver it to the grantee, it does not pass title to the land till delivered with the assent of the grantor. *Carr v. Hoxie*, 5 Mason, 61.

§ 86. Competency.—A slave is incompetent to contract, and an executory contract between a master and a slave, though partly executed, cannot be enforced, either in law or in equity. So where a master promised a slave his freedom if he would pay him \$900, and the slave paid \$850, and then the master died, it was *held* that the slave could not compel the executor of the master to manumit him though he offered the balance due under the promise of the master. *Brown v. Wingard*, 2 Cr. C. C., 302.

§ 87. A female slave was sold for a term of years and her master promised her her freedom at the end of that term of years, but failed to execute the deed. While serving out the term the slave had a child which was sold by her owner for the term. *Held*, that the contract between the master and the slave was void for the incapacity of the slave to contract, and that consequently the child was a slave. *Fanny v. Kell*, 2 Cr. C. C., 413.

§ 88. A contract between a master and a slave is not enforceable, either in law or equity. *Richard v. Van Meter*, 3 Cr. C. C., 215.

§ 89. A slave is not bound by his promise to his master even to pay for his freedom. *Contee v. Garner*, 2 Cr. C. C., 162.

§ 90. During the existence of slavery in Mississippi, a contract between a slave and his master was an utter nullity, and conferred no rights and imposed no obligations upon either of the parties. The destruction of slavery could have no effect on such a contract in case its validity was afterwards drawn in question in court. (Affirming S. C., 9 Ct. Cl., 174.) *Hall v. United States*, 2 Otto, 30.

§ 91. In contemplation of the law, any foreigner, even an ignorant African, is competent to make a contract, and a court of admiralty will not inquire whether the engagement is advantageous or onerous to him, unless for the purpose of seeing whether the evidence shows him to have been incapable of entering into a contract, or that some imposition was practiced upon him. *Sunday v. Gordon, Bl. & How.*, 579.

§ 92. A promise by a married woman to repay a loan of money made at her request is not binding, even though she subsequently gives a written promise to the same effect, after she has become a widow. *Watson v. Dunlap*, * 2 Cr. C. C., 14.

§ 93. **State may make a contract.**—The power of a state to enter into contracts is inherent in its sovereignty. *State Bank of Ohio v. Knoop*, 16 How. 389 (CONSTR., §§ 2243-53).

§ 94. **A parol agreement to insure is binding on the insurer if all the particulars of the agreement are understood, and this, notwithstanding a state statute providing that valid policies of insurance must be signed by the president of the insurance company, and countersigned by the secretary.** The statute has no application to agreements to make insurance, but applies only to the formal execution of the policies. *Commercial Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How., 321.

§ 95. **Written contract—Preliminary negotiations.**—Where the terms of a contract of insurance have been reduced to writing and signed by one party and accepted by the other at the time the premium was paid, neither party can abandon that instrument as of no value in ascertaining what the contract was, and resort to verbal negotiations which were preliminary to its execution for that purpose. *Insurance Co. v. Lyman*, 15 Wall., 670.

§ 96. **Not complete until reduced to writing.**—Where parties agree that an oral contract shall be reduced to writing and signed, the contract is not complete until it has been so written and signed. *Riggs v. Magruder*,* 2 Cr. C. C., 145.

§ 97. **Turning parol into written.**—The intention of the parties to turn a parol agreement into a written one does not weaken the obligation of the parol contract. And a party to a parol contract, which is to be reduced to writing, cannot escape from its obligations by refusing to execute the written instrument when prepared, or to proceed further with it. *Blight v. Ashley*,* Pet. C. C., 15.

§ 98. **Seal by one owner where the promise is by two.**—If an indenture describes two persons as party of the first part and only one seal the instrument, the other is no party to the contract; and the one sealing it may sue on the covenants made with "the party of the first part." *Philadelphia, etc., R. Co. v. Howard*, 13 How., 307 (§§ 1595-1608).

§ 99. **By corporation—Seal by officer.**—A contract in writing will bind a corporation, although the seal used is the private seal of an officer, and no record of his having authority is found, if the court is satisfied that, as a matter of fact, he did have such authority, or the company ratifies his contract afterwards. *Eureka Co. v. Bailey Co.*, 11 Wall., 491.

§ 100. **Bond without seals.**—An instrument in the form of a bond, but without the seals of the parties, is a good and valid contract if a good and sufficient consideration to support it is proven. *United States v. Linn*, 15 Pet., 315.

§ 101. **Collateral understanding to a contract under seal.**—No penal condition or understanding collateral to a contract under seal can have any effect upon it. *Crown v. United States*,* Dev., 57 (178).

§ 102. **A promise to pay when able does not bind the promisor unless the promisee accepts the promise as it is made and agrees to wait till the promisor is able to pay.** *Craig v. Brown*, 3 Wash., 506.

§ 103. **In order that the promise of the drawee of a dishonored bill, that he will pay it when able, should bind him, it must be assented to by the plaintiff.** If valid to bind the defendant to pay when able, it must have been obligatory upon the plaintiff to wait until that event should take place. The fact that the plaintiff entered suit upon the bill at least two years before it was contended that the defendant was able to pay will be held to show that there was no assent on his part, and will prevent a recovery, on the promise after the statute of limitations has run, even if the defendant is then able. *Craig v. Brown*, 3 Wash., 506.

§ 104. **Where the debtor promised to pay a debt when he was able the assent of the creditor bound him to wait till the debtor was able.** *Lonsdale v. Brown*, 4 Wash., 152.

§ 105. **When time is of the essence.**—Time is always deemed of the essence of the contract where its subject varies in value, or the motives and interests of complainant are subject to change. *Tait v. New York Life Ins. Co.*, 1 Flip., 325.

§ 106. **It seems that time is not of the essence of the contract when no time is fixed within which it is to be performed, and the other party has never resorted to chancery to fix a time within which performance was limited.** *Tufts v. Tufts*, 3 Woodb. & M., 474.

§ 107. **If a contract is silent with respect to the condition of time, or fails to indicate a distinct purpose of the parties to make it an essential consideration, and where no circumstances exist to manifest its importance, it is the habit of a court of equity to relax the stringency of the rules of legal interpretation on that subject, and to decree performance and direct compensation, even in cases where there has been inattention and neglect.** But if the parties have agreed in their contract that time is a material consideration, and have agreed that their rights shall depend upon a scrupulous fidelity to their engagements, it does not belong to that court to make another agreement for the parties. Where it plainly appears that the contract is conditional, and its completion is dependent upon the fulfillment of any of the terms by either party with punctuality, a court of equity, in general, will not interpose to re-

lieve the party in default, on the principle that time is not of the essence of the contract. *Stinson v. Dousman*, 20 How., 466.

§ 108. It seems that at law, if there is an express agreement for the payment of the purchase money and the delivery of the property on a particular day, the parties will be bound by it and time will be of the essence of the contract. Time may be made of the essence of the contract by express stipulation, or it may become essential by considerations arising from the nature of the property, or the character of the interest bargained; and in applying this principle courts of equity do not depend upon considerations collateral to the contract merely, or on the conduct of the parties subsequently showing that time was not of the essence of the contract in the particular case, but for them to regard time as of the essence of the contract it must appear that the parties so regarded it. *Seacombe v. Steele*, 20 How., 103.

§ 109. Where a policy of life insurance stipulates that the annual premiums shall be paid on certain days, and if not so paid then the policy shall be forfeited, such condition is a condition subsequent upon which the policy is liable to forfeiture, and time is material and of the essence of the contract, and non-payment at the day involves absolute forfeiture. Courts cannot, with safety, vary the stipulation of the parties by introducing equities for the relief of the insured against his own negligence. *New York Life Ins. Co. v. Statham*, 3 Otto, 81.

§ 110. Time is not of the essence of the contract where it does not provide at what time either party shall perform his part under the contract, and nothing is said as to an avoidance of the contract for any failure to perform. *Longworth v. Taylor*, 1 McL., 403.

§ 111. Parties may make time of the essence of the contract, and in no case is it to be considered an immaterial circumstance. *Ibid*.

§ 112. A principal is bound on a contract made in his name by his general agent, although the latter fails to notify him of the formation of the contract. *Steam Packet Co. v. Sickles*, 10 How., 419 (§§ 1029-32).

§ 113. An agent who has entered into a written contract in which he appears as principal cannot exonerate himself by parol evidence, even though he proposes to show that he disclosed his agency and the name of his principal at the time the contract was executed. *Nash v. Towne*, 5 Wall., 639 (§§ 1039-42).

§ 114. Parol evidence of agency.—In an action upon a written contract for the non-delivery of certain corn the declaration alleged that G. was agent of plaintiff and R. agent of defendant. In the contract there were several references to plaintiff and to defendant, and it was held that parol evidence of the agency of G. and R. was admissible. *Somers v. Tayloe*,* 3 Cr. C. C., 138.

§ 115. Agency—False date.—After the authority of an agent to make a contract is revoked he cannot bind his principal by ante-dating the contract. A false date is of as little force in such a case as a false signature. *Anthony v. County of Jasper*, 11 Otto, 698.

§ 116. Compromise for another without authority.—If a person make a compromise for another without authority such compromise is of no effect unless ratified, and does not in any way affect the original cause of action. *Abbe v. Rood*, 6 McL., 111.

§ 117. By ratification of acts of another.—If the owner of property, with a full knowledge of the facts, ratifies a contract respecting it made by a third person, he makes himself a party to it, as much so as if the original agreement had been made with him; and no new or additional consideration is required to support the ratification. *Drakely v. Gregg*,* 8 Wall., 242.

§ 118. Corporation bound by contract of its agent and chief stockholder.—B., the legal owner of a patent to which a company had the equitable title, sued C. for infringement of his patent in his own name, and pending the suit made an agreement with C. by which the suit was dismissed and C. was given the right to use the patent of which B. was the legal owner. B. assigned his rights to the company, and it sued C. for infringement. B., at the time of the agreement with C., was a member and the chief stockholder in the company, and its agent, and the suit was in his name. Held, that B., as the legal owner of the patent, had a right to settle claims as to its infringement, and that, owing to his relations to it, the company was bound by his contract with C., and could not maintain a suit against C. for infringement. *Troy Iron & Nail Factory v. Corning*, 1 Blatch., 474.

§ 119. Creating the relation of agency or of master and servant.—A contractor agreed to build a new wharf for a railway company and rebuild an old one. He agreed to furnish all materials and labor, to put in piles, posts, etc., as the company should require, to make the old wharf as good as new and build the new one in the most workmanlike manner, to submit to the directions of the company's engineer, and do all work to his satisfaction. Held, that, under the contract, the contractor was the agent and servant of the company, and that it was liable for his negligence. *Railroad Company v. Hanning*, 15 Wall., 656.

§ 120. Creating the relation of landlord and tenant, and not that of master and servant.—C., the owner of a shingle-mill, entered into a contract with D. by which D. was to

run the mill for the milling season of 1877 and pay all expenses. C. was to put the mill in condition and furnish the logs necessary to run the mill, and D. was to receive a certain price for all shingles manufactured. *Held*, that the contract created the relation of landlord and tenant between C. and D., and not that of master and servant, and that C. was not responsible for D.'s conduct in running the mill negligently. *Mason v. Clifford*, * 4 Fed. R., 177.

§ 121. Agreement creating a contract relation and not an office.—Where by statute the governor of a state is empowered to hire a person to do a certain work for a certain compensation, such hiring does not constitute such person a public officer, but the relation is a contract relation and cannot be put an end to by the state alone. *Hall v. Wisconsin*, 13 Otto, 9 (Constr., §§ 1830-32).

§ 122. Constituting one a partner.—A partner who owns a specific part of a manufacturing business cannot, by a contract to sell to a third party a portion of the share owned by him, constitute such third party a partner with himself and his copartners in carrying on the business. *McNamara v. Gaylord*, * 1 Bond, 303.

§ 123. A grant is an executed contract. By its nature it amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. *Fletcher v. Peck*, 6 Cr., 136 (Constr., §§ 1803-12).

§ 124. An ante-nuptial settlement which was valid and recorded when made continues to hold the property as against subsequent creditors and purchasers, though the parties remove from the state and carry the property with them. *De Lane v. Moore*, 14 How., 266.

§ 125. Lease, not signed but acted on.—A lease was reduced to writing and acted upon by the parties but was not signed. *Held*, that it must be regarded as binding as if signed. *Farmer's Loan & Trust Co. v. St. Joseph & Denver City R'y Co.*, 1 McC., 248.

§ 126. Building contract—Extra work.—If a builder seeks to recover for extra work done upon a house, over and above the sums specified in the written contract between the parties, he must show a separate contract that such extra work should be done by the builder and paid for by the owner; or that the owner, while the house was building, requested the builder to do the extra work, knowing that it was not contemplated in the written contract, and that the cost of the house would be increased thereby. The mere circumstance of the owner's knowing that the builder was doing such work, and not objecting to it, does not raise a contract on his part to pay for it; but is competent evidence to be given to the jury, tending to prove an agreement to pay for such extra work. *Belt v. Cook*, * 3 Cr. C. C., 666.

§ 127. For extra work ordered by the party for whom the work is being done, the contractor is entitled to extra compensation. *Kingsbury v. United States*, * 1 Ct. Cl., 14.

§ 128. Agreement to make mutual wills.—It seems that where two persons agree with each other to make mutual wills, and each executes a will accordingly, neither can revoke the will made or make another without due and reasonable notice to the other party. *Robinson v. Mandell*, 3 Cliff., 169.

§ 129. The doctrine as to mutual wills is stated by Judge Clifford as follows: "Admission may well be made that mutual wills, as understood in legal decision, afford evidence of a contract by the respective testators, each with the other, more or less strong, in view of the surrounding circumstances, that neither would revoke his will or make another without due and seasonable notice to the opposite party; but the insuperable difficulty in the complainant's case is, that the two wills under consideration are not mutual wills in any proper sense, as recognized in the law of evidence or the decisions of the courts. Where two persons agree each with the other to make mutual wills, and both execute the agreement, it is held that neither can properly revoke his will without giving notice to the other of such revocation. The death of one of the parties in such a case carries his part of the contract into execution, and the better opinion perhaps is, that the other party, after that event, if the agreement was definite and satisfactory, cannot rescind the contract. (*Dufour v. Pereira*, 1 Dick. Ch., 419; 2 Harg. Jurid. Arg., 272.) Both wills, it is agreed, even in a case where the agreement between the respective testators is fully proved, are still in their nature revocable; but the doctrine is, that the parties are under a restriction, each to the other, not to revoke their respective wills so as to secure any undue advantage. Bound by the agreement to maintain good faith, each to the other, the conclusion is, that neither can revoke without giving due and seasonable notice. (*Loffas v. Maw*, 32 L. J. Eq. (N. S.), 49; *Ridley v. Ridley*, 12 Law Times (N. S.), 481.) Few decided cases in point are to be found in judicial reports, and these are nearly equally divided for and against the doctrine, even when it appears that the agreement was fully proved. (*Walpole v. Orford*, 3 Ves. Jr., 402; *Izard v. Middleton*, 1 Desaus., 116.) Judge Story says that a contract to make mutual wills, if one of the parties has died having made a will according to the agreement, will be decreed in equity to be specifically executed by the surviving party, if he has enjoyed the benefits of the will of the other party. (1 Story's Eq. Jur., § 785.) If two persons enter into a fair and definite agreement to leave each other a sum of money, or to settle by their wills the property of each for the

benefit of the survivor, a court of equity, says Roper, will enforce a performance of such agreement. (Roper on Leg., 766; 3 Pars. on Contr., 406; *Logan v. McGinnis*, 12 Penn. St., 27; 1 Jarm. on Wills, 28; 1 Williams, Ex'rs, 104.) These authorities are cited to show that equity only interposes in such cases to enforce the agreement made by the parties." *Ibid*.

§ 130. Interest of party in subject-matter subsequently acquired.—A contract will have effect according to the actual authority and right of the party making it in the subject-matter when no specific reserve or restriction is expressed; and if, at the time of entering into the contract, a party has no capacity to perform it, and afterwards acquires the ability, he and his representatives will be estopped afterwards to deny the full force and effect of his undertaking. *The Ship Panama, Olc.*, 846.

§ 131. Cannot be objected to by third persons.—An executed contract, though without consideration, mutuality or writing to take it out of the statute of frauds, cannot afterwards be objected to by third persons. *Mason v. Crosby*, 3 Woodb. & M., 272.

§ 132. Stranger to contract cannot claim its benefits.—A person who was not a party to a contract and who had no knowledge of it cannot claim the benefit of it. *Maury v. Talmadge*, 2 McL., 158.

§ 133. Use of contract in which others are interested.—A person who, in his own name, holds a contract in which others have a beneficial interest, cannot use such contract to obtain title to the subject-matter for a third party; and if as a reward for his services he obtains a share of the property, he will be held to hold it subject to the right of those interested with him to claim such shares as they had in the original contract. *Delmonico v. Roudebush*, * 2 McC., 18.

§ 134. Defeasance gives no rights to strangers.—A bill of sale of a ship was absolute in its terms, but by a collateral parol agreement it was made defeasible upon certain conditions. *Held*, that the conditions were for the benefit of the grantee alone, and that they could not be taken advantage of by third parties. *The Ocean*, 1 Spr., 536.

§ 135. Purchase of his freedom by one already free—Recovery back—Past services not recoverable.—A negro slave child was brought into the United States, and became at once free by the operation of the law forbidding such importation. Being held to service past his majority, he made an agreement by which he was to have his freedom on payment of a certain sum. Part of the sum was paid. *Held*, that he was entitled to recover back the sum paid to purchase his freedom, as it was paid without consideration, and that as the defendant, at the time of the payment, supposed she had a right to the negro as her slave, no interest would be allowed. *Held*, also, that as there was no express contract on the part of the mistress to pay the negro for his services, he could not recover therefor. *Currahee v. McQueen*, 2 Paine, 110.

§ 136. Promise by slave to repay money advanced to purchase his freedom.—A person advanced money to a slave to purchase his freedom, and after he was manumitted he promised to repay the loan. *Held*, that the promise so made would not support an action. *Crease v. Parker*, 1 Cr. C. C., 449; 507.

§ 137. By one in a particular capacity.—Where a person contracts in a particular and not in a personal capacity, it is of no consequence, as to the legal result, whether, supposing no remedy can be had against him personally, none will lie against another. It is the party's own folly to make such a contract, and unless there be fraud, direct misrepresentation or warranty, there is no reason why a recovery can be had. *Thayer v. Wendell*, 1 Gall., 40.

§ 138. A public officer is not personally liable on a contract made by him in his official capacity. *Parks v. Ross*, 11 How., 373; *Hodgson v. Dexter*, 1 Cr., 863.

§ 139. Between states.—A contract is an agreement of two or more parties to do or not to do certain acts, and an arrangement of this character between two states is a contract, the same as if between private parties. *Green v. Biddle*, 8 Wheat., 92.

§ 140. By city, how made.—A city charter provided that the city might license a ferry across a certain river. *Held*, that in absence of any provision on the subject, it was not necessary that the city should act in the matter by resolution of its common council, but that a written contract with a person to maintain a ferry, which was made with the approval of the council and signed by the mayor, was a good contract. *Fanning v. Gregoire*, 16 How., 532.

§ 141. Surety—Alteration or substitution to his prejudice.—A surety may stand upon the very terms of his contract, and he will be discharged if any alteration is made to his prejudice, or a new contract is substituted for his, but he is as much bound by the true intent and meaning of his contract as is his principal. *Read v. Bowman*, 2 Wall., 603.

§ 142. City must pay for services, though mode of payment agreed upon is ultra vires.—Though a city promises to pay for certain services rendered to it in bonds, which, under its charter, it has no authority to issue, still if the work is done the contractors may recover of the city the reasonable value of their services. The promise to pay in bonds was at most only *ultra vires*, and though its performance could not be specifically enforced, yet the city is liable

on its contract. Having received benefits at the hands of the contractors, it cannot object that it was not empowered to perform what it had promised in return, in the mode in which it promised to perform. The contract remains in force as far as it was lawful. *Hitchcock v. Galveston*, 6 Otto, 350 (CORP., §§ 2354-58).

§ 143. A contract to pay for services continues binding, though the proposed mode of payment is unavailable. *City of Memphis v. Brown*, 20 Wall., 811 (CORP., §§ 2218-23).

§ 144. Agreement not to issue execution, conditional.—An agreement not to issue execution on a judgment, provided its payment is secured in a certain way, is conditional only, and, if the condition be not performed, it is not binding. *Bleecker v. Bond*, 4 Wash., 8.

§ 145. Under the laws of Louisiana a novation takes place when, 1st, a debtor contracts a new debt to his creditor; or, 2d, when a new debtor is substituted for an old one, who is discharged by the creditor; and 3d, when, by the effect of a new engagement, a new creditor is substituted for the old, with regard to whom the debtor is discharged. Under this law the sale of property on execution on a credit of twelve months neither satisfies the judgment nor novates the debt. *Union Bank of Louisiana v. Stafford*, 12 How., 339.

§ 146. A bond voluntarily given by a disbursing officer of the United States and his sureties to secure his fidelity in the discharge of his official duties is good and binding as a voluntary obligation, though required by no statute of the United States. *United States v. Tingey*, 5 Pet., 123.

§ 147. Every one who signs an application for insurance is presumed to know what he signed, and is held thereto, unless he can show that he answered truthfully and the answers were not written down as he answered, and that he signed it believing the answers to have been properly written down. *Fletcher v. New York Life Ins. Co.*, 3 McC., 608.

§ 148. Agreement to accept a bill — Statute of frauds.—If a party agrees, for the consideration that another will purchase a bill already drawn or to be drawn, that he will accept and honor it, and the bill is afterwards drawn, or has already been drawn, and is purchased for a sufficient consideration on the credit of such promise, then the promisor is liable. It is an original undertaking, and is not within the statute of frauds. *Townsend v. Sumrall*, 2 Pet., 181.

§ 149. Parties — Ratification — Modification.—A., who claimed to own a tract of land, and who had made conveyances of portions of his interest to B. and C., entered into an agreement with S., who also claimed the land, on March 1, by which A. conveyed to S. a part of the land, and S. conveyed to A. the remainder, the whole agreement being subject to conveyances made before January 1. It was further provided that if those who held interests under A. should refuse to ratify the agreement, then S. should have the option to cancel the agreement. C. and B. first knew of the contract on April 13, but before that time, and after January 1, they individually, and C., as attorney for A., had made certain conveyances to other parties. C. and B. afterwards indorsed on the agreement a ratification thereof, with a further clause placing the dispositions of land made between January 1 and April 13 on the same basis as those made before that date. D. afterwards, as attorney in fact for S., noted under said ratification a ratification thereof as far as his interest was concerned. Held, that the original agreement made C. and B. substantially parties thereto, and that the two ratifications constituted a modification of the original agreement so as to ratify and confirm, so far as S. was concerned, all dispositions of land made by C. and B. individually, and by A. through C. and B., during the time between January 1 and April 13. *Starr v. Stark*,* 2 Saw., 603.

§ 150. Action for breach — Evidence.—In a suit to collect a sum acknowledged by note to be due in consequence of a breach of contract by boat-owners in failing to deliver goods, the action not being brought on the note, the bill of lading need not be produced. *Newell v. Nixon*,* 4 Wall., 572.

§ 151. No cause of action stated.—In a suit for damages for breach of contract, it was alleged that plaintiff sold slaves to defendant on the agreement that the slaves were not to be removed out of the District of Columbia south of the Potomac, and the breach alleged was the sale and removal of the slaves contrary to the agreement. A demurrer to the declaration was sustained. *Corcoran v. Jones*,* 5 Cr. C. C., 603.

§ 152. Rights of parties to a joint adventure where the property is sold.—If two persons are jointly concerned in a particular adventure, where one is authorized to dispose of the whole on joint account, if the connection is of such a nature as to terminate with the sale, the owner making the sale may appropriate the whole proceeds to his own purpose, and make himself debtor to the other for his proportion; or, he may hold the money for their joint account, entitling the other to a specific lien upon it, and subjecting him to all the risks which may attend it as such. If he chooses to do the former, an action on the case will lie by the other part owner for his share. But if the connection is of such a nature that it does not terminate the sale, the sum cannot be recovered in this form of action. *Hourquebie v. Girard*,* 2 Wash., 212.

§ 153. **Liability of one reciting on a note that funds for its payment have been placed in his hands.**— In order to induce plaintiff to deliver a bridge which it had built for a certain party, a note was drawn, across the face of which the defendant wrote "funds for the payment of this note at maturity have been placed in my hands, as trustee," signing the same. *Held*, that defendant was liable, although plaintiff knew that he had no such funds when he signed the statement. *The Keystone Bridge Co. v. Britton*,* 17 Blatch., 407.

§ 154. **Principal in bond cannot show that he is a surety only.**— When parties to an instrument under seal sign themselves as principals, they are estopped from showing that they signed only as sureties. *Bank of Mount Pleasant v. Sprigg*, 1 McL., 181; S. C., 10 Pet., 257.

§ 155. **Intention in signing immaterial.**— Where a writing recites that it is a contract between two parties, and names them as such, and refers in separate clauses to their intention, and has their signatures attached, it is immaterial whether the parties at the time of signing it supposed they were signing as parties or as witnesses. *Phelps v. Clasen*, 1 Woolw., 211.

§ 156. **Not binding until joined in by another.**— It may be shown that at the time of the sealing of an indenture by a corporation it was agreed that it should not become its deed until another person should execute it. But such an understanding prior to the sealing, and in no way connected with that act, cannot be shown. *Philadelphia, etc., R. Co. v. Howard*, 13 How., 807 (§§ 1593-1603).

§ 157. **By two of three assignees in bankruptcy, not binding on the third.**— Two of three assignees in bankruptcy cannot bind the third by a contract made in his absence, unless there is a previous authority or subsequent ratification. *Blight v. Ashley*,* Pet. C. C., 15.

§ 158. **Negotiable— Assignable.**— Written contracts inuring to the benefit of the bearer are not necessarily negotiable. So certificates which recite that one party has delivered to another certain shares of stock in a corporation, for which the bearer is entitled to receive certain other shares of stock, are not negotiable though assignable, and in the hands of the assignee are subject to all equities. *Railroad Co. v. Howard*, 7 Wall., 415.

§ 159. **Assumpsit** will lie for the cost of feeding and training a race-horse. *Maddox v. Thornton*,* 2 Cr. C. C., 260.

§ 160. **Partnership— New partner— Assignment of interest of partners.**— Where several parties were jointly interested in a series of trading voyages, though a new partner could not be introduced pending the adventure who would acquire any rights as against the parties not consenting thereto, yet after the adventure had terminated, such person, as assignee of a share of the interest of some of the partners, may maintain a suit for an accounting against one having the proceeds of such adventure in his possession. *Mathewson v. Clarke*, 6 How., 140.

§ 161. **A demand for corn contracted to be delivered is unnecessary when the defendant has declared that he will not deliver it.** *Somers v. Tayloe*,* 2 Cr. C. C., 138.

§ 162. **Contract need not express circumstances under which it was made.**— It is not indispensable to the validity of a contract that it shall express the circumstances under which it was made so precisely and distinctly as to show the motives which induced it and the objects to be effected by it. *United States v. Maurice*, 2 Marsh., 111.

§ 163. **Partial assignment by one party without the assent of the other.**— A partial assignment of the rights of one party under a contract is not good as against the other party without his assent, nor will such an assignment be permitted to work a rescission of the contract. *Cook v. Bidwell*, 8 Fed. R., 456.

§ 164. **Injunction against violation of contract.**— Where a cable company, having a contract for the transmission of messages with a telegraph company, sought to enjoin the consolidation of the latter with another company, on the ground that such consolidation was in violation of the plaintiff's rights under the contract, and it appeared that the granting of the injunction would be of greater injury to the defendant than its refusal would be to the plaintiff, the relief asked was refused. *Compagnie Francaise Du Telegraphe de Paris a New York v. Western Union Tel. Co.*,* 11 Fed. R., 842.

§ 165. **What words in a deed constitute a covenant.**— Any words in a deed will constitute a covenant which show the intent of the parties to do or not to do a particular thing. *Burton v. Smith*, 4 Wash., 524.

II. KINDS OF CONTRACTS.

1. *Contracts by Letter.*

SUMMARY — *Contract is complete when acceptance is mailed, § 166.*

§ 166. A contract is complete when the letter accepting plaintiff's offer is mailed. T. applied to M.'s agent for insurance on certain buildings, the formal application to M. being made November 25, 1844, by the agent, T. being absent on a journey. In reply M. gave terms of insurance which the agent communicated to T. by letter of December 2d. In consequence of misdirection this letter did not reach T. until December 20th. The next day he mailed his answer to the agent, accepting the offer, and inclosing his check for the premium. This letter reached the agent December 31st, who answered on the following day that the acceptance came too late, as the building had been destroyed by fire December 22d. *Held*, that the letter of December 2d was an offer to make a contract of insurance, that this offer was accepted by T.'s letter of December 21st, and that from the mailing of that letter the contract was complete. *Tayloe v. Merchants' Fire Ins. Co.*, §§ 167-174.

[NOTES. — See §§ 175-179.]

TAYLOE v. MERCHANTS' FIRE INSURANCE COMPANY.

(9 Howard, 390-406. 1849.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS. — This is an appeal from a decree of the circuit court for the district of Maryland, which was rendered for the defendants. The case in the court below was this: William H. Tayloe, of Richmond county, Virginia, applied to John Minor, the agent of the defendants, residing in Fredericksburg in that state, for an insurance upon his dwelling-house to the amount of \$8,000 for one year, and, as he was about leaving home for the state of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly under the date of 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy-five cents on the thousand dollars, the premium amounting to the sum of \$56. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the state of Alabama on business, and would not return till February following; and that he was desired to communicate to him at that place the answer of the company. On receiving the answer the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance and adding: "Should you desire to effect the insurance, send me your check payable to my order for \$57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month, who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the center building of the dwelling-house in the mean time, on the 22d of the month, having been consumed by fire. The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy or pay the loss. A bill was filed in the court below by the insured against the company, setting

forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is, that the contract of insurance was not complete at the time the loss happened, and, therefore, that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defense. 1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and, 2. The non-payment of the premium.

§ 167. *An offer by mail, and an answer of acceptance mailed in due course, make a complete contract.*

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract. The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks, nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance. On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted. This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him and shall be in due time accepted or rejected. Such is the plain import of the offer. And, besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance,

it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance. It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

§ 168. *Knowledge of acceptance is not necessary.*

The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present. The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried further in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other. It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company. For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

§ 169. — *application of the rule to the case at bar.*

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration;

and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance. The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms. This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes: "Should you desire to effect the above insurance, send me your check payable to my order for \$57, and the business is concluded;" obviously enough importing that no other step would be necessary to give effect to the insurance of the property upon the terms stated. The cases of *Adams v. Linsdell*, 1 Barn. & Ald., 681, and *Mactier v. Frith*, 6 Wend., 103, are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

§ 170. — *contract complete, when.*

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain, from the time of the transmission of the acceptance. This is, also, the effect of the case of *Eliason v. Henshaw*, 4 Wheat., 228 (§ 20, *supra*), in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

§ 171. *Payment by check is binding on a principal when so made at the request of an agent having authority to fix mode of payment.*

2. The next position against the claim is the non-payment of the premium. One of the conditions annexed to the policies of the company is, that no insurance will be considered as made or binding until the premium be actually paid; and one of the instructions to the agent was, that no credit should be given for premiums under any circumstances. But the answer to this objection is, that the premium, in judgment of law, was actually paid at the time the contract became complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise; the agent, therefore, was at liberty to exercise a discretion in the matter, and prescribe the mode of payment; and, accordingly, we find him directing, in this case, that it may be paid by a check payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn, at all times from the date of the check till it was received by the agent, sufficient to meet it; and that it would have been paid on presentment. It is not doubted that, if the check for the premium had been received by the agent from the hands of the insured, it would have been sufficient; and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amounts, in judgment of law, to the same thing. Doubtless, if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent, in this respect, trusted to his responsibility, having full confidence in his ability and good faith in the transaction.

§ 172. *Positive refusal of an insurance company to pay a loss, on the ground that there had been no insurance, waives preliminary proofs.*

II. Another objection taken to the recovery is, that the usual preliminary proofs were not furnished, according to the requirement of the seventh article of the conditions annexed to the policies of the company. These are required to be furnished within a reasonable time after the happening of the loss. The fire occurred on the 22d of December, 1844, and the preliminary proofs were not furnished till the 24th of November, 1845. This was, doubtless, too late, and the objection would have been fatal to the right of the complainant, if the production of these proofs were essential to the recovery. But the answer is, that the ground upon which the company originally placed their resistance to the payment of the loss, and which is still mainly relied on as fatal to the proceedings, operated as a waiver of the necessity for the production of the preliminary proofs; and that is, that no obligation to insure the loss was ever entered into by the company, the contract being incomplete at the time that it occurred. On this ground they refused to issue the policy, which would have imposed upon the insured a strict compliance with its conditions; or to recognize any obligations arising out of the arrangement between him and their agent.

The objection went to the foundation of the claim, which, in connection with the refusal to issue the policy, superseded the necessity of producing these proofs; as the production would have been but an idle ceremony on the part of the insured, in the further prosecution of his right. Why produce them after the company had denied the contract and refused the policy? The case of *The Columbian Ins. Co. v. Lawrence*, 2 Pet., 25, has been referred to on this point. An objection was there taken, on the trial, to the sufficiency of the preliminary proofs, on the ground that the certificate of the magistrate was not in conformity with the ninth article of the conditions. The particular objection had not been taken by the company when the proofs were furnished, although several others had been, to their liability; and the court left to the jury the question, among others, whether the company had not thereby waived the objection to the sufficiency of the certificate.

The plaintiff recovered; and on the motion for a new trial, among other grounds assigned for granting it, was this instruction of the court. It was held that there was no evidence in the case from which the jury could properly infer a waiver. The preliminary proofs had been presented to the company on the 16th of February, 1824, soon after the loss. The suit was discontinued, and a new certificate procured from the magistrate correcting the defects in the first, and furnished to the company, on the 14th of February, 1829, five years after the first had been delivered. A new suit was brought, and the case as reported the second time will be found in 10 Pet., 507. On the second trial, the objection was taken that the certificate had not been produced within a reasonable time after the loss; but the court held otherwise, placing their decision upon the ground that the laches were not properly imputable to the insured, but to the company, on account of their neglect to give notice of the defect when the first certificate was presented, and of the mistaken confidence which the party had placed in them. The court say: "If the company had contemplated the objection, it would have been but ordinary fair dealing to have apprised the plaintiff of it; for it was then obvious that the defect might have been immediately supplied; as it was, the company, unintentionally it may be, by their silence misled him."

It is manifest, on an examination of the two cases, that the doctrine of the first on this point of waiver was virtually overruled, for, if maintained in the second, it would have upheld the ruling at the circuit court in the first. The reasons given in support of the corrected certificate, procured and furnished some five years after the loss, are cogent and unanswerable in favor of the position that the conduct of the company in not objecting to the defect in the first one, at the time it was furnished, operated to mislead the party, and should have been regarded as a waiver of the objection. The cases are very full upon this point, and clearly establish the position that the preliminary proofs, under the circumstances stated in this case, were dispensed with by the company as inferable from the ground upon which they placed their denial of liability. 9 Wend., 165; 25 id., 378, 382; 6 Harr. & Johns., 412; 6 Cow., 404.

§ 173. *A court of equity can compel the delivery of a fire insurance policy, and, having jurisdiction for that purpose, can decree a specific performance of the contract.*

III. It has also been objected that the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a court of equity; which may very well be admitted. But it by no means follows from this, that a court of chancery will not entertain jurisdiction. Had the suit been instituted before the loss occurred, the appropriate, if not the only, remedy would have been in that court, to enforce a specific performance, and compel the company to issue the policy. And this remedy is as appropriate after as before the loss, if not as essential, in order to facilitate the proceedings at law. No doubt, a count could have been framed upon the agreement to insure, so as to have maintained the action at law. But the proceedings would have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that court after the loss happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand. Such relief was given in the case of *Motteux v. London Assurance Co.*, 1 Atk., 545, and in *Perkins v. Washington Ins. Co.*, 4 Cow., 645. See, also, 1 Duer, 66 and 110, and 2 Phillips, 583. As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And no doubt it was a strong sense of this injustice that led the court at an early day to establish the rule, that, having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in proceedings at law.

§ 174. *Specific performance may be decreed under a prayer for general relief.*

IV. It is further objected, that, admitting the claim to be properly enforceable in equity, still the complainant is not entitled to the relief sought on the ground that the bill contains no sufficient statement of the contract, or of the performance of the conditions, and also for want of a proper prayer. We are of opinion that these several objections are not well founded. The contract as set forth we have already considered, and held complete and binding on the company; and, further, that the denial of having entered into the agreement, and refusal to issue the policy, also set forth, are sufficient ground upon which

to infer a waiver of the production of the preliminary proofs, as a condition of liability; and if sufficient ground to infer a waiver, it was of course unnecessary to set forth these proofs in the bill. And as to the prayer it is sufficient to say that the prayer for general relief which is here found will enable the court to make such a decree as the complainant may show himself entitled to, upon the facts set forth in the stating part of the bill.

The pleading is not very formal, nor very cautiously drawn, and, in the absence of the prayer for general relief, might have led to embarrassment in making the proper decree in the case. There is a specific prayer for a decree for the loss, but it would have been more formal and appropriate, regarding the ground of jurisdiction in these cases, to have added also a prayer for a specific performance of the agreement to insure. But the particular relief permitted under a general prayer, where the statement in the body of the bill is sufficient to entitle the party to it, meets the difficulty suggested, and well warrants the decree proposed to be entered. Story, Eq. Pl., §§ 41, 42, and cases. Upon the whole, without pursuing the examination further, we are of opinion that the decree of the court below should be reversed, and that the cause be remitted, with directions to the court to take such further proceedings therein as may be necessary to carry into effect the opinion of this court.

§ 175. *Letter of offer, of acceptance, and of retraction of offer.*—When a proposition is made in writing and sent by post, the person making the offer can retract or modify by a subsequent letter reaching the other party at any time before an answer of acceptance is written and put in the mail. But as soon as such answer is placed in the mail the contract is closed as to both parties. Although a letter of retraction be actually on the way at the time when the letter of assent is mailed, yet the contract is closed, unless such letter of retraction be received prior to the mailing of the letter of assent. The acceptance by written communication takes effect from the time when the letter of acceptance is sent, and not from the time when it is received by the other party. *Winterport, etc., Co. v. Schooner Jasper*, 1 Holmes, 101.

§ 176. *Offer by letter, when made — Revocation of offer, when effective.*—Where an engagement or contract has been entered into between parties at a distance from each other by the means of messengers or letters, an offer made by one party is not made till it is received by the one to whom it is sent, and it is revocable till it is received and accepted. But a revocation, though sent before the offer is accepted and acted upon, if it does not reach the one to whom it is sent till after such acceptance, is without effect. *The Palo Alto, Dav.*, 356.

§ 177. *Unconditional acceptance necessary.*—Where a letter accepting a proposition contains a condition, though of slight importance, the contract is not consummated nor the party bound. *Merriam v. Lapsley*, 2 McC., 606.

§ 178. *Letter and answer merging prior negotiations.*—A letter containing a statement of work which the writer proposes to do, and an answer thereto accepting the offer as made, constitute the written contract by which the rights of the parties are to be determined, and merge all prior conversations, negotiations and statements. *Lawrence v. Morrisania Steamboat Co.*, *9 Fed. R., 208; 12 Fed. R., 850.

§ 179. *Question for court.*—The question whether a correspondence between persons amounts to an agreement is a question of law for the court, the aid of the jury being invoked to pass upon any technical words used. *Goddard v. Foster*, *17 Wall., 128.

2. *Contracts by Telegraph.*

SUMMARY — *Contract complete, when*, § 180.

§ 180. An acceptance by telegraph of an offer made in the same way takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, provided such deposit is made within a reasonable time. *Minnesota Oil Co. v. Collier Lead Co.*, §§ 181, 182.

[*Notes.*—See § 183.]

MINNESOTA LINSEED OIL COMPANY v. COLLIER WHITE LEAD COMPANY.

(Circuit Court for Minnesota: 4 Dillon, 481-486. 1876.)

STATEMENT OF FACTS.—Action to recover for oil sold to defendant. The defendant pleads a counterclaim arising as follows: On Saturday, July 31, 1875, at 9:15 P. M., plaintiff sent the following telegram in reply to one received from defendant: "Will accept fifty-eight cents on terms named in your telegram." This was delivered to defendant on Monday, August 2, between 8 and 9 o'clock A. M., and on the next day, at 8:53 A. M., the following dispatch was deposited in reply: "Offer accepted; ship three hundred barrels as soon as possible." On the same day plaintiff sent the following: "We must withdraw our offer wired July 31st." To which the defendant responded: "Sale effected before your request to withdraw was received. When will you ship?"

Defendant was the resident agent of plaintiff, at St. Louis, and the above correspondence had reference to a sale of some oil. Plaintiff refused to deliver the oil, and the defendant seeks in this action to set off the damages against plaintiff's demand. Plaintiff denies that there was a contract, but contends that the dispatch accepting the offer of July 31st was not received until after the offer was withdrawn, and that there was an unreasonable delay in accepting the offer.

§ 181. *Contracts by telegraph governed by same rule as contracts by mail.*

Opinion by NELSON, J.

It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the postoffice and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission. See Am. Law Reg., vol. 14, No. 7, 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also, *Trevor v. Wood*, 36 N. Y., 307. The reason for this rule is well stated in *Adams v. Lindsell*, 1 Barn. & Ald., 681. The negotiation in that case was by post. The court said "that if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the postoffice; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that so it might go on *ad infinitum*." See, also, 5 Penn. St., 339; 11 N. Y., 441; *Mac-tier v. Frith*, 6 Wend., 103; 48 N. H., 14; 8 Eng. Com. B., 225. In the case at bar the delivery of the message at the telegraph office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8:53 of the clock, on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. 1 Parsons on Cont., 482, 483.

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the

issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

§ 182. — *an acceptance within a reasonable time concludes the contract.*

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established, if such acceptance is within a reasonable time after the offer was received. The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject-matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts, vol. 1, p. 482. He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. . . . If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests. Judgment will be entered in favor of the plaintiff for the amount claimed. The counterclaim is denied.

Judgment accordingly.

§ 183. *Contract with implied warranty.*—Defendants telegraphed plaintiffs: "Make best bid for fifteen Central Pacifics, quick." Plaintiffs replied by telegraph: "We will buy Central Pacifics at 102½." Defendants telegraphed reply: "We accept your offer." Held, a contract with implied warranty that the bonds offered were genuine. *Utley v. Donaldson*, 4 Otto, 29 (§§ 998-1000).

3. Guaranties and Letters of Credit.

[See *BILLS AND NOTES*, V.]

SUMMARY—*Remedies must be exhausted against third parties*, § 184.—*Time of taking effect; notice of acceptance*, §§ 185, 189, 190, 193, 199.—*Notice that letter has been acted upon*, § 186.—*Notice not necessary. when*, § 187.—*Notice of terms of contract, and of alterations*, § 188.—*As to date of credit; notice of value of goods*, § 189.—*Construed by reference to a letter*, § 190.—*Demand upon insolvent, and notice to guarantor*, § 191.—*Requisites of notice*, § 192.—*Continuing guaranty; notice of amount due; demand and notice*, §§ 193, 199.—*Acted on by persons other than those addressed*, § 194.—*Consideration; negotiability*, § 195.—*To be binding after due course of law against principal*, § 196.—*Addressed to no particular person*, § 197.—*The word "cattle" includes hogs*, § 198.—*Unconditional; application of loan; amount covered; dissolution of firm*, § 199.—*A con-*

tinuing guaranty may extend to other loans, § 200.—A valuable consideration is sufficient, § 200.—Letter must show a clear intention to be bound, § 201.—Agreement construed, §§ 202, 203.—Liability of stockholder of national bank, § 204.—Rules of construction, § 205.

§ 184. A defendant is not liable upon his guaranty, made upon new consideration, of certain securities given to plaintiff by third parties, until plaintiff has exhausted his remedies against such third parties. *Parker v. Culvertson*, §§ 206, 207. See § 307.

§ 185. In an action upon the following guaranty: "For and in consideration of \$1 to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guaranty unto them, the said Wells, Fargo & Co., unconditionally, at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars (\$10,000) for any overdrafts now made, or that may hereafter be made, at the bank of said Wells, Fargo & Co. This guaranty to be an open one, and to continue one at all times to the amount of \$10,000, until revoked by us in writing:

"Dated Salt Lake City, 11th November, 1874.

"In witness whereof we have hereunto set our hands and seals the day and year above written.

ERWIN DAVIS. [SEAL.]

"Witness: J. GORDON.

J. N. H. PATRICK. [SEAL.]"

it was held that the instrument took effect upon delivery; and that notice to D. of its acceptance by W. was not necessary. *Davis v. Wells*, §§ 208-213. See § 294.

§ 186. In order to hold a guarantor upon his letter of guaranty, notice must be given him that his guaranty has been acted upon by plaintiff. *Adams v. Jones*, § 214.

§ 187. Defendant gave to W. a letter of credit addressed to C. Under it C. made purchases of plaintiff in defendant's name. Defendant approved of the invoices on these purchases and took part of the goods into his possession. *Held*, that defendant was liable to plaintiff for the amount of the purchases, and that notice to him of the acceptance of the letter of credit was not necessary. *Bleeker v. Hyde*, §§ 215, 216.

§ 188. When A. guaranties the credit of B. in a contract between him and C., notice must be given A. of the acceptance of his guaranty, and also notice of all material terms of the contract between B. and C. A. is also entitled to notice of any alterations in the terms of that contract. *Edmondston v. Drake*, §§ 217-220.

§ 189. The following letter of credit, dated May 3, 1845, was signed by defendant, and upon it this suit was brought: "I hereby guaranty the payment of any purchases of bagging and rope which Thomas Barrett may have occasion to make between this and the 1st of December next." *Held*, (1) that the giving of credit to B. upon purchases made by him before December 1st did not excuse defendants from liability on the guaranty; and (2) that it was not necessary for plaintiffs to give defendants immediate notice of the value of the goods furnished B. in reliance upon the guaranty. *Louisville Manuf. Co. v. Welch*, §§ 221-223.

§ 190. A letter between the parties to a formal guaranty, written on the paper and bearing the same date, is admissible to show the proper construction of the guaranty. When a guaranty refers to a draft thereafter to be drawn, notice of acceptance of the guaranty must be given the guarantor in order to bind him. *Lee v. Dick*, §§ 224-226.

§ 191. Demand upon an insolvent debtor and notice to his guarantors of his failure to pay are not necessary to charge such guarantors, when they are not prejudiced by want of such demand and notice. *Reynolds v. Douglass*, §§ 227-233. See § 294.

§ 192. A notice of acceptance of a guaranty need not be technical nor in writing, but must be given within a reasonable time. *Ibid*.

§ 193. In an action upon the following guaranty:

"PORT GIBSON, December, 1807.

"Messrs. Reynolds, Byrne & Co.:

"GENTLEMEN—Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advance in cash. In order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding \$8,000, should the said Chester Haring fail to do so. Your obedient servants,

"JAMES S. DOUGLASS.

"THOMAS SINGLETON.

"THOMAS GOING."

it was held (1) that the instrument was a continuing guaranty, and covered successive future advances to the amount of \$8,000 whenever the antecedent transactions were discharged; (2) that notice must be given a guarantor of the acceptance of his guaranty; (3) that when a guaranty is a continuing one, notice of the amount due at the close of transactions under it is

sufficient; (4) that a guarantor is not liable unless the creditor makes a previous demand on the principal debtor and gives notice of his failure to make payment. *Douglass v. Reynolds*, §§ 234-239.

§ 194. A letter of credit not ambiguous on its face was addressed to John and Joseph Naylor & Co., and was presented to John and Jeremiah Naylor, and acted upon by these latter. In an action upon it by them it was held that evidence to show that the letter was in fact intended for them was inadmissible. *Grant v. Naylor*, §§ 240, 241.

§ 195. A guaranty indorsed on a bond before its delivery is supported by the same consideration which supports the bond. And if the bond be negotiable, the guaranty is also negotiable. So where defendant indorsed on certain bonds the following, "And the said company further agree that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special indorsement, or by delivery, as if the same were a note of hand, payable to bearer," and plaintiff afterwards became a *bona fide* purchaser for value of the bonds, it was held that the guaranty was negotiable, and gave plaintiff a right to sue upon it equally as did the bonds. *Toppan v. C. & C. R. Co.*, §§ 242-248.

§ 196. Where a guaranty has been given to pay a debt "after a due course of law" had been taken to collect the debt of the principal, the taking of such steps is a condition precedent to right of action on the guaranty; and the insolvency of the principal debtor is no excuse for not bringing suit against him. *Dwight v. Williams*, § 249-253.

§ 197. A guaranty may be binding although addressed to no particular person. So in an action upon the following instrument:

"ALEXANDRIA, 28th November, 1800

"*Mr. James M'Pherson:*

"DEAR SIR — We will become your security for one hundred and thirty barrels of corn, payable in twelve months. "LAWRASON & SMOOT."

it was held that L. and S. were liable to M., who delivered the corn on the faith of the instrument. *Lawrason v. Mason*, § 254.

§ 198. A guaranty was given of drafts to be drawn against shipments of "cattle," and it was held that the parties intended to guaranty drafts drawn against shipments of "hogs," as well as against those of horned cattle. *Decatur Bank v. St. Louis Bank*, §§ 253, 256.

§ 199. In an action upon the following instrument:

"BOSTON, December 15, 1808.

"*Messrs. Thomas and Adrian Cremer, Rotterdam:*

"Our friends and connexions, Messrs. Stephen and Henry Higginson, contemplate, under certain circumstances, making a considerable purchase of goods on the continent, and for that purpose are about to send an agent to Europe. They wished to obtain a letter of credit from us to increase their means, and to be used or not, as circumstances may require. As we are now indebted to you, and have no funds on the continent of Europe, we told them we could not give a positive letter of credit for any sum, but that we had no doubt you would be disposed to furnish them with funds, under our guaranty. The object of the present letter is, therefore, to request you, if convenient, to furnish them with any sum they may want, as far as \$50,000; say \$50,000. They will reimburse you the amount they receive, together with interest, as soon as arrangements can be made to do it; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount, and are with great regard, gentlemen,

"Your friends and servants,

"STEPHEN HIGGINSON & Co."

"Signature of S. V. S. WILDER."

it was held that the instrument was an unconditional guaranty for a loan of \$50,000 to the firm of S. and H. H.; that plaintiffs were not bound to know how that firm's agent applied the loan; that the guaranty was exhausted when the amount of the loan once reached \$50,000, nor did it cover loans made to one partner after notice of the dissolution of the firm of S. and H. H.; and that notice of the acceptance of a guaranty and of the amount advanced must be given the guarantor. *Cremer v. Higginson*, §§ 257-258. •

§ 200. A guaranty, continuing by its terms, may extend to a second loan made on different terms from that first made under it. A valuable consideration, however small or nominal, is sufficient to support a guaranty. *Lawrence v. McCalmont*, §§ 267-271. See § 291.

§ 201. The language of an instrument must show a clear intention to bind one party for the debt of another, in order to have that effect; letters which recommend a third party to the confidence of plaintiff, but which do not show an intention to be bound for such party's debts, do not amount to a guaranty. *Russell v. Clark*, §§ 272-277.

§ 202. B. signed an agreement in the following words: "For value received, I hereby guaranty the performance of the within contract on the part of Hopkins and Leach; and, in case of non-performance thereof, to refund to Messrs. Hillard and Mordecai all sums of

money they may pay or advance thereon, with interest from the time the same is paid." In an action against B., it was held that his guaranty was that H. and L. should deliver such machinery as was called for by the contract between them and H. and M.; and also that in case of failure to perform, the money advanced by H. and M. should be secured to them. *Benjamin v. Hillard*, §§ 278-281.

§ 203. Under a guaranty in the following terms:

"NEW YORK, 23d April, 1831.

"*Messrs. Bell & Grant, London:*

"DEAR SIRS—Our mutual friend, Mr. Wm. H. Thorn, has informed me that he has a credit for £2,000 given by you in his favor with Messrs. Archias & Co., to give facilities to his business at Marseilles. In expressing my obligations to you for the continuation of your friendship to this gentleman, I take occasion to state that you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty.

"I am, dear sirs, your friend and servant.

"M. BRURN."

It was held that Bruen was liable as guarantor upon three accounts opened by plaintiffs at Thorn's request with other parties than Messrs. Archias & Co. *Bell v. Bruen*, §§ 282-286.

§ 204. A stockholder in a national bank is not liable to a creditor of the bank as on a contract of guaranty, but is himself a principal debtor. *Hobart v. Johnson*, § 287.

§ 205. It is particularly true of guaranties that all the facts and circumstances under which they were given are to be considered in the construction of them. *Mauran v. Bullus*, §§ 288-290.

[NOTES.—See §§ 291-321.]

PARKER v. CULVERTSON.

(Circuit Court for Pennsylvania: 1 Wallace, Jr., 149-151. 1846.)

STATEMENT OF FACTS.—Action on the following instrument executed by Culvertson: "I do hereby covenant and agree and hereby guaranty to the said Parker the payment of the said debt or sum of \$6,000 so as aforesaid secured to be paid by the said Wharton to the said Chambers and assigned to the said Parker as aforesaid, and do hereby also covenant and agree to guaranty the payment of the balance of the said debt of \$10,000, to wit, the sum of \$4,000, which, upon the acceptance of the said bond of said Wharton as payment, will still be due by the said Chambers to the said Parker, and for the further security of which the said Parker will also hold his mortgage before mentioned, upon two lots, etc., all the other lots having been released by the said Parker from his said mortgage. And I do hereby covenant and agree to and with the said Parker, his heirs and assigns, that the security of his debt of \$10,000 and its interest so due and owing to him by the said Chambers, shall in no wise be affected or rendered less secure in its ultimate payment to the said Parker, by reason of anything contained in the release of the said Parker bearing even date herewith, but that the said debt shall be well and truly paid."

The above mentioned parties were all residents of Pennsylvania, where the mortgaged property was situate and where all the contracts connected with the matter were made. Before the bringing of this suit Parker alone became a citizen of New Jersey. In May, 1839, Chambers executed to Parker his bond and mortgage for \$10,000, and assigned a bond and mortgage of one Wharton for \$6,000 as a collateral security. The \$10,000 mortgage debt matured in May, 1840, and the collateral mortgage in March, 1841. It was agreed between the parties, in March, 1840, that the contract be so modified that the \$6,000 debt should be accepted as payment *pro tanto* of the \$10,000 debt, that Culvertson should become surety or guarantor of the \$6,000 mortgage, and of the \$4,000, balance of the \$10,000 debt, and that all the property covered by the \$10,000 mortgage, except a few inconsiderable items, should be released from its liens. In accordance with this modified contract Culvertson exe-

cuted the deed upon which action was brought. Wharton's bond was not paid, and the mortgaged property was wholly insufficient to discharge the \$6,000 debt.

Opinion by GRIER, J.

The decision of the point here raised depends upon the effect of the contract declared on, *according to the laws of Pennsylvania*, the place of the contract.

§ 206. *Distinction between a contract of suretyship and a guaranty of ultimate payment.*

The covenants, when taken in connection with the recitals in the instrument, show that it is not an original contract of suretyship, nor, like the guaranty of a promissory note, a contract to pay on a given day if the principal does not; but one of a secondary or ancillary sort — for a new consideration guarantying the sufficiency of certain securities held by the plaintiff, and their *ultimate* payment. Being thus collateral and conditional, it requires, in its essence, that the plaintiff should exhaust his remedies against the other parties before he comes upon the defendant. The word used, it may be remarked is "*guaranty*," a word which, in its enlarged sense, says Chancellor Kent (Com., vol. 3, p. 121), is "a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another party who in the first instance is liable." The duties and liabilities consequent upon such a contract are settled in Pennsylvania, as will be seen by reference to the cases cited on the argument; particularly by that of *Johnson v. Chapman*, 3 Penn., 18, where the words of the contract much resemble those in the engagement before us. No case, so far as I am aware, has ever overruled this decision.

§ 207. *Due diligence must be averred and proved as a condition precedent to holding a guarantor liable.*

It follows, then, that the plaintiff must aver in his declaration, and, of course, must prove on the trial, that he had used due diligence to enforce payment of both the bond and mortgage assigned to him by Wharton; or that Wharton was in such a situation — call it what you will — that further pursuit would have been fruitless. For want of this the declaration is fatally defective, and judgment must go against the plaintiff, who has committed the first error, and, in this case, showed no cause of action.

DAVIS v. WELLS.

(14 Otto, 159-170. 1881.)

ERROR to the Supreme Court of the Territory of Utah.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—The action below was brought by Wells, Fargo & Co. against the plaintiffs in error, upon a guaranty, in the following words:

"For and in consideration of \$1 to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guaranty unto them, the said Wells, Fargo & Co., unconditionally, at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars (\$10,000) for any overdrafts now made, or that may hereafter be made, at the bank of said Wells, Fargo & Co.

"This guaranty to be an open one, and to continue one at all times to the amount of \$10,000, until revoked by us in writing.

"Dated, Salt Lake City, 11th November, 1874. .

"In witness whereof we have hereunto set our hands and seals the day and year above written.

"ERWIN DAVIS. [SEAL.]

"J. N. H. PATRICK. [SEAL.]

"Witness: J. GORDON."

The answer set up, by way of defense, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice, after the account was closed, of the amount due thereon; and no notice of the demand of payment upon Gordon & Co., and of their failure to pay within a reasonable time thereafter. But there was no allegation that by reason thereof any loss or damage had accrued to the defendants. On the trial it was in evidence that this guaranty was executed by the defendants below, and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo & Co., which took place on the same day; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over \$9,000 on their bank account; that their account continued to be overdrawn, Wells, Fargo & Co. permitting it on the faith of the guaranty, from that time till July 31, 1875, when it was closed, with a debit balance of \$6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was made by Wells, Fargo & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed; and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendants' counsel requested the court, among others not necessary to refer to, to give to the jury the following instructions, numbered first, second, third and fifth:

1. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterwards delivered to the latter by Joseph Gordon, or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it; and, if they neglected or failed so to do, the defendants are not liable on the guaranty, and your verdict must be for the defendants.

2. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of the plaintiff to notify the defendants, within a reasonable time after the last of said advancements, of the amount advanced under the guaranty, and if the plaintiff failed or neglected so to do, it cannot recover under the guaranty, and your verdict must be for the defendants.

3. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court, therefore, instructs you that if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not

in contemplation of law a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants.

5. Before any right of action accrued in favor of plaintiff under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and, on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made, and no notice given to the defendants, the plaintiff cannot recover upon the guaranty.

The court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the court to the jury, to the giving of each of which the defendants excepted:

1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount \$10,000, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered to plaintiff and that plaintiff accepted and acted on the same, such delivery, acceptance and action thereon by plaintiff bind the defendants, and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co. at the date of said delivery of said guaranty, and since, and which were unpaid at the date of the commencement of this suit, not exceeding \$10,000.

2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding \$10,000, which the jury may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit; and, further, if you believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on the amount found due at such statement, from the date thereof, at the rate of ten per cent. per annum.

These exceptions form the basis of the assignment of errors.

§ 208. *Whether it is necessary to give notice to a guarantor of acceptance of his guaranty. Authorities examined.*

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raise the question whether the guaranty becomes operative if the guarantor be not, within a reasonable time, informed by the guarantee of his acceptance of it, and intention to act under it. It is claimed in argument that this has been settled in the negative by a series of well considered judgments of this court. It becomes necessary to inquire precisely what has been thus settled, and what rule of decision is applicable to the facts of the present case.

In *Adams v. Jones*, 12 Pet., 207, 213 (§ 214, *infra*), Mr. Justice Story, delivering the opinion of the court, said: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this court, after the decisions which have been made in *Russell v. Clark*, 7 Cranch, 69 (§§ 272-

277, *infra*); Edmondston v. Drake, 5 Pet., 624 (§§ 217–220, *infra*); Douglass v. Reynolds, 7 Pet., 113 (§§ 234–239, *infra*); Lee v. Dick, 10 Pet., 482 (§§ 224–226, *infra*); and again recognized at the present term in the case of Reynolds v. Douglass. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty, for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached, and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own.”

In Reynolds v. Douglass, 12 Pet., 497, 504 (§§ 227–233, *infra*), decided at the same term, and referred to in the foregoing extract, Mr. Justice McLean stated the rule to be “that, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them to the defendants, that the same had been accepted;” and he added: “This notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference.” There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. This appears very plainly, not only from a particular consideration of the cases themselves, but was formerly declared to be so by Mr. Justice Nelson, speaking for the court in delivering its opinion in Louisville Manuf. Co. v. Welch, 10 How., 461, 475 (§§ 221–223, *infra*), where he uses this language: “He [the guarantor] has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; *it is deemed essential to an inception of the contract*; he is therefore advised of his accruing liabilities upon the guaranty, and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged.” And in Wildes v. Savage, 1 Story, 22, Mr. Justice Story, who had delivered the opinion in Douglass v. Reynolds, 7 Pet., 113 (§§ 234–239, *infra*), after stating the rule requiring notice by the guarantee of his acceptance, said: “This doctrine, however, is inapplicable to the circumstances of the present

case; for the agreement to accept was contemporaneous with the guaranty, and, indeed, constituted the consideration and basis thereof."

§ 209. *Notice of acceptance of a guaranty is necessary only when the letter of guaranty amounts to an offer to guaranty.*

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between them. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or a proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete, and may be withdrawn by the proposer. Frequently the only consideration contemplated is that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation on that account the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases no notice of assent other than the performance of the consideration is necessary to perfect the agreement; for, as Professor Langdell has pointed out in his Summary of the Law of Contracts (Langdell's Cases on Contracts, 987), "though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in *Wildes v. Sarago*, *supra*, where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor; for in each of these cases the mutual assent of the parties to the obligation is either expressed or necessarily implied.

The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief: "For the ground of the doctrine is not that the operation of the writing is condi-

tional upon notice, but it is that until it is accepted, and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guaranty the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality: the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever." It is thence argued that the words in the instrument which is the foundation of the present action—"we hereby guaranty unto them, the said Wells, Fargo & Co., *unconditionally, at all times,*" etc.—cannot have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guaranty the debt of Gordon & Co., we accept the conclusion as entirely just.

§ 210. *In the case at bar notice of acceptance of the guaranty was not necessary.*

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words, "for and in consideration of \$1 to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we hereby guaranty," etc. How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

§ 211. *A nominal consideration is sufficient to support a contract of guaranty.*

It is not material that the expressed consideration is nominal. That point was made, as to a guaranty, substantially the same as this, in the case of *Lawrence v. McCalmont*, 2 How., 426, 452 (§§ 267–271, *infra*), and was overruled. Mr. Justice Story said: "The guarantor acknowledged the receipt of the \$1, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guaranty as to other contracts. A stipulation in consideration of \$1 is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in *Dutchman v. Tooth*, 5 Bing. N. C., 577, where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the court held the guaranty good, and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms. It does not affect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engage-

ment, in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a completed contract, based upon the mutual assent of the parties; and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety, and cannot be separated into distinct parts. The covenant is single, and cannot be subjected in its interpretation to the operation of two diverse rules. Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that he delivered it to them.

But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of future advances was subject to a condition implied by law, that notice should be given to the guarantor that the guarantee either would or had acted upon the faith of it, we are led to inquire, what effect is to be given to the use of the words which declare that the guarantors thereby "guaranty unto them, the said Wells, Fargo & Co., *unconditionally, at all times*, any indebtedness of Gordon & Co., etc., to the extent and not exceeding the sum of \$10,000, for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo & Co." Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not and cannot be claimed that such a condition is so essential to the obligation that it cannot be waived. We do not see, therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligation are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

§ 212. *A guaranty is to be construed liberally.*

It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally, to promote the use and convenience of commercial intercourse. This view applies with equal force to the exceptions to the other charges and refusals to charge of the court below. These exceptions are based on the propositions: 1. That if Wells, Fargo & Co. neglected to notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and, 2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co., to notify the defendants of the default, the plaintiffs could not recover upon the guaranty. For if the necessity in either or both of these contingencies existed to give the notice specified, it was because the duty to do so was, by construction of law, made conditions of the contract. But by its terms, as we have shown, the contract was made absolute, and all conditions were waived.

§ 213. *Effect of failure of the guarantee to give notice of default.*

It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged; but

both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense. If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies. Such was the express decision in *Louisville Manuf. Co. v. Welch*, *supra*. An unreasonable delay in giving notice, or a failure to give it altogether, is not of itself a bar.

There was a question made at the trial as to the meaning of the word "overdrafts," as used in the guaranty. It was contended that it would not include the debit balance of account charged to Gordon & Murray, and assumed by Gordon & Co., as their successors, before the guaranty was made, nor charges of interest accrued upon the balances of Gordon & Co.'s account, which were entered to the debit of the account. The reason alleged was, that no formal checks were given for these amounts. The point was not urged in argument at the bar, and was very properly abandoned. The charges were legitimate and correct, and the balance of the account to the debit of Gordon & Co. was the overdraft for which they were liable. There could be no doubt that it was embraced in the guaranty. We find no error in the record.

Judgment affirmed.

ADAMS v. JONES.

(12 Peters, 207-214. 1833.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This cause comes before us upon a certificate of division of opinion of the judges of the circuit court of West Tennessee. The plaintiffs, Adams and others, brought an action against the defendant, Jones, for the amount of certain goods supplied by them, upon the credit of the following letter of guaranty:

"RALEIGH, September 25, 1832.

"*Mr. William A. Williams:*

"SIR—On this sheet you have the list of articles wanted for Miss Betsey Miller's millinery establishment, which you were so very good as to offer to purchase for her. I will be security for the payment, either to you or to the merchants in New York, of whom you may purchase, and you may leave this in their hands, or otherwise, as may be proper. I hope, to your favor and view, will be added all possible favor by the merchants, to the young lady, in quality and prices of goods, as I have no doubt she merits as much, by her late knowledge of her business, industry and pure conduct and principles, as any whatever.

CALVIN JONES."

"After the compliment that is paid me above, I should hardly be willing to place my name so near it, was I not told it was necessary and proper the merchants should know my handwriting generally, and particularly my signature.

"ELIZABETH A. MILLER."

The list of the articles was appended to the letter. Upon the trial of the cause upon the general issue before the jury, it occurred as a question, "whether the plaintiffs were bound to give notice to the defendant that they had accepted or acted upon the guaranty, and given credit on the faith of it." Upon which question the opinions of the judges were opposed; and thereupon, according to the act of congress, on motion of the plaintiffs, by their attorney, the point has been certified to this court. A statement of the pleadings, and also a statement of facts made under the direction of the judges, have been certified as a part of the record.

§ 214. *To hold a guarantor, notice that his guaranty has been accepted is necessary.*

Some diversity of opinion has existed among the judges as to the true nature and extent of the question certified; whether it meant to ask the opinion of this court, whether, under all the circumstances disclosed in the evidence, any personal notice to the defendant, or any other notice than what was made known to Williams, was necessary to fix the liability of the defendant; or whether it meant only to put the general question of the necessity of notice in cases of guaranty. If the former interpretation were adopted, it would call upon this court to express an opinion upon the whole facts of the case, instead of particular points of law growing out of the same; a practice which is not deemed by the majority of the court to be correct, under the act of congress on this subject. Act of 1802, ch. 31, § 6. The latter is the interpretation which we are disposed to adopt; and the question which under this view is presented is, whether, upon a letter of guaranty addressed to a particular person, or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor, that the person giving the credit has accepted or acted upon the guaranty, and given the credit on the faith of it. We are all of opinion that it is necessary; and that this is not now an open question in this court, after the decisions which have been made in *Russell v. Clark*, 7 Cranch, 69 (§§ 272-277, *infra*); *Edmondston v. Drake*, 5 Pet., 624 (§§ 217-220, *infra*); *Douglass v. Reynolds*, 7 Pet., 113 (§§ 234-239, *infra*); *Lee v. Dick*, 10 Pet., 482 (§§ 224-226, *infra*); and again recognized at the present term, in the case of *Reynolds v. Douglass*, 12 Pet., 497 (§§ 227-233, *infra*). It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity, to compel the other parties to discharge him from future responsibility. The reason applies with still greater force to cases of a general letter of guaranty; for it might otherwise be impracticable for the guarantor to know to whom, and under what circumstances, the guaranty attached; and to what period it might be protracted. Transactions between the other parties, to a great extent, might from time to time exist, in which credits might be given, and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the question were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own.

It is highly probable that the real questions intended to be raised before this court, upon the certificate of division, were whether, upon the whole evidence, Williams was not to be treated as the agent of the defendant, as well as of Miss Miller, in the procurement of this credit from the plaintiffs; and if so, whether the knowledge of Williams of the credit by the plaintiffs to Miss Miller, upon the faith of the guaranty, was not full notice also to the defendant, and thus dispensed with any further and other notice to the defendant. These were matters of fact, very proper for the consideration of the jury at the trial; and, if satisfactorily established, would have dispensed with any further notice; but are by no means matters of law upon which we are called, on the present occasion, to give any opinion. A certificate will be sent to the circuit court, in conformity to this opinion.

MR. JUSTICE BALDWIN dissented.

BLEEKER v. HYDE.

(Circuit Court for Michigan: 3 McLean, 270-281. 1843.)

Opinion by the COURT.

STATEMENT OF FACTS.—The defendant gave the following letter of credit: "Messrs Erastus Corney & Co., New York: Gentlemen, I hereby authorize Messrs. A. & D. Wallingsford to purchase goods, such as they may wish to, in my name and on my account, to the amount of \$2,500. (Signed) O. M. HYDE, 20th September, 1841." Under this letter Wallingsfords purchased goods of Corney & Co. to the amount of \$1,453, and of the plaintiff to the amount of \$1,046.04.

It is objected that the letter of credit did not authorize a purchase from the plaintiff, and that consequently the defendant is not bound. In *Grant v. Naylor*, 4 Cranch, 224 (§§ 240, 241, *infra*), it was held that a letter of credit addressed by mistake to John and Joseph Naylor, and delivered to John and Jeremiah Naylor, will not support an action by John and Jeremiah, for goods furnished by them to the bearer upon the faith of the letter of credit. A surety is not answerable beyond the scope of his engagement. *Walsh v. Bailie*, 10 Johns., 179; *Penoyer v. Watson*, 16 Johns., 99; *Robbins v. Bingham*, 4 Johns., 475.

§ 215. *A letter was addressed to A., and purchases were made from B. Guarantor held liable, especially as he approved of the purchases.*

Although the letter of defendant is directed to Corney & Co., yet it does not appear from its language to have been alone intended for them. The language is general — "that he had authorized A. & D. Wallingsford to purchase goods on his account to the amount of \$2,500." He does not say he had authorized the purchase of goods from them. Had such been the language of the letter, it would be clear from the cases above cited, that, by virtue of the letter, the defendant would not have been bound by a purchase from any other person or firm. But the case does not necessarily turn upon the construction of the letter of credit, as it has been proved that, after the purchases were made, the defendant saw and approved of the invoices. And it further appears that the defendant took the remaining goods into possession, on the ground that he was bound to pay for them. The goods were charged to the defendant in the invoices. This is sufficient to show that the defendant approved of the purchases, and he is consequently bound to pay for them.

§ 216. *Notice of the acceptance of a letter of credit is unnecessary when purchases under it are made in the name of the guarantor.*

No notice of the acceptance of the letter of credit, by the plaintiff, was necessary, as the purchases were made in the name of the defendant. Verdict for the plaintiff and judgment.

EDMONDSTON v. DRAKE.

(5 Peters, 624-640. 1831.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit was instituted by Drake and Mitchel, merchants, of Havana, in Cuba, against Charles Edmondston, merchant, of Charleston, in the court of the United States for the sixth circuit and district of South Carolina in order to recover the balance of an account due to Drake and Mitchel, from J. & T. Robson, who were merchants and partners, of Columbia, in South Carolina. Thomas Robson being about to proceed to the Havana, for

the purpose of making a speculation in coffee, obtained from Mr. Edmondston the following letter of credit:

"CHARLESTON, April 16, 1825.

"*Messrs. Castillo and Black:*

"GENTLEMEN — The present is intended as a letter of credit, in favor of my regarded friends Messrs. J. & T. Robson, to the amount of \$10,000 or \$50,000, which sum they may wish to invest through you in the produce of your island. Whatever engagements these gentlemen may enter into will be punctually attended to. With my best wishes for the success of this undertaking, I am, gentlemen, yours respectfully,

CHARLES EDMONDSTON."

On his arrival in Havana, Mr. Robson presented his letter of credit to Messrs. Castillo and Black, who, being unable to undertake the business, introduced him to Drake and Mitchel, and showed them the letter of Mr. Edmondston, but did not deliver it to them. At this interview an agreement was entered into between Robson, and Drake and Mitchel, the particulars of which are stated in the following letter:

"HAVANA, April 28, 1825.

"*Messrs. Drake and Mitchel:*

"GENTLEMEN — I intend sailing to-morrow morning, in the schooner Felix, bound for Charleston, South Carolina, wind and weather permitting. I will thank you to execute the following order at your earliest convenience, provided you feel yourselves warranted in so doing from the letter of credit I produced, namely, two to three thousand bags of prime green Havana coffee, provided the same can be had at prices from eleven to thirteen dollars, and for extra prime large lots thirteen and a half. Bills on New York at sixty days, at two and a half to five per cent. premium, and to be governed in said purchase by the rise and fall in foreign markets, exercising your better judgment thereon. Said coffee to be forwarded by first good opportunity, to Charleston, South Carolina, on board of a good, sound and substantial vessel, addressed to the care of Boyce and Henry, Kunhart's wharf, Charleston. Bills of lading to be immediately forwarded to New York, and insurance ordered thereon to the full amount. Invoice of coffee, with duplicate loading, to be made out in the name of J. and T. Robson, and forwarded with advice of drafts to the care of Boyce and Henry, Charleston. Wishing you success in said purchase, and claiming your particular attention thereto, I am, gentlemen, your obedient servant,

THO. ROBSON.

"Please inform me the name of the house to whom the bills of lading, etc., will be addressed."

On the succeeding day, notice of this arrangement was communicated to Charles Edmondston in the following letter:

"HAVANA, April 29, 1825.

"*Charles Edmondston, Esquire:*

"DEAR SIR — In virtue of your letter of credit to Messrs. Castillo and Black, in favor of Messrs J. and T. Robson, and at their request, we have consented to purchase two thousand bags of coffee, to be consigned to Messrs. Boyce and Henry, of your city; the insurance to be effected by Messrs. Goodhue & Co., of New York, upon whom we are to draw for the amount, by reason of the facility of negotiations, Mr. Robson or his friends remitting the money to these gentlemen to meet our drafts. Mr. Robson, who carries this, will no doubt explain to you, in person, this negotiation, and we trust that there will be no demur in forwarding the necessary funds, with the costs of insurance. We are, etc., Drake and Mitchel."

On the 25th of May, a short letter, on business, from Charles Edmondston to Drake and Mitchel, concluded in these terms:

"In acknowledging the receipt of yours of the 29th of April, I cannot help expressing my grateful feelings at the manner you treated my letter of credit in Robson's favor. I am, etc., Charles Edmondston."

The shipment of coffee for J. and T. Robson was completed by the 17th of May, and on the 21st of that month Drake and Mitchel had drawn bills on New York for nearly \$15,000, which were regularly paid. On that day they determined, of their own accord, to change the mode of reimbursement, and on the 25th drew bills on London for £4,000 sterling. This was communicated to Messrs. Boyce and Henry, the agents of J. and T. Robson, at Charleston, in the following letter:

"21st May, 1825.

"GENTLEMEN— We crave reference to our last respects per brig Catharine, which vessel, we hope, is safely arrived at this date. We have this day received accounts from your city, and from New York, announcing to us the decline in the price of coffee; it is, therefore, well that we had not gone to the full extent of the instructions of Mr. Robson. We also note the decline of your exchange on London, and as ours is still maintained at fourteen per cent., it has occurred to us to alter our plan of reimbursements, for the benefit of the interested in these coffee purchases, by drawing on London for the balance of our shipments; for some houses here are drawing on the United States at par, to one per cent., a rate which we cannot submit to; we are accordingly about to value on our friends, Messrs. Campbell, Bowden & Co., to be covered by you, or Messrs. Goodhue & Co., as you may direct, to the amount of £4,000 sterling, which at \$141, at fourteen per cent., amounts to \$20,246.40. And we have already drawn upon Messrs. Goodhue & Co., \$12,699.12, with premium, three and two and a half per cent., \$337.43; and to complete this account we have again drawn on the same \$2,071.34, at two and a half per cent., \$2,123.12; making together \$35,406.07, from which, deducting our commission for drawing and negotiating, two and a half per cent., the remainder, \$34,522, will then be equal to the amount of our three invoices per Eagle, Hannah and Catharine, as per inclosed statement. We trust that these dispositions will meet your approbation, and we pray you to make the necessary remittances to Messrs. Campbell, Bowden & Co., including their commission and any other incidental charges."

On the same same day Drake and Mitchel drew their last bill on New York, which was duly honored. J. and T. Robson, afterwards, on the 4th of June, assented to this alteration in the mode of reimbursement; and directed their agents, Boyce and Henry, to conform to it. They remitted a bill drawn by J. B. Clough on his firm of Crowder, Clough & Co., of Liverpool, at sixty days' sight, for £4,000, on account of Drake and Mitchel. No notice of this transaction appears to have been given to Mr. Edmondston. On the 16th September Drake and Mitchel inclosed to him for collection a small order on T. Robson in the following words:

"HAVANA, 16th September, 1825.

"*Thomas Robson, Esq., Charleston:*

"Please pay Charles Edmondston, Esq., or order, the sum of \$26, for balance of your account with, Dear Sir, Your obedient servants, Drake and Mitchel."

The bill on Crowder, Clough & Co. having been returned under dishonor, Drake and Mitchel, in a letter of the 15th of October, employed Mr. Edmond-

ston, as their agent, to obtain its amount from the Robsons, or from Boyce and Henry. In a letter of the 5th of November Mr. Edmondston informed Drake and Mitchel of the ill success of his endeavors to procure payment. The Robsons, who were insolvent, considered themselves as discharged from the debt by remitting the bill on London in conformity with the directions of Drake and Mitchel; and Boyce and Henry, whose names were not on the bill, said they had acted only as agents of the Robsons, and of Drake and Mitchel. After some correspondence between Mr. Edmondston and Drake and Mitchel on the liability of the former for the protested bill on Crowder, Clough & Co., in the course of which Mr. Edmondston transmitted to them a copy of his letter to Castillo and Black, this suit was instituted on the original letter of credit of the 16th of April, 1825, and on the letter addressed by Edmondston to Drake and Mitchel on the 25th of May following.

At the trial of the cause the following bills of exceptions were taken:

1st Exception. The counsel for the defendant insisted that the letter of the defendant of the 16th of April, 1825, addressed to Castillo and Black, was not a general letter of credit, but an engagement only to guaranty the contracts of J. and T. Robson with Castillo and Black, and not with the plaintiffs; and that the said guaranty was not assignable; and that the defendant on the said letter was not accountable to the plaintiffs. But the court instructed the jury that the said letter of the 16th of April, 1825, was a general letter of credit in favor of J. and T. Robson; that it authorized the said Castillo and Black not only to give, but to procure, a credit for the said Robsons; and if the jury believed that under the said letter the said Castillo and Black had procured such credit for them with Drake and Mitchel, that Drake and Mitchel, the plaintiffs, had, under this letter, the same right to call on the defendant to make good the contracts of J. and T. Robson with them, the plaintiffs, as Castillo and Black would have had, if they, Castillo and Black, had, on the faith of this letter, contracted with the said J. and T. Robson.

2d. And the counsel for the defendant contended, and so moved the court to instruct the jury, that in order to make the defendant liable to the plaintiffs, under the said contract, they were bound by the law merchant to give him due notice thereof; and as the defendant neither received notice of, nor ever assented to, the subsequent change as to the place or form of payment, he was fully discharged therefrom; on which the court, being divided in opinion, refused to give the instruction. It was, therefore, not given to the jury; and, on the contrary, his honor Judge Lee, one of the presiding judges, charged and instructed the jury that they, the plaintiffs, were not bound to give the defendant notice of the original contract, and though they gave him notice of it, they were not bound to give him notice of the alteration made in it.

3d. And the counsel for the defendant argued to the court, and requested the court so to instruct the jury, that if the defendant was bound at all to the plaintiffs he was bound for the performance of the agreement made between the Robsons and the plaintiffs, as set forth in the letter of Thomas Robson to them, dated the 23th of April, and the plaintiffs' letter of the 29th of April, 1825, to the defendant; and that the arrangement afterwards made between the plaintiffs and Robson, for payment in London, instead of New York, was an alteration of the contract; and the defendant, not having consented thereto, was not bound for the performance of the agreement thus altered, but was discharged from his liability, if in fact he was at all liable; but the court being divided, refused to give such instruction.

4th. And the counsel for the defendant further argued to the court, and requested the court so to charge and instruct the jury, that the guaranty of the defendant was not a continuing guaranty, and could not be extended to any other engagements than those mentioned in the letter of the plaintiffs to him, of the 29th of April aforesaid, and set forth in that of Thomas Robson to them, of the 28th of April aforesaid; and that the change in the place of payment, from New York to London, made without due notice thereof given to the defendant, discharged him from the said guaranty; but the court being divided in opinion, refused to give such instruction.

5th. And the counsel for the defendant further argued to the court, and requested the court so to charge and instruct the jury, that the plaintiffs, in their letter of the 29th of April, having given notice to the defendant of the contract made by them with the Robsons, in virtue of his, the defendant's, letter of the 16th of April, were bound to give him notice of the change of the contract; and as they did not give him any such notice he is thereby discharged. But the court, being divided in opinion, refused to give the instruction; it was, therefore, not given to the jury; and on the contrary, his honor Judge Lee, one of the presiding judges, charged and instructed the jury that the plaintiffs were not bound to give the defendant notice of the original contract; and though they gave him notice of it, they were not bound to give him notice of any alteration made in it.

§ 217. *A letter of credit addressed to one person, acted on by another, binds the writer if he ratifies the change.*

The jury found a verdict for the plaintiffs, the judgment on which is brought before this court by writ of error. In the view which the court takes of the case, it is unnecessary to decide on the first instruction given by the circuit court. If the letter of the 16th of April, 1825, was limited to Castillo and Black, that of the 25th of May unquestionably sanctioned the advances made by Drake and Mitchel on its authority, and made Edmondston responsible for Robson's contract with them. It is on his part a collateral undertaking, which binds him as surety for the Robsons, that they will comply with their contract. No doubt exists respecting his original liability. The inquiry is, has the subsequent conduct of the parties released him from it?

It is necessary to ascertain exactly what the contract really was. The evidence of it is to be found in the letter of T. Robson to Drake and Mitchel, of the 28th of April, 1825, and in the letter written by Drake and Mitchel to Edmondston on the succeeding day. The first states the order to be executed by Drake and Mitchel. It is for "two thousand to three thousand bags of prime green Havana coffee, provided the same can be had at prices from \$11 to \$13, and for extra prime large lots \$13.50. Bills on New York at sixty days, at two and a half to five per cent. premium, and to be governed in said purchase by the rise or fall in foreign markets, exercising your better judgment thereon." The last states it to Edmondston in the following words: "We have consented to purchase two thousand bags of coffee, to be consigned to Messrs. Boyce and Henry, of your city, the insurance to be effected by Messrs. Goodhue & Co., of New York, upon whom we are to draw for the amount, by reason of the facility of negotiation; Mr. Robson or his friends remitting the money to these gentlemen to meet our drafts."

The contract consists of the quantity of coffee to be purchased, the house to which it was to be shipped, and the mode of payment. On the quantity to be purchased, Drake and Mitchel were to exercise their judgment. It was to be

from two thousand to three thousand bags, as the rise or fall of foreign markets might render advisable. The letter of Drake and Mitchel, giving notice of the contract to Edmondston, shows their determination to limit their purchase to two thousand bags. On the other parts of the contract, if we are to judge from its language, they could exercise no discretion. The coffee was to be shipped to Boyce and Henry, of Charleston, and the mode of payment was settled definitively. It was to be by remittances to Messrs. Goodhue & Co., New York, on whom Drake and Mitchel were to draw at a rate of exchange settled between the parties. This contract was obligatory in all its parts, and when communicated to Mr. Edmondston, gave him precise information to the extent of his liability. His letter of the 25th May was written with a view to the particular contract which had been thus communicated.

§ 218. — *the guarantor is entitled to notice.*

In estimating the influence of this notice on the cause, it has been supposed of some consequence to establish its necessity. The district judge, sitting in the circuit court, informed the jury that it was not necessary. The attempt has not been made to sustain this instruction in its terms, but to explain it so as to limit it to the necessity of giving Mr. Edmondston notice of the mode in which Drake and Mitchel were to be reimbursed for the coffee. This was probably the intention of the judge. It would indeed be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions, which is an important principle in the law and usage of merchants, if a merchant should act on a letter of this character, and hold the writer responsible, without giving notice to him that he had acted on it. The authorities quoted at the bar on this point unquestionably establish this principle. If it were incumbent on Drake and Mitchel to give notice to Mr. Edmondston that they had acted on his letter of credit, did the nature of the transaction require a communication of that part of the contract which stipulated for the mode of payment?

§ 219. *A stipulation in an order for goods, that they are to be paid for in bills on a certain place, renders the place of payment a material part of the contract.*

It cannot be alleged that this part of it was of no importance, or that it did not concern Mr. Edmondston. It is an essential article in all contracts, and was of peculiar interest to Mr. Edmondston in this. The parties thought the particular mode of reimbursement of sufficient importance to stipulate for it expressly in their agreement. We cannot determine positively whether it was or was not a matter of indifference to them. They selected this, and when selected it became a part of the contract. Each had consequently a right to insist upon it.

We have said that this part of the agreement was of peculiar interest to Mr. Edmondston. For any failure in it he was responsible. Being informed of the place on which bills were to be drawn by Drake and Mitchel, and to which remittances to meet them were to be made, he was enabled to bestow that general attention on the course of the business which he might think necessary for his own safety. He might observe, generally, the shipments made on account of the Robsons to New York, and be led to further inquiry by any apparent remissness. Drake and Mitchel seem to have given him the information with this view. After saying they are to draw on Messrs. Goodhue & Co. of New York, they add, "Mr. Robson or his friends remitting the money to these gentlemen to meet our drafts." It was essential to Mr. Robson, or to the

friends by whom the remittances might be made, that the place and persons to whom they might be made should be fixed.

§ 220. *Alterations in a contract excuse a guarantor, if made without his assent.*

We cannot consider this part of the agreement as immaterial. It was the part in which Mr. Edmondston was most deeply interested. Being part of the contract, it is not pretended that Drake and Mitchel could alter it without the consent of the Robsons. They could no more vary a contract made, than they could make one originally. The one as much as the other requires the consent of both parties. Drake and Mitchel, and the Robsons, being capable of binding themselves by an original contract, were equally capable of varying that contract at will. But, though capable of binding themselves, they were not capable of binding Mr. Edmondston. To this his own consent was indispensable. Any new stipulation introduced into it was so far a new contract, which could only affect themselves. Mr. Edmondston was a stranger to it, unless his letter to Castillo and Black, of the 16th of April, 1825, in connection with his letter to Drake and Mitchel, of the 25th of May, in the same year, made him a party to it.

The letter of the 16th of April, in its object and its language, is limited to a contract to be made by Mr. Robson during his stay in Havana. It was written for a special purpose, and its obligation could be extended no further when that purpose was accomplished. It was intended to pledge the credit of the writer to the amount of \$40,000 or \$50,000, to be invested by Mr. Robson in the purchase of the produce of the island. The letter was directed to an operation for which Mr. Robson went to the Havana, and which was to be completed while there. It was addressed to merchants of that place, and relates to an operation to be performed in that place. If, instead of proceeding to the Havana, and purchasing the produce of the island, he had proceeded to Great Britain and purchased a cargo of woollens, it would scarcely be pretended that the vendor trusted to this letter. Still less could it be pretended, if, after actually making the contract in Havana, he had proceeded to Europe and made purchases in that part of the world. The cases cited in argument show that, in law and in the understanding of commercial men, the credit given by such a letter is confined to the particular operation and to the particular time. It extended to no contract made by Robson after returning to the United States.

Still less can the letter of the 25th of May avail the defendants in error. That is obviously confined to the contract stated in the letter of Drake and Mitchel, to which it is an answer. The credit then given in the letter of Mr. Edmondston was exhausted by the contract made by Robson while at Havana, and the extent of his responsibility under those letters is confined to that contract. Drake and Mitchel, and the Robsons, could no more affect him by any change in its terms, than by an entirely new stipulation, or an entirely new contract. It has been said that this change was made for the advantage of the Robsons, and with their consent. It is immaterial whether it was made for the benefit of the Robsons, or of Drake and Mitchel, or of both. They had no right to vary a contract for their own benefit at the hazard of Mr. Edmondston. It has been urged that the risk of remittances to New York was as great as the risk of bills on England. Were this true, it could not affect the case. Mr. Edmondston had a right to exercise his own judgment on the risk; and the persons who varied this contract had no right to judge for him. But

is it true that the risk was not increased? While payments were to be made in New York, the agents in the transaction were in some measure within the view of Mr. Edmondston. He could observe their situation, and act for his own safety. This power is essentially diminished, when a bill without his knowledge, on a house of whose stability he may be ignorant, is remitted at sixty days' sight to England. It is on every reasonable calculation, at all events, a prolongation of the risk.

The contract at the Havana may be considered as one to be performed immediately. It does not appear that any time was given for the shipment of the coffee; and the whole transaction has the appearance that the bills were to be drawn as soon as the coffee was shipped. The last bill on New York was drawn on the 21st of May, and notice of the bill on London was given on the 26th of that month. It may be considered, then, as a transaction to be completed as soon as the nature of the business would permit. It might be reasonably supposed that it would be completed before the condition of the parties would be essentially changed. Had the bill which was drawn on London been drawn at the same time on New York, there is reason to believe that it would have been paid. The change in the mode of payment, by substituting a bill on London at long sight, necessarily prolonged the time at which payment should be made, and prolonged the risk of Mr. Edmondston. This they had no right to prolong without his consent. It is admitted that Drake and Mitchel could not change the mode of payment without the consent of the Robsons. Then, it is a part of the contract; of that contract for which alone Mr. Edmondston became responsible. It has been said that the engagement respecting the place of payment was contingent, dependent on the facility of negotiations, and subject to any future arrangement to be made between the parties. We do not so understand the agreement. Its terms are positive, dependent on no contingency. "The facility of negotiations" was the motive for the stipulation. No hint of a reserved power to change it is given, either in the letter of P. Robson to Drake and Mitchel, or in theirs to Edmondston. It was not a contingent, but an absolute, arrangement; as absolute as any other part of the contract.

We think the court erred in not giving the second, third, fourth and fifth instructions to the jury; and the judgment ought to be reversed, and the cause remanded, with directions to award a *venire facias de novo*.

LOUISVILLE MANUFACTURING COMPANY v. WELCH.

(10 Howard, 461-477. 1850.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the circuit court held by the district judge in and for the district of Louisiana. The suit was brought upon the following letter of credit signed by the defendant, and dated New Orleans, 3d May, 1845: "I hereby guaranty the payment of any purchases of bagging and rope which Thomas Barrett may have occasion to make between this and the 1st of December next."

It appeared that this letter of credit, soon after it was given, was deposited by Barrett with a house in New Orleans, who, as the factors of the plaintiffs, sold, at different periods, within the time prescribed, several parcels of bagging and rope, and delivered the same to Barrett on the faith of it, giving the usual credit on the sales of goods of this description, and taking his acceptances for

the price, payable at the expiration of the credit to the order of the plaintiffs. There were four different parcels sold at different times, and the usual credit given, on each of the sales, extended beyond the 1st of December, the time mentioned in the guaranty. No notice was given to the defendant by the house in New Orleans, nor by the plaintiffs, of the acceptance of his letter of credit, or of the sales made to Barrett on the faith of it.

Shortly after the maturity of the first acceptance, which was in the latter part of December, the clerk of the New Orleans house called on the defendant, and gave him notice the acceptance was unpaid, and that he would be looked to for payment; and also for the payment of the acceptances then running to maturity, if unpaid when they fell due. The defendant desired the clerk to obtain all he could from Barrett towards the payment. Subsequently, and after all the acceptances had become due and were dishonored, the clerk had a second interview with him, when he expressed a wish that he might not be pressed for the payment immediately, observing that he did not wish to interpose any obstacle to the collection of the demand; that he had not the means of paying the amount then conveniently; but would have them at the coming in of the next cotton crop.

At a still later interview, the defendant expressed the opinion that his letter restricted the time of credit to Barrett for the goods to be purchased to the 1st of December, stating that, under this impression, he had delivered up to him certain securities at the expiration of the period of the credit given, which he held as an indemnity, Barrett assuring him at the time that the demand had been settled.

The evidence being closed, the following instructions were, among others, prayed for, on the part of the plaintiff, and refused. 1. That the giving a reasonable credit to Barrett on the sales was no violation of the rights of the defendant; and that the credits in this case were reasonable. 2. That the mistake of the defendant as to the fact of the demand having been paid did not release his obligation.

And the court gave, among others, the following instructions: 1. That after the bagging and rope had been furnished by the plaintiffs, they should have given immediate notice to the defendant of the amount furnished, and the sum of money for which they looked to him for payment. 2. That the credit to Barrett should not have extended beyond the term mentioned in the said letter of credit, to wit, the 1st of December.

The jury found a verdict for the defendant.

§ 221. *A letter guarantying all purchases made by a certain time does not limit the term of credit.*

I. We are of opinion that the court below erred in the construction given to the terms of the letter of credit. It guarantied the payment of any purchases of bagging and rope that Barrett might have occasion to make between its date and the 1st of December. The limitation is as to the time within which the purchases were to be made; not as to the time of the credit to be given to the purchaser. As credit was contemplated, indeed was the special object of the guaranty, that which was given upon the sales of goods of this description in the ordinary course of trade must have been intended. And, for aught that appears in the case, this was the credit given. The time for which credit was to be given upon the purchases is left indefinite in the instrument, and must receive a reasonable interpretation; one within the contemplation of the parties; and that obviously is as we have stated. *Samuell v. Howarth*, 3 Mer.,

272. There might be some doubt upon the language used by the court below on this point, whether, in charging that the credit to Barrett should not have been extended beyond the 1st of December, it was not intended to refer to the purchases of the goods and not to the period of credit given. But when taken in connection with the seventh instruction prayed for and refused, all ambiguity is removed. Besides, no question appears to have been raised that the price was claimed for any goods sold beyond the limit of the guaranty.

§ 222. — *nor is the guarantor entitled to immediate notice of the amount for which he is liable.*

II. We are also of opinion that the court erred in the instruction that, after the bagging and rops had been furnished to Barrett, the plaintiffs should have given immediate notice to the defendant of the amount furnished, and of the sum of money for which they looked to him for payment.

§ 223. — *authorities reviewed on the doctrine of notice.*

The rule as laid down by this court in *Douglass v. Reynolds*, 7 Pet., 126 (§§ 234–239, *infra*), is, that, in a letter of credit of this description, all that is required is that, when all the transactions between the parties under the guaranty are closed, notice of the amount for which the guarantor is held responsible should, within a reasonable time afterwards, be communicated to him. What is a reasonable time must depend upon the circumstances of each particular case, and is generally a question of fact for the jury to determine. *Lawrence v. McCalmont*, 2 How., 426 (§§ 267–271, *infra*). It was also ruled in that case that, when the debt fell due against the principal debtor, a demand of payment should be made, and in case of non-payment by him, that notice of such demand should be given in a reasonable time to the guarantor, and that otherwise he would be discharged from his liability. When the case came before the court a second time, and which is reported in 12 Pet., 497 (§§ 227–233, *infra*), the principle here stated was somewhat qualified, the court holding that in case of the insolvency of the principal debtors, and total inability to respond to the surety before the debt fell due, the demand and notice might be dispensed with. The court refers to a class of cases both in England and in this country, drawing the distinction between the liability assumed by a guarantor, and that of the drawers or indorser of commercial papers; the former being held liable on his guaranty in the absence of any demand and notice, unless some damage or loss had been sustained by reason of the neglect; while, in order to charge the latter, strict demand and notice must be shown according to the law merchant. The authorities are very full on this head, and are founded upon sound and substantial reasons. 8 East, 242; 2 Taunt., 206; 3 B. & Cr., 439, 447; 1 id., 10; 5 M. & S., 62; 5 M. & Gr., 559; 9 S. & R., 198; 1 Story, 22, 35, 36; Chitty on Bills, 324; Chitty, Jr., 733; 3 Kent, Com., 123.

When this case was before the court the second time, one of the grounds upon which a new trial was ordered was the refusal of the court below to instruct the jury that, if they found the principal debtors, at or previous to the time the payment of the debt fell due, insolvent, the omission to demand payment and give notice to the guarantor did not discharge him from his liability. The rule, therefore, above stated was not only laid down very distinctly, but applied in that case in the final disposition of it by the court. The same doctrine is very fully stated and enforced by Mr. Justice Story in *Wildes v. Savage*, 1 Story, 22, already referred to; and also laid down in his work on

Promissory Notes, § 485, and by Chancellor Kent in his Commentaries, vol. 3, p. 123.

The same course of reasoning and authority would seem to be equally applicable to the notice required of the goods furnished or credits given under the guaranty, and on the faith of it at the close of the transactions, and of the amount for which the party intended to look to the guarantor for payment, so as to advise him of the extent of his liabilities. We perceive no reason why the rule in respect to notice should be more strict in this stage of the dealings of the parties than at the time when the debt becomes due; or that the guarantor should be discharged for the delay in giving this notice, when no loss or damage has resulted to him thereby. He has already had notice of the acceptance of the guaranty, and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; it is deemed essential to an inception of the contract; he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate, or be charged with notice of, an amount of indebtedness to the extent of the credit pledged. Still, it may be reasonable that he should be advised of the actual amount of liability, when the transactions are closed; and, if any loss happens in consequence of the omission to give the notice within a reasonable time, the fault is attributable to the laches of the creditor, and must fall on him.

Upon this view, the doctrine governing the question of notice at the close of the dealings on the faith of the guaranty, and also at the subsequent period when the indebtedness under it becomes due, is consistent and reconcilable, and places the duty of the creditor on the one hand, and the obligation of the guarantor on the other, in both instances, upon those general principles which have always been applied to contracts of this description, and preserves and maintains throughout the settled distinction on the subject of notice between the liability assumed by the guarantor, and that of the drawer or indorser of commercial paper. This intermediate notice required in this court does not appear to be a necessary step to charge the guarantor according to the English cases, as notice of acceptance and intention to act upon the guaranty is regarded as sufficient, until the debt becomes due and payable; then reasonable notice of the default of the principal to pay must be given; as otherwise, if loss or damage should happen in consequence of the omission, it would operate as a discharge to that extent.

Returning, then, to the case in hand, we think the court erred in charging the jury in respect to this intermediate notice of the goods furnished, and of the sum for which the plaintiffs intended to look to the defendant for payment, in holding that it should be given immediately upon the closing of the dealings under the guaranty; as reasonable notice, in the cases in which it is required, is all the diligence that is essential in order to comply with the rule. According to the instruction, the jury must have understood that notice to charge the defendant should have been as strict as in the case of a drawer or indorser of a bill of exchange. The eighth instruction refused, to wit, that the mistake of the defendant as to the fact of the debt having been paid did not discharge him, is not very intelligible; but, as a proposition standing alone, should have been given or explained. The refusal implied that the mistake operated to discharge the defendant, which we presume was not intended. The instruction is incautiously drawn, and was, doubtless, connected with some other matters

that have not been brought into it. It was probably connected with the facts embodied in the first instruction, in which the court was requested to charge that the admission of the defendant to the clerk, that he had given up certain papers to Barrett which would have indemnified him, on his assurance that the debt had been settled, was an acknowledgment of due notice that the plaintiffs had sold the goods on the faith of the letter of credit.

This instruction was properly refused, as the inference sought to be drawn from the statement was not a matter of law. At most, it could only be a question for the jury, accompanied with proper directions of the court as to the law. The admissions were made more than a year after the debt had become due, and the failure of Barrett to make payment. The time when the defendant possessed this knowledge was material in order to make out due notice, and this is not embraced in the proposition upon which the court was called upon to charge. If submitted to the jury, this must necessarily have entered into the instructions that should have been given to them.

The court was also right in refusing the fifth instruction, as it respected the promise of the defendant to the clerk to pay, as the effect of the promise, if made, depended upon the question whether it was made with a full knowledge of all the facts going to discharge him from his obligation. This question was, therefore, properly submitted to the jury.

But, upon the grounds above stated, and principally the misconstruction of the terms of the letter of credit, which was fatal to the right of the plaintiffs, and the error in respect to the degree of diligence to be used in giving notice of the transactions under it, the judgment must be reversed, and the case remitted, and a *venire de novo* awarded for a new trial.

LEE v. DICK.

(10 Peters, 482-496. 1836.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes up on a writ of error from the circuit court of the United States for West Tennessee. It was a special action on the case, on a guaranty given by the plaintiff in error in favor of Nightingale and Dexter. The declaration is special, stating that the defendant in the court below, by his guaranty bearing date the 24th of September in the year 1832, directed and addressed to the plaintiffs below, requested them to accept the draft of Nightingale and Dexter for the amount of \$2,000, and thereby promised to guaranty the punctual payment of the same to that amount; and avers that Nightingale and Dexter afterwards, on the 5th of October, 1832, drew a bill on the plaintiffs below for \$4,250; and that, confiding in the promise of the defendant, they accepted the same, etc. The declaration contains a count alleging an agreement by the defendant to guaranty the payment of \$2,000, part of the \$4,250; with the necessary averments to charge the defendants with the payment of the \$2,000. The defendant pleaded the general issue, and upon the trial of the cause the plaintiffs produced the following evidence:

“MEMPHIS, September 24, 1832.

“*Messrs. N. and J. Dick & Co.*:

“GENTLEMEN:—Nightingale and Dexter of Maury county, Tennessee, wish to draw on you at six or eight months date. You will please accept their draft for \$2,000, and I do hereby guaranty the punctual payment of it. Very respectfully, your obedient servant,

SAMUEL B. LEE.”

"NASHVILLE, October 5, 1832.

"Exchange for \$4,250.

"Six months after date of this first of exchange (second unpaid), pay to H. R. W. Hill, or order, 4,250 dollars — cents, value received, and charge the same to account of yours, etc.

NIGHTINGALE AND DEXTER.

"To N. and J. Dick & Co., New Orleans."

The plaintiff also offered in evidence the following letter of the defendant Samuel B. Lee, which letter was written upon the same sheet of paper with the guaranty, but on different parts of it:

"MEMPHIS, September 24, 1832.

"Mr. P. B. Dexter:

"DEAR SIR—Yours of the 15th instant came to hand in due time. I was absent, or should have answered it sooner. I left Mount Pleasant sooner than I had expected when I saw you last. I learned that my presence was wanted at Savannah, and put o p h. I had calculated to get along with business without having anything to do with drawing bills or with the bank; but there is no cash in this quarter, and our bills at the East are falling due, and I have no other alternative but to draw for what funds I am compelled to have, and may, during the winter (should I go largely into the cotton market), wish to draw for a considerable amount. I have no objections to guaranty your bill, except it might affect my own operations. I, however, send a guaranty for \$2,000, which you can use if you choose. The balance, I have no doubt, your friend Mr. Watson will do for you. I would cheerfully do the whole amount, but expect to do business with that house, and do not wish to be cramped in my own operations. Spun thread, also coarse homespun, are in good demand. My compliments to Mrs. and Miss Nightingale.

Your friend,

"SAMUEL B. LEE."

It was agreed by the counsel that the bill of exchange and letter should go to the jury, and their effect, etc., be charged upon by the court. The plaintiff proved that N. and J. Dick & Co. accepted the above bill, upon the faith of the said guaranty, and that they had paid it, and gave notice to the defendant that they looked to him for the money. The court charged the jury that if the defendant intended to guaranty a bill of exchange to be drawn for \$2,000, he would not be liable for a bill drawn for upwards of \$4,000. But if he intended to guaranty \$2,000 of a bill to be drawn for a larger amount, then he would be liable for the \$2,000. That the court was of opinion that the letter accompanying the guaranty was admissible in evidence to explain whether the guarantor meant to guaranty a bill for \$2,000, or only \$2,000 in a bill for a larger amount. The court also charged the jury that no notice by N. and J. Dick & Co. to the defendant, that they intended to accept, or had accepted and acted upon, this guaranty was necessary. To which opinion of the court the defendant excepted.

The questions arising upon this case are: 1st. Whether this evidence will warrant the conclusion that the defendant intended to guaranty \$2,000 in a bill to be drawn for a larger sum. 2d. Whether N. and J. Dick & Co. were bound to give notice to the defendant that they intended to accept, or had accepted and acted upon, the guaranty.

§ 224. *A formal guaranty, and a letter written on same paper with it, may be construed together.*

A guaranty is a mercantile instrument, and to be construed according to what is fairly to be presumed to have been the understanding of the parties,

without any strict technical nicety. If the guaranty stood alone, unexplained by the letter which accompanied it, it would undoubtedly be limited to a specific draft for \$2,000, and would not cover that amount in a bill for a larger sum; but the letter which accompanied it fully justifies the conclusion that the defendant undertook to guaranty \$2,000 in a draft for a larger amount. The letter and guaranty were both written by the defendant on the same sheet of paper, bear the same date, and may be construed together as constituting the guaranty. 7 Cranch, 89 (§§ 272-277, *infra*). This letter is obviously in answer to one received from Dexter, one of the firm of Nightingale and Dexter; for he says: "Your letter of the 15th instant came to hand in due time, etc. I have no objection to guaranty your bill, except it might affect my own operations. I, however, send a guaranty for \$2,000, which you can use if you choose." This was clearly in answer to an application to guaranty a larger sum, and admits of no other construction than that he should have no objection to guaranty the whole sum he requested, if he was not under apprehensions that it would affect his own operations. The bill not having been drawn until the 5th of October, eleven days thereafter, the letter must have referred to a bill he wished to draw. But this is not all. He adds: "The balance, I have no doubt, your friend Mr. Watson will do for you." The balance! What balance could this mean? Clearly the balance between the \$2,000 for which he sent the guaranty and the amount of the sum mentioned in the letter for which he wanted a guaranty. And again he says: "I would cheerfully do the whole amount, but expect to do business with that house, and do not wish to be cramped in my own operations." The whole amount! What amount is here referred to? This admits of no other answer than that it was the amount of the sum mentioned in the letter he had written to Dexter, in which he requested a guaranty. The opinion of the circuit court, therefore, upon the construction of the guaranty was correct.

§ 225. *Notice of acceptance of guaranty must be given when guaranty refers to draft to be drawn in future.*

The next question is, whether the plaintiffs were bound to give notice to the defendant that they intended to accept, or had accepted and acted upon, this guaranty. It is to be observed that this guaranty was prospective; it looked to a draft thereafter to be drawn; and this question is put at rest by the decisions of this court. The case of *Russel v. Clark*, 7 Cranch, 91, was a bill in chancery to recover a sum of money upon a guaranty alleged to grow out of several letters written by Clark and Nightingale to Russel. The court say: "We cannot consider these letters as constituting a contract by which Clark and Nightingale undertook to render themselves liable for the engagements of Robert Murray & Co. to Nathaniel Russel. Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendant of the extent of his engagements." Although the point now in question was not precisely the one before the court in that case, as there was no contract or guaranty made out, yet it is laid down as a settled and undisputed rule. The case of *Edmondston v. Drake*, 5 Pet., 624 (§§ 217-220, *supra*), was an action founded on a letter of credit given by Edmondston to Castillo and Black, as follows: "Gentlemen — The present is intended as a letter of credit in favor of my regarded friends, Messrs. J. and T. Robson, to the amount of \$40,000 or \$50,000; which sum they wish to invest through you in the purchase of your produce. Whatever engagements these gentlemen may enter into will be punctually attended to."

On the trial, the court was requested to instruct the jury, that, in order to make the defendant liable to the plaintiff under the contract, they were bound by the law merchant to give him due notice. Upon this prayer the court was divided, and the instruction was not given; and this court decided that the instruction ought to have been given. The court said it would indeed be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions, which is an important principle in the law and usages of merchants, if a merchant should act on a letter of this character, and hold the writer responsible without giving notice to him that he had acted on it. The authorities on this point, say the court, unquestionably establish this principle. And again, the case of *Douglass v. Reynolds*, 7 Pet., 125 (§§ 234–239, *infra*), was an action upon a guaranty; and the court was requested to instruct the jury that, to enable the plaintiff to recover on the letter of guaranty, they must prove that notice had been given in a seasonable time after said letter of guaranty had been accepted by them, to the defendant, that the same had been accepted. This instruction the court below refused to give; and this court say the instruction asked was correct, and ought to have been given. That a party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given. Especially, it is important in case of a continuing guaranty, since it may guide his judgment in recalling or suspending it. This last remark by no means warrants the conclusion that notice is not necessary in a guaranty of a single transaction; but only that the reason of the rule applies more forcibly to a continuing guaranty. It is unnecessary, after such clear and decided authorities in this court on this point, to fortify it by additional adjudications. We are not aware of any conflict of decisions on this point; and if there are, we see no reason for departing from a doctrine so long and so fully settled in this court.

§ 226. *Proof required to charge a guarantor.*

We do not mean to lay down any rule with respect to the time within which such notice must be given. The same strictness of proof is not necessary to charge a party upon his guaranty, as would be necessary to support an action upon the bill itself; when, by the law merchant, a demand upon and refusal by the acceptors must be proved in order to charge any other party upon the bill. 8 East, 245. There are many cases where the guaranty is of a specific existing demand by a promissory note or other evidence of a debt; and such guaranty is given upon the note itself, or with a reference to it and recognition of it, when no notice would be necessary. The guarantor, in such cases, knows precisely what he guaranties, and the extent of his responsibility; and any further notice to him would be useless. 14 Johns., 349; 20 id., 365. But when the guaranty is prospective, and to attach upon future transactions, and the guarantor uninformed whether his guaranty has been accepted and acted upon or not, the fitness and justice of the rule requiring notice is supported by considerations that are unanswerable.

We are, accordingly, of opinion that the circuit court erred in deciding that notice was not necessary, and that the judgment must be reversed.

REYNOLDS v. DOUGLASS.

(12 Peters, 497-506. 1833.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This case is brought before this court by a writ of error to the district court of Mississippi.

The action is founded on the following guaranty:

“PORT GIBSON, 27th December, 1827.

“*Messrs. Reynolds, Byrne & Co.:*

“GENTLEMEN — Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptances or indorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you, at any time, for a sum not exceeding \$8,000, should the said Chester Haring fail to do so.

Your obedient servants,

“JAMES S. DOUGLASS,

“THOMAS G. SINGLETON,

“THOMAS GOING.”

On the trial, the plaintiffs proved that they treated this paper as a continuing guaranty; and from time to time, on the faith of it, accepted drafts, indorsed bills, and made advances of money at the request of Haring. And an account current was given in evidence showing a balance due to the plaintiffs, from Chester Haring, on the 1st of July, 1828, of \$13,702.73; on 1st of January, 1829, of \$32,920.57; and on the 1st of July, in the same year, of \$25,109.57. And eight bills of exchange, drawn by Haring on the plaintiffs, amounting to \$8,000, and which were accepted and paid by them in the year 1828, were also given in evidence. On the 1st of May, 1829, it was proved that Haring executed five promissory notes, in the whole amounting to \$25,000, which were indorsed by Daniel Greenleaf, and also by the plaintiffs; and which were payable in the months of November, December, January, February and March, succeeding; the proceeds of which notes, when discounted, were to be credited to Haring in the general account. On the 11th of April, 1829, Haring sold and transferred to Daniel Greenleaf his mercantile establishment, which constituted the whole of his property; and in August or September following, he died.

At the time this transfer was made, Greenleaf gave a bond in the penalty of \$32,000, with Thomas G. Singleton, one of the guarantors, and others security, conditioned that he would faithfully pay the debts of Haring, as therein stated; and especially after paying the home debts, “that he should pay the sum of \$8,000 to the securities and signers of a letter of credit to Reynolds, Byrne & Co., in favor of the concern of Chester Haring for that amount; or otherwise relieve and exonerate the securities and signers to said letters of credit.” And on the 24th of December following, Daniel Greenleaf assigned to James S. Douglass, another of the guarantors, by deed of trust, on the conditions stated therein, “all his debts, claims and demands, either at law or in equity due, or to become due.” This assignment included the property, etc., he received from Haring. One of the witnesses examined stated that he heard James S. Douglass and Thomas Going say they considered the above assignments would indemnify them for their liability under the guaranty. There was a good deal of evidence in the case, which, in considering the questions of law on the instructions, it is not material to notice.

§ 227. *Points decided at previous hearing of this case, as reported in 7 Peters, 113.*

This case was brought before this court on certain exceptions, at the January term, 1833, 7 Pet., 113 (§§ 234–239, *infra*), at which time the following points were adjudged: 1. That the paper in question was a continuing guaranty, and was not discharged on the payment of advances, acceptances and indorsements amounting to \$8,000; but that it covered future and successive advances, acceptances and indorsements. 2. That to entitle the plaintiffs to recover on the guaranty, they must show that, within a reasonable time, they gave notice of its acceptance. 3. That notice of the future and successive advances, acceptances and indorsements, after the acceptance of the guaranty, was not necessary. 4. That in case of non-payment, the plaintiffs were required to show a demand of Haring; and, within a reasonable time, a notice to the guarantors.

After the evidence was closed, the plaintiffs moved the court to instruct the jury, “if they believe that Chester Haring was insolvent previous to the maturity of any of the five promissory notes drawn by Chester Haring, dated the 1st May, 1829; and that these notes were indorsed upon the faith of the letter of credit, by the plaintiffs, then such previous insolvency rendered it unnecessary for the plaintiffs to give the defendants, as guarantors, notice of a demand upon and refusal by Chester Haring to pay the said notes; and the plaintiffs are entitled to recover. But the court refused to charge as requested; and charged the jury that the insolvency of Chester Haring could be proved only by a record of the insolvency, or by admission of the defendants, and not by common rumor or hearsay evidence.”

This instruction was incautiously drawn, and its language is open to criticism. It would seem at the first view to place the right of the plaintiffs to recover on the fact of Haring's insolvency. . This would dispense with notice of the acceptance of the guaranty, and with all evidence of advances of money by the plaintiffs, and of acceptances and indorsements under it, except the five notes referred to. But such could not have been the meaning of the instruction, as understood by the counsel concerned in the case, and by the court. Much evidence had been given of advances of money, of acceptances and of indorsements on the faith of the guaranty; and also evidence of facts from which the jury might, in the exercise of their discretion, infer a notice to the defendants that the guaranty had been accepted. In the view of these facts, it cannot be supposed that the plaintiffs would ask the court to instruct the jury to find in their favor, aside from all the other evidence in the case, if the insolvency of Haring should be satisfactorily established.

The instruction was undoubtedly intended to cover the objection that no demand had been made of Haring on his failure to pay, nor notice given to the defendants. And that if the jury should find the notes referred to had been indorsed on the faith of the letter of credit, the previous insolvency of Haring rendered notice of a demand on him unnecessary; and consequently the want of this notice constituted no objection to the plaintiffs' recovery. That the court considered the instruction in this light is clear from the qualification which they annexed to it. By charging the jury that the insolvency of Haring could be proved only by the admission of the defendants, or by record evidence, the court seem to consider, if the fact of insolvency were legally made out, demand and notice were unnecessary.

Although the objection to the structure of the prayer is not without force, yet we are inclined to think that if the instruction had been given in the terms

requested by the plaintiffs, under the circumstances, it could not have misled the jury. They could not have understood the instruction as laying down the basis of a recovery, independent of all other evidence in the case. In this part of the record, the question is fairly raised whether the insolvency of Haring, either prior to or at the time of payment, will excuse the plaintiffs from making a demand on him, and giving notice to the guarantors. At the death of Haring, the notes given by him on the 1st of May, 1829, and indorsed by Greenleaf, were not due. And these promissory notes, to have had an influence in the case, under the instruction, must have been indorsed by the plaintiffs on the faith of the guaranty.

An objection is made that these notes greatly exceed in amount the guaranty; and, consequently, that they could not have been indorsed on the credit of the guaranties. The same objection is urged against the various balances, which exceed the amount of the guaranty as stated in the account current. And it is contended that, to bind the guarantors, the advances, acceptances and indorsements, although made at successive periods, on the faith of the guaranty, must not exceed it in amount. If this objection were well founded, it could not affect the right of the plaintiffs. They have brought their action on the guaranty, and exhibit eight bills of exchange, amounting to \$8,000, which they aver were accepted and paid by them on the faith of the guaranty.

The question as to the liability of the guarantors, under acceptances and indorsements, for a sum exceeding \$8,000, does not, therefore, arise in this case; and it is unnecessary to consider it. The advances which were made from time to time, and also the acceptances and indorsements on the credit of the guaranty, go to show how it was considered and treated by the plaintiffs. And it was a question for the jury to determine, whether the advances, acceptances and indorsements, as alleged by the plaintiffs, were made under the guaranty.

§ 228. *Insolvency of the principal debtor must be proved like any other fact.*

If the insolvency of Haring was a material fact in the case, how was it to be proved? Could it be proved only by record evidence, or by the admissions of the defendants, as decided by the district court? No reason is perceived for this rule, and there is no principle of law that sustains it. The insolvency of Haring should be proved in the same manner as any other fact in the cause. Was he without property, and unable to pay the demands against him? There can be no difficulty in showing his circumstances, by competent proof.

§ 229. *Demand on the principal debtor, who was insolvent, and notice of his failure to pay, were not necessary to charge the guarantors.*

But does the insolvency of Haring, if it be established, excuse the failure to make a demand on him at the maturity of his notes; and to give notice to the guarantees. In the case of *Gibbs v. Cannon*, 9 Serg. & R., 193, it was held that on a guaranty of a promissory note, drawn and indorsed by others, if the drawer and indorser are insolvent when the note becomes due, this would, *prima facie*, be evidence that the guarantor was not prejudiced; and therefore the giving him notice of non-payment is, in such case, dispensed with. And in the case of *Holbrow v. Wilkins*, 1 Barn. & Cress., 10, the court say, if a guarantor of a bill be informed, before it is due, of the insolvency of the acceptors, and that the plaintiff looked to him for payment, it is not necessary to prove presentment and notice of non-payment. In the case of *Warrington v. Furber*, 8 East, 242, Lord Ellenborough says: The same strictness of proof

is not necessary to charge the guarantors as would have been necessary to support an action upon the bill itself, where, by the law merchant, a demand upon and refusal by the acceptors must have been proved in order to charge any other party upon the bill; and this, notwithstanding the bankruptcy of the acceptors. But this is not necessary to charge guarantors, who insure, as it were, the solvency of the principals; and, therefore, if the latter become bankrupt and notoriously insolvent, it is the same as if they were dead; and it is nugatory to go through the ceremony of making a demand upon them.

Mr. Justice Lawrence, in the same case, says that, although proof of a demand on the acceptors, who had become bankrupts, was not necessary to charge the guarantors, yet that the latter were not prevented from showing that they ought not to have been called upon at all; for that the principal debtors could have paid the bill if demanded of them. And Mr. Justice Le Blanc also says, in the same case, there is no need of the same proof to charge a guarantor as to charge a party whose name is upon the bill of exchange; for it is sufficient, as against the former, to show that the holder of the bill could not have obtained the money by making a demand upon the bill. In the third volume of his Commentaries, 123, Chancellor Kent says it has been held that the guarantor of a note could be discharged by the laches of the holder, as by neglect to make demand of payment of the maker, and give notice of non-payment to the guarantor, provided the maker was solvent when the note fell due, and became insolvent afterwards. The rule is not so strict as in the case of mere negotiable paper; and the neglect to give notice must have produced some loss or prejudice to the guarantor.

The same principle is laid down in the following cases: *Philips v. Astling*, 2 Taunt., 206; *Swinyard v. Bowes*, 5 Maule & S., 62; *Van Wart v. Woolley*, 3 Barn. & Cress., 439. The rule is well settled that the guarantor of a promissory note, whose name does not appear on the note, is bound without notice, where the maker of the note was insolvent at its maturity. That his liability continues, unless he can show he has sustained some prejudice by want of notice of a demand on the maker of the note, and non-payment.

In the case before us there is no pretense that the defendants have sustained any injury from a neglect of the plaintiffs to make a demand on Chester Haring for payment of the balances against him, in the account current, or for the amount paid in discharge of the eight bills of exchange referred to in the declaration. But if the defendants could prove they had suffered damage by the neglect of the plaintiffs to make the demand and give notice, according to the case of *Van Wart v. Woolley*, 3 Barn. & Cress., 439, they could only be discharged to the extent of the damage sustained. As before remarked, Haring died before any of the promissory notes dated 1st May, 1829, became due; and, consequently, no demand on him for the payment of these notes could be made. From the facts in the case, it appears that the defendants resided in Port Gibson, the place where Haring lived, and it cannot be doubted that they had knowledge of his death. From these considerations, it is clear that the district court erred in refusing to give the first instruction asked by the plaintiffs.

The plaintiffs also requested the court to charge that, if the jury believed that Chester Haring transferred all his property to Daniel Greenleaf on the 11th April, 1829, and that Daniel Greenleaf at that time was engaged to pay all the debts of the said firm, and to secure the defendants from their liability on the letter of guaranty; and that Daniel Greenleaf, on the 24th December, 1829, by deed of trust to one of the defendants, James S. Douglass, transferred

claims to the amount of \$28,000 or \$29,000, to secure the defendants for their liability on said letter of credit, then it is not necessary for the plaintiffs to prove that the defendants were duly notified of their liability on said letter of credit; which charge the court refused to give. The facts, hypothetically stated as the basis of this instruction, are such as, if found by the jury, must have had influence on their minds; for they conduce to show that the defendants had received knowledge of their responsibility under the letter of credit, and of the circumstances of Haring. But as the instruction does not necessarily import the insolvency of Haring, which, or his death, can alone excuse the plaintiffs from making a demand on him, and giving notice to the defendants of his failure to pay, the court did not err in declining to give the instruction. The facts supposed in the instruction might be admitted, and yet the insolvency of Haring, at some subsequent period, would not follow as a consequence.

§ 230. *Notice of acceptance of guaranty need not be technical nor in writing, but must be given within reasonable time.*

Several instructions were given by the court, at the request of the defendants' counsel, to which the plaintiffs excepted; and we will now consider them. And first, the court charged the jury that, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them, to the defendants, that the same had been accepted. This instruction, being in conformity to the rule formerly laid down by this court in this case, was properly given. This notice need not be proved to have been given in writing, or in any particular form; but may be inferred by the jury from facts and circumstances which shall warrant such inference.

§ 231. *An admission of liability made under mistake does not operate as a waiver of a notice to which the party is entitled.*

The court also instructed the jury that if they believed from the evidence that two of the defendants, Going and Singleton, admitted that the debt sued for was a just debt, and that the said two defendants stated that they would try to arrange the payment thereof out of the funds or effects that had been assigned by Daniel Greenleaf to James S. Douglass; and that the admission and declaration were made in 1830, and that at said period no notice had been given by the plaintiffs to the defendants that said guaranty had been accepted by them; and that said defendants were uninformed at the time of such admission and declaration of such failure to give such notice, that then such admission and declaration do not operate in law a waiver of, and dispense with the necessity of such notice. This instruction must have been hastily drawn; but we understand it as laying down the principle that a recognition of their obligation to pay, by the defendants, under a supposed liability which did not exist, from the facts of the case, and of which facts they were ignorant, would not be a waiver of the notice. In this view, the instruction was correctly given.

§ 232. *An acknowledgment of a debt may amount to a waiver of a notice to which a party is entitled.*

And the court further instructed the jury that in the absence of evidence of notice given in a reasonable time by the plaintiffs, that said letter of credit had been accepted by them, the mere acknowledgment by the defendants that the debt sued for is a just debt does not dispense with the necessity of such notice; but that to dispense with such notice there must be evidence of an express and unconditional promise by the defendants to pay, made under a full knowledge that such notice had not been given. This instruction is not

founded upon the supposition that the defendants were ignorant of the necessity of a notice to bind them, and this ignorance, therefore, cannot be presumed. The proposition then is that, although the defendants knew that a notice was necessary to bind them, and which had not been given, an acknowledgment of the debt and a promise to pay, which is not express and unconditional, would not dispense with notice. In giving this instruction we think the court erred. A party to a note entitled to notice may waive it by a promise to see it paid, or an acknowledgment that it must be paid, or a promise that "he will set the matter to rights," or by a qualified promise, having knowledge of the laches of the holder. *Hopes v. Alder*, 6 East, 16; *Selw. N. P.*, 323; *Haddock v. Bury*, 7 East, 236, note; *Rogers v. Stephens*, 2 Term R., 713; *Anson v. Bailey*, *Bul. N. P.*, 276. In the case of *Thornton v. Wynn*, 12 Wheat., 183, this court say an acknowledgment of his liability by the indorser of a bill or note, and knowledge of his discharge by the laches of the holder, will amount to a waiver of notice.

§ 233. *A promise to pay upon a condition which is rejected by a creditor is not a waiver of a notice to which the debtor is entitled.*

In their fourth instruction the court say that a qualified or conditional promise made by the defendants to pay the debt sued for, which was rejected by the plaintiffs or their agent, is not a waiver of the necessary notice from the plaintiffs to the defendants that said letter of credit had been accepted by them. This instruction is somewhat vague in its language, but if it is to be considered as laying down the rule that a promise to pay the debt, qualified with a condition which was rejected by the plaintiffs, or their agent, the court were right in saying that it was not a waiver of notice.

In their fifth and last instruction the court charge the jury that to enable the plaintiffs to recover on said letter of credit they must prove that a demand of payment had been made of Chester Haring, the principal debtor, of the debt sued for, and, in case of non-payment, notice should have been given in a reasonable time to the defendants, and on failure of such proof the defendants are in law discharged. This instruction rests upon the necessity of a personal demand of Haring by the plaintiffs. It has been already shown that this demand was unnecessary in case of Haring's insolvency; the instruction was, therefore, on the facts in the case, erroneous. The judgment of the district court must be reversed and the cause remanded for a *venire de novo*.

BALDWIN, J., dissented.

DOUGLASS v. REYNOLDS.

(7 Peters, 113-129. 1833.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This case comes before us upon a writ of error to a judgment of the district court of the district of Mississippi, in which the plaintiffs in error are defendants in the court below. The original action is founded upon a guaranty given by Douglas and others in favor of one Chester Haring, by the following letter:

"PORT GIBSON, December, 1807.

"*Messrs. Reynolds, Byrne & Co.*:"

"GENTLEMEN — Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm by so doing, we

do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding \$8,000, should the said Chester Haring fail to do so.

Your obedient servants,

"JAMES S. DOUGLASS,
"THOMAS G. SINGLETON,
"THOMAS GOING."

The declaration contains two counts. The first alleges that, upon the faith of the letter, the original plaintiffs accepted and indorsed drafts or papers of Haring to the amount of \$8,000, which they were obliged to pay, and did pay at the maturity thereof, and of which they gave due notice to the defendants. The second count is for money lent and money had and received. But this may be laid entirely out of the case, since it is very clear that, upon a collateral undertaking of this sort, no such suit is maintainable.

At the trial upon the general issue and the plea of payment, the plaintiffs, who are resident merchants at New Orleans, offered evidence to prove the payment of five promissory notes, dated on the 1st of May, 1829, payable to Daniel Greenleaf or order, and indorsed by him, namely: one note due on the 20th of November, 1829, for \$4,000; one due on the 20th of December, 1829, for \$4,500; one due on the 20th of January, 1830, for \$5,500; one due on the 20th of February, 1830, for \$5,500; and one due on the 20th of March, 1830, for \$5,500, in the whole amounting to \$25,000; and that the notes had been discounted with the plaintiffs' indorsement thereon, and were taken up by them at maturity. It also appeared in evidence that soon after the letter of guaranty had been received, acceptance had been made of the drafts of Haring by the plaintiffs to the amount of \$8,000; and that other large transactions of debt and credit took place between them, upon which, on the 1st of May, 1829, there was a balance of principal of \$22,573.23, besides interest, due to the plaintiffs, and credits to a larger amount than \$8,000 had come into possession of the plaintiffs. And on that day the foregoing notes were received, and the following receipt written on the account containing the balance:

"Received, Port Gibson, May 1, 1829, in part and on account of the above account, and interest that may be due thereon, the following notes, to wit (enumerating them), amounting in all to \$25,000, which notes, when discounted, the proceeds to go to the credit of this account.

"REYNOLDS, BYRNE & Co."

There was a good deal of other evidence in the cause, but it does not seem necessary to state it at large, since no part of it becomes important to a just understanding of the merits of the controversy, as it now stands before us. In the progress of the trial, the depositions of several witnesses who were clerks in the counting-house of the plaintiffs were read, in which they stated that they knew that the letter of credit was considered by the plaintiffs as covering any balance due by Chester Haring to the plaintiffs, for advances from that time to the extent of \$8,000; and that advances were made, and moneys paid by them on account of Haring from the time of receiving the said letter of credit, predicated on the said letter always protecting the plaintiffs to the amount of \$8,000, whenever the said amount or less might be uncovered; and that it was considered in the said counting-house of the plaintiffs as a continuing letter of credit, and so acted upon by the plaintiffs. To the admission of this part of the depositions the defendants objected; but the court overruled the objection, and permitted the evidence to be read to the jury as evidence of the reliance of the plaintiffs upon the letter of credit to the amount of the

\$8,000, for acceptance, payments, advances and indorsements made to Haring. The defendants excepted to this admission of the evidence, and the propriety of this ruling of the court constitutes the first question in the case.

We are of opinion that the evidence was rightly admitted in the view and for the purposes stated by the court below. It was not offered to explain or establish the construction of the letter of credit. See *Clarke v. Russell*, 3 Dal., 415; *S. C.*, *Russell v. Clark*, 7 Cranch, 69 (§§ 272-277, *infra*), whether it constituted a limited or a continuing guaranty; and was not thus open to the objection which has been relied on at the bar, that it was an attempt by parol evidence to explain a written contract. It was admitted simply to establish that credit had been given to Haring upon the faith of it from time to time, and that it was treated by the plaintiffs as a continuing guaranty; so that if, in point of law, it was entitled to that character, the plaintiffs' claim might not be open to the suggestion that no such advances, acceptances or indorsements had in fact been made upon the credit of it; an objection which, if founded in fact, might have been fatal to their claim. Nothing can be clearer upon principle than that if a letter of credit is given, but in fact no advances are made upon the faith of it, the party is not entitled to recover for any debts due to him from the debtor, in whose favor it was given, which have been incurred subsequently to the guaranty, and without any reference to it.

The other exceptions are to certain instructions prayed by the defendants, and refused by the court. They are as follows:

1. That the said letter of credit sued on is not a continuing guaranty, but is a limited one; and that when an advance or advances, acceptance or acceptances, indorsement or indorsements, had been made by the plaintiffs on the faith of said letter of credit to the amount of \$8,000, the guaranty became *functus officio*, and ceased to operate upon any future advances, acceptances, or indorsements, made by said plaintiffs for Chester Haring. And that if the said plaintiffs received from said Haring, in payment of their advances, acceptances or indorsements made on account of said guaranty, the amount of \$8,000, it was a discharge of said letter of guaranty; and that any future advances, acceptances or indorsements cannot be charged against and recovered from the defendants, by virtue of said letter of credit.

2. That to entitle the plaintiffs to recover on said letter of guaranty, they must prove that notice had been given in a reasonable time after said letter of guaranty had been accepted by them, to the defendants, that the same had been accepted.

3. That to entitle the plaintiffs to recover on said letter of credit, they must prove that, in a reasonable time after they had made advances, acceptances or indorsements for said Haring on the faith of said letters of guaranty, they gave notice to said defendants of the amount and extent thereof.

4. That to entitle the plaintiffs to recover on said letter of credit, they must prove that a demand of payment had been made of Chester Haring, the principal debtor, of the debt sued for; and in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendants; and in failure of such proof, the defendants are in law discharged.

5. That the promissory notes, drawn by C. Haring, the principal debtor, and indorsed by Daniel Greenleaf, and received by the plaintiffs on the 1st of May, 1829, as expressed in the said receipt of that date at the end of their said account, and the discounting the same in New Orleans by the plaintiffs after

they had indorsed the same for that purpose, the same being discounted before they fell due, and the receipt of the net proceeds arising from the discounting, carried to the credit of Chester Haring's account on the books of the plaintiffs, was a discharge of the guarantors on said guaranty, provided the debt now sued for was included in the sum total of said account, on account of which said promissory notes were taken and receipted for.

6. That if the said notes, mentioned in said receipt, were received as conditional payments of said debt, the defendants are discharged, unless it be proved that due diligence has been used to recover the amount called for by said notes from the individuals responsible thereon, and that the same could not be obtained.

7. That the plaintiffs, by accepting said notes on account of said debt, from C. Haring, the principal debtor, with D. Greenleaf as indorser, on account of said debt, the same being at that time due, and receiving the money on the same by discounting them, and the passing said notes away by indorsement, could not have sued Haring for the original debt, before said notes fell due, dishonored, and returned to the plaintiffs; and that, therefore, they by their own act placed it out of their power to proceed against said Haring, to recover said debt, before said notes fell due and were returned to the plaintiffs, which in law discharge the guarantors.

There was another exception, but it was withdrawn from the cause by the defendants; and that, as well as another respecting the refusal of the court to sign the bill of exceptions, without incorporating in it the evidence given at the trial, may be dismissed without commentary. It is proper to add, however, that the conduct of the court in relation to the bill of exceptions constitutes no just matter of error revisable in this form of proceeding; and if it did, we see no reason to question the propriety of its conduct upon the present occasion. It is manifestly proper for the court to require that all the evidence which is explanatory of the true points of the exceptions should be brought before the appellate court, to assist it in forming a correct judgment.

§ 234. *The guaranty in the case at bar was a continuing one. Guaranty to be liberally construed.*

The question involved in the first instruction is, whether the guaranty contained in the letter is a limited or a continuing guaranty; or, in other words, whether it covered advances, acceptances and indorsements, in the first instance, to the amount of \$8,000, or terminated when these were discharged; or whether it covered successive advances, acceptances and indorsements made to the same amount at any future times, *toties quoties*, whenever the antecedent transactions were discharged. Upon deliberate consideration, we are of opinion that it is a continuing guaranty; and we found ourselves upon the language, and the apparent intent and object of the letter. Every instrument of this sort ought to receive a fair and reasonable interpretation, according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms. It was observed by this court in *Russell v. Clarke*, 7 Cranch, 69 (§§ 272-277, *infra*), that "the law will subject a man, having no interest in the transaction, to pay the debt of another only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction." On the other hand, as these instruments are of extensive use in the commercial world, upon the faith of which large credits and advances are

made, care should be taken to hold the party bound to the full extent of what appears to be his engagement; and for this purpose it was recognized by this court in *Drummond v. Prestman*, 12 Wheat., 515, as a rule in expounding them, that the words of the guaranty are to be taken as strongly against the guarantor as the sense will admit. Fell on Guaranty, ch. 5, p. 129, etc. And the same rule was adopted in the king's bench in *Mason v. Pritchard*, 12 East, 227.

If we examine the language or object of the present letter, we think it is difficult to escape from the conclusion that it was intended, and was understood by all the parties as a continuing guaranty. There is no doubt that it was so interpreted by the plaintiffs. The object is to assist Haring in business: "our friend Mr. Chester Haring," to assist him "in business may require your aid." It was not contemplated to be a single transaction, or an unbroken series of transactions for a limited period. The aid required was to be "from time to time, either by acceptance or indorsement of his paper, or advances in cash." The very nature of such negotiations, with reference to the business of the party, unless other controlling words accompanied them, would seem to indicate a succession of acts at different periods, having no definite termination or necessary connection with each other. The language of the letter then proceeds: "In order to save you from harm in so doing, we do hereby bind ourselves, etc., to be responsible to you at any time for a sum not exceeding \$8,000, should the said Chester Haring fail so to do." It is difficult to satisfy this language without giving to the guaranty a continuing operation. The parties agree to be responsible, at any time, for a sum not exceeding \$8,000; and if so, is not the natural, nay necessary, import, that the acceptances, indorsements and advances are not limited in duration; but that whenever made, and at whatever future times, the same responsibility shall attach upon them, not exceeding \$8,000? We think that it would be difficult to give any other interpretation of the language, without subjecting mercantile papers to refinements and subtleties which would betray innocent men into the most severe losses by an unsuspecting confidence in them. That the language fairly admits of, if it does not absolutely require, this construction, cannot be doubted. If it does so, it is but common justice that it should receive this construction in favor of innocent parties who have made acceptances, indorsements and advances upon the faith of it, according to the rule already stated, that the words shall be taken as strongly against the party using them as the sense will admit.

It is rare that in cases of guaranty the language of the instruments is such as to make the decision upon one an exact authority for that of another. The whole words and clauses are to be construed together, and that sense is to be given to each which best comports with the general scope and intent of the whole. So far as authorities go, however, we think they are decidedly in favor of the interpretation which we have adopted. In *Mason v. Pritchard*, 12 East, 227; S. C., 2 Camp., 436, the words of the guaranty were, "to be responsible for any goods he hath or may supply my brother with to the amount of £100;" and the court were of opinion that it was a continuing or standing guaranty to the extent of £100, which might at any time become due for goods supplied until the credit was recalled. That case was certainly founded upon words less expressive and cogent than those of the case before us. In *Merle v. Wells*, 2 Camp., 413, the guaranty was: "I consider myself bound to you for any debt he (my brother) may contract for his business as a jeweler, not exceeding £100, after this date." Lord Ellenborough held it a continuing guaranty for any debt not exceeding £100, which the brother might from time to time con-

tract with the plaintiffs in the way of his business; and that the guaranty was not confined to one instance, but applied to debts successively renewed. The case of *Sansom v. Bell*, 2 Camp., 39, before the same learned judge, is to the same effect. The case of *Bastow v. Bennett*, 3 Camp., 226, was upon words far less stringent. There the guaranty was: "I hereby undertake and engage to be answerable to the extent of £300 for any tallow or soap supplied by B. to F. and B., provided they shall neglect to pay in due time." Lord Ellenborough held it a continuing guaranty, principally upon the force of the word *any*; but the case went off upon another point.

The cases cited on the other side are all distinguishable. *Kirby v. Marlborough*, 2 Maule & S., 18, turned upon the ground that the whole recital of the bond showed that a limited guaranty, for advances to a definite amount, when they were made the guaranty, became *functus officio*. In *Melville v. Hayden*, 3 Barn. & Ald., 593, the guaranty was: "I engage to guaranty the payment of A. to the extent of £60 at quarterly account, bill two months, for goods to be purchased by him of B.;" and the court held that it was not a continuing guaranty, as the words "quarterly account" import only the first quarterly account; and relied on the word "any" in *Mason v. Pritchard*, 12 East, 227, as distinguishing that case from the one before them. The case of *Rogers v. Warner*, 8 Johns., 119, was on a guaranty in these words: "If A. and B., our sons, wish to take goods of you on credit, we are willing to lend our names as security for any amount they may wish;" and the court held it to be a limited guaranty for a single credit. It is observable that here no words of continuing credit, such as "from time to time," or "at any time," are used; so that the whole language is satisfied by one transaction. It is, therefore, strongly distinguishable from that before this court.

We cannot admit, therefore, as has been contended at the bar, that the courts have inclined to vary the rule of construction of instruments of this nature, and to hold them to be *strictissimi juris* as to their interpretation. And we are well satisfied that the authorities in no degree interfere with the construction which we have given to the terms of the present letter. The court below were then right in refusing the first instruction.

§ 235. *Notice must be given within a reasonable time of the acceptance of a guaranty.*

The second instruction insists that, to entitle the plaintiffs to recover on the guaranty, they must prove that notice had been given to the defendants of that fact in a reasonable time after the guaranty had been accepted. Whether there was not evidence before the jury sufficient to have justified them in drawing the conclusion that there was such a notice, we do not inquire. It is sufficient for us to declare that in point of law the instruction asked was correct, and ought to have been given. A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct and his exercise of vigilance in regard to the party in whose service it is given. Especially is it important in the case of a continuing guaranty, since it may guide his judgment in recalling or suspending it.

§ 236. *Under a continuing guaranty it is not necessary to give guarantor notice of each acceptance, but only of sum due when transactions are finally closed.*

The third instruction insists, that to entitle the plaintiffs to recover on the

guaranty, they must prove that, if, at a reasonable time after they made advances, acceptances or indorsements for Haring on the faith of the guaranty, they gave notice to the defendants of the amount and extent thereof. If this had been the case of a guaranty limited to a single transaction, there is no doubt that it would have been the duty of the plaintiffs to have given notice of the advances, acceptances or indorsements made to Haring, within a reasonable time after they were made. But this being a continuing guaranty, in which the parties contemplated a series of transactions, and as soon as the defendants had received notice of the acceptance, they must necessarily have understood that there would be successive advances, acceptances and indorsements, which would be renewed and discharged from time to time, we cannot perceive any ground of principle or policy upon which to rest the doctrine that notice of each successive transaction, as it arose, should be given. All that could be required would be, that when all the transactions between the plaintiffs and Haring under the guaranty were closed, notice of the amount for which the guarantors were held responsible should, within a reasonable time afterwards, be communicated to them. And if the instruction had asked nothing more than this, we are of opinion, upon principle, as well as upon the authority of *Russell v. Clarke*, 7 Cranch, 69 (§§ 272-277, *infra*), and *Edinondston v. Drake*, 5 Pet., 624 (§§ 217-220, *supra*), that it ought to have been given. *Oxley v. Young*, 2 H. Bl., 613; *Peel v. Tatlock*, 1 Bos. & Pull., 419. But it goes much further, and requires, in the case of a continuing guaranty, that every successive transaction under it should be communicated from time to time. No case has been cited which justifies such a doctrine, and we can perceive no principle of law which requires it. The instruction was, therefore, properly refused.

§ 237. *Guarantors are not liable without previous demand on the principal debtor and notice of his failure to make payment.*

The fourth instruction insists that a demand of payment should have been made of Haring, and in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendants, otherwise the defendants would be discharged from their guaranty. We are of opinion that this instruction ought to have been given. By the very terms of this guaranty, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him and a failure on his part to perform his engagements are indispensable to constitute a *casus fœderis*. The creditors are not indeed bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose, but have a right to insist that the risk of their responsibility shall be fixed, and terminated within a reasonable time after the debt has become due. The case of *Allen v. Rightmere*, 20 Johns., 365, is distinguishable. There the note was payable to the defendant himself or order, at a future day, and he indorsed it with a special guaranty of its due payment; and the court held his condition absolute and not conditional.

§ 238. *In the case at bar, certain discounted promissory notes did not operate to discharge guarantors.*

The fifth instruction insists that the promissory notes mentioned in the receipt of the 1st of May, 1829, when discounted, and the proceeds carried to the account of Haring, operated a discharge of the guarantors, provided the debt

sued for was included in the sum total of the account for which those notes were received. We think that the court were not bound, under the circumstances, to give this instruction. It proceeds upon the ground that the notes were necessarily received as an absolute payment, a fact which the court had no right to assume, and that, by indorsing the notes and procuring the same to be discounted and credited in the account, the guaranty was, *per se*, discharged. This is not correct in point of law; for if the plaintiffs, by their indorsements, were compellable to pay, and did afterwards pay, the notes upon their dishonor by the maker, and these notes fell within the scope of the guaranty, they might, without question, recover the amount from the guarantors.

§ 239. *One who takes in conditional payment a note on which third parties are liable must use due diligence to collect it of the parties primarily liable.*

The sixth instruction asserts that, if the notes mentioned in the receipt were received as conditional payments of the said debt, the defendants are discharged, unless it is proved that due diligence had been used to recover the amount of them from the individuals responsible thereon, and that the same could not be obtained. If, by the word "recover," were here intended a recovery by a suit at law, the proposition could not be maintained. But if, as we suppose, it is used in the sense of collect or obtain, its correctness as a general proposition, in cases of conditional payments of debts by notes, is admitted. He who receives any note upon which third persons are responsible, as a conditional payment of a debt due to himself, is bound to use due diligence to collect it of the parties thereto at maturity; otherwise by his laches the debt will be discharged. The difficulty is in applying the doctrine to the circumstances of the present case in the actual form in which it is propounded in the instruction. It assumes, as matter of fact, what the court cannot intend, that the notes were received as conditional payment. It does not assert what the debt is to which it alludes; though it probably refers to the debt stated in the account connected with the receipt. Now, that account is not in terms sued for; but certain drafts amounting to \$8,000, accepted and indorsed, and paid by the plaintiffs; and whether they were included in the account or not was matter of evidence and not matter of law. Although, then, the instruction asserted a proposition generally true in point of law, it is not clear that in the very terms in which it is propounded with reference to the case in judgment, the court were bound to give it, since it involved matters of fact.

The seventh instruction is open to a similar objection. It manifestly assumes, as its basis, general questions of fact, upon which the court had no right to pronounce judgment. It also supposes that the debt sued for is wholly confined to the account, and that the notes referred to were not within the scope of the guaranty, and, if paid by the plaintiffs, could not be recovered by the defendants; which is far from being admitted. Indeed, this and several of the preceding instructions proceed upon the ground that the guaranty was a limited and not a continuing guaranty, which construction has been already overturned.

Upon the whole, we are of opinion that the court below erred in refusing the second and fourth instructions prayed by the defendants, and that for these errors the judgment must be reversed, and the cause remanded to the district court of Mississippi with directions to award a *venire facias de novo*.

GRANT v. NAYLOR.

(4 Cranch, 224-236. 1808.)

ERROR to U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.—Action of *assumpsit* by John and Jeremiah Naylor, upon a letter of credit signed by plaintiff in error and directed to John and Joseph Naylor & Company.

Opinion by MARSHALL, C. J.

In this case three points are made by the plaintiff in error on the letter which constitutes the basis of this action. He contends, 1st. That this letter being a collateral undertaking, and being addressed to John and Joseph Naylor & Co., the plaintiffs below cannot be admitted to prove by parol testimony that it was intended for, and is an *assumpsit* to, John and Jeremiah Naylor. 2d. That the undertaking was conditional, and required notice to be given to the writer of the intent and nature of his liability. 3d. That it is confined to the shipments made during the year in which it was written.

§ 240. *On the policy of taking cases out of the statute of frauds by exception.*

On the first objection the court has felt considerable difficulty. That the letter was really designed for John and Jeremiah Naylor cannot be doubted, but the principles which require that a promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and wise policy, which this court cannot relax so far as to except from its operation cases within the principles. Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion that this relaxing construction of the statute ought not to be extended further than it has already been carried, and this court entirely concurs in that opinion.

On examining the cases which have been cited at the bar, it does not appear to the court that they authorize the explanation of the contract which is attempted in this case. This is not a case of ambiguity. It is not an ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John and Joseph Naylor & Co. to either of which this letter might have been delivered. It is not a case of fraud. And if it was, a court of chancery would probably be the tribunal which would, if any could, afford redress. If it be a case of mistake, it is a mistake of the writer only, not of him by whom the goods were advanced and who claims the benefit of the promise. Without reviewing all the cases which have been urged from the bar, it may be said with confidence that no one of them is a precedent for this.

§ 241. *Parol evidence is not admissible to show that a letter of guaranty addressed to A. was intended for B.*

A letter addressed by mistake, it is admitted, to one house is delivered to another. It contains no application or promise to the company to which it is delivered, but contains an application and a promise to a different company not existing at that place. The company to which it is delivered are not imposed upon with respect to the address, but knowing that the letter was not directed to them, they trust the bearer, who came to make contracts, on his own account. In such a case the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was deliv-

ered. To admit parol proof to make it such a contract, is going further than courts have ever gone, where the writing is itself the contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it.

It being the opinion of a majority of the court that John and Jeremiah Naylor could not maintain their action on this letter, it becomes unnecessary to consider the other points which were made at the bar. It is the opinion of this court that the circuit court erred in directing the jury that the evidence given by the plaintiffs in that court was proper and sufficient to support the issue or their part. The judgment of the circuit court is, therefore, to be reversed and the cause sent back for further trial.

Judgment reversed.

TOPPAN v. CLEVELAND, COLUMBIA & CINCINNATI RAILROAD COMPANY.

(Circuit Court for Ohio: 1 Flippin, 74-84. 1862.)

Opinion by WILLSON, J.

STATEMENT OF FACTS.— This case stands upon a demurrer to the first and second counts of the plaintiff's declaration. Many grave and important principles were discussed by counsel in the argument, some of which it is deemed unnecessary to consider, in determining the issue of law raised by the demurrer. The suit is brought against the defendant upon its guaranty indorsed upon sundry bonds of the Columbus, Piqua & Indiana Railroad Company. These bonds bear date April 1, 1854, and are all of the same tenor and effect, with interest coupons attached. The following is a copy of them:

"The Columbus, Piqua & Indiana Railroad Company acknowledge themselves to owe Elias Fassett, or bearer, \$1,000, which sum said company promise to pay to said Elias Fassett, or the holder hereof, at the office of the Ohio Life Insurance and Trust Company, Wall street, in the city of New York, on the 1st day of April, in the year 1869, and also interest thereon at the rate of seven per cent. per annum, semi-annually, on the 1st day of October next, and of each April and October thereafter until the said principal sum shall be paid, on the presentation of the annexed interest warrants at said office. And the said company also agree to deliver to the holder hereof, at any time before said principal sum shall fall due, when such holder shall elect to receive the same, on the delivery of this obligation and the unpaid interest warrants to the trustee named in the annexed certificate, or to his successor in the trust, in the city of New York, or to the treasurer of said company, in the city of Piqua, Ohio, twenty shares, of \$50 each, of the capital stock of said company, in exchange for and satisfaction of this obligation.

"And the said company further agree that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special indorsement, or by delivery, as if the same were a note of hand payable to bearer, and hereby waive all benefits from valuation or appraisal laws."

Signed by the president of the company, with the corporate seal affixed.

The interest warrants or coupons are also payable to the bearer or holder. After the execution of said bonds and coupons, and before their negotiation and issue, the defendant guarantied their payment by indorsing on the back of the bonds the words following:

"The Cleveland, Columbus & Cincinnati Railroad Company, for value received, hereby warrant and guaranty the punctual payment of the interest and principal of this obligation.

"In testimony whereof the said company, in pursuance of a resolution of the board, passed the 6th day of March, 1854, have caused these presents to be signed by its president this 7th day of April, 1854."

Which guaranty was afterwards, to wit, on said 7th day of April, 1854, duly ratified and confirmed by the stockholders of said company. The plaintiff became the owner and holder of the bonds and coupons so guarantied on the 4th day of August, 1854, by purchase in the regular course of business, and for a valuable consideration.

It is alleged that the Columbus, Piqua & Indiana Company is insolvent, and that certain of the coupons are due and remain unpaid. Both the first and second counts of the declaration contain the averments that the Columbus, Piqua & Indiana Company was a corporation created and organized under the laws of Ohio, empowered to issue bonds, notes and other evidences of debt, to borrow money at seven per cent. interest, and authorized to construct, maintain and run a railroad from Columbus, Ohio, to the west line of the state. That the Cleveland, Columbus & Cincinnati Company is a corporation of like powers, organized to construct, maintain and run a railroad from Cleveland, in Cuyahoga county, to Columbus, in Franklin county, Ohio, and being interested in the construction of the Columbus, Piqua & Indiana road, and being authorized by the laws of Ohio so to do, did indorse and guaranty the bonds of the last named company as aforesaid. This statement of the case, though much abbreviated, is nevertheless deemed sufficient for a full apprehension of the questions of law raised by the demurrer.

It is insisted by the defendant's counsel: 1st. That this contract of guaranty is not negotiable. 2d. That no sufficient consideration for the undertaking on the part of the defendant is averred; and 3d. That the defendant having no power under its charter to make the guaranty, the legal authority and the *facts and circumstances* contemplated by the act of 1852, by which such power could be obtained, should be fully set forth upon the record.

§ 242. *A guaranty of negotiable paper is supported by the same consideration that upholds the original promise, is collateral to that promise, and if general is negotiable with the paper on which it is indorsed.*

"A guaranty," said Verplank in *McLaren v. Watson*, in its legal and commercial signification, "is an undertaking to be answerable for the payment of some debt, or the due performance of some contract by another, who himself remains liable for his own default. If the guaranty be of a prior debt or contract, then there must be some good consideration received by the guarantor, and such consideration should be averred in the pleadings and proved on the trial. But where the guarantor holds out his engagement of *secondary liability* as an inducement to any one who may, upon the faith of that promise, give credit in any way to a party, then if there be no special consideration of benefit received by the guarantor, yet the same consideration of debt or damage which supports the claim against the principal in default equally applies to and supports the right of action against the guarantor.

§ 243. *When a distinct consideration is necessary to support a guaranty.*

Hence, as the guaranty in this case is a contract collateral to the bond, there is no force in the objection that a distinct consideration should be averred. It would be different had the guaranty been made after the execution of the bond and its delivery and receipt as a complete contract. But here the record discloses the fact that the guaranty was made and indorsed on the bond before its issue and delivery by the Columbus, Piqua & Indiana Company. It was

done for the benefit of that company, to add strength to its paper, and to induce third persons to take the bonds and to advance money upon them: We are clearly of the opinion that the credit thus given to the Columbus, Piqua & Indiana Company is, of itself, a good and sufficient consideration to support the contract of guaranty. 8 Cush., 154; 12 Wend., 381; 26 Wend., 425; 3 Burr., 1662.

Again, it is argued that this guaranty is a special contract, a mere *chose in action*, and therefore not negotiable. It is claimed to be analogous in principle to an ordinary mercantile guaranty of a debt or purchase where the primary liability can go no further than the first parties. The ordinary mercantile guaranty of a debt is a contract to become liable for another, for some specific debt in the hands of a creditor, whose right to sue and enforce it cannot be transferred. In such a case the offer of guaranty is only of some specific transaction, which becomes final as to parties when the offer is accepted.

In the language of the court in *Watson v. Dodson*, 3 Carr. & P., 163, "such a guaranty will inure to the benefit of those *to whom or for* whose use it was first delivered." But the rule of law is different where the guaranty is for the payment of negotiable paper. That is a positive undertaking to become liable in case of the default of the original parties to the bond, note or bill, and such undertaking is held out to every person who may, on the faith of it, become the legal holder of such paper. Not, say the authorities, that the guaranty is in itself negotiable as a separate contract, but that it is a collateral promise to any and each person in his turn, who may give credit to a negotiable bond, note or bill *coupled with such guaranty*.

In *Ketchell v. Burns*, 24 Wend., 456, the supreme court of New York declare that on a guaranty indorsed upon a note, whereby the payment of the note is guarantied to a third person or bearer, an action lies by any subsequent holder *in his own name*. And in *Story on Contracts*, 738, the author broadly declares the law to be that "where a general guaranty is made upon the face of a promissory note or bill of exchange, *and is not limited to a particular person, or restricted in its terms*, but purports to be a guaranty to the payee or his order, or to the bearer, the guaranty is as negotiable as the bill or note, and accompanies it in the hands of every holder." 26 Wend., 425; 19 id., 202, 557; 6 Conn., 315; 12 Pet., 207; 16 East, 355; 3 Carr. & P., 162. Now, the bonds in question of the Columbus, Piqua & Indiana Company are made negotiable by distinct and unequivocal terms. The language employed is: "And the said company further agree that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special indorsement, *or by delivery, as if the same were a note of hand, payable to bearer*."

The defendant's guaranty of payment, indorsed upon the bond, is not limited to any particular person, nor is it restricted in terms. The obligation on the part of the defendant is, in legal effect, an undertaking to pay the interest and principal as they severally become due, in default of the maker, and such undertaking extends to any person who may have become the holder of the paper by advancing money on the *strength of the indorsement*. Such clearly was the purpose and effect intended by the parties to the transaction. We therefore hold that, from the record in the case, it sufficiently appears this guaranty was given for a good consideration, and also that it is negotiable, and as available in the hands of the holder as is the right to sue upon the bonds themselves.

§ 244. *Where a corporation has power under a general statute to guaranty the obligations of another corporation, it is not necessary, in pleading, to set out such authority.*

It only remains to consider the third objection to the sufficiency of the pleadings, which is that, the defendant having no power under its charter to make the guaranty, the legal authority and *the facts and circumstances* contemplated by the act of 1852, by which such power could be obtained, should have been fully set forth upon the record. The federal courts, sitting in any state, are bound to take judicial notice of the statutes of such state. Hence a party in alleging a claim in his declaration, or a party in setting up a defense in his plea, under a public law, is not required to set forth the statute in his pleadings. It is sufficient that the facts are stated which are necessary to bring the case within the operation of the statute, and to insist that upon those facts the right exists or does not exist. The court will then judicially notice the existence of the statute, and declare its legal effect upon the case as made by the pleadings.

§ 245. — *judicial notice.*

The courts are, in like manner, bound to take judicial notice of the location of towns and cities, and the boundaries of counties, and of state lines.

§ 246. — *presumption in favor of contracts by corporations.*

There is still another principle of law which has application, where one of the parties is a corporation and contracts as such. And that is, that while corporations have no powers except those specifically granted, or such as are necessary for carrying into effect the powers expressly granted, yet the presumption of law arising in favor of such contracts is always in favor of *their validity*, or, in other words, it will be presumed that the debt was due, or the obligation or other consideration was given in the lawful course of business, *until the contrary is shown*. This presumption, however, only arises in cases where it appears the corporation is empowered to contract under the authority of its charter, or *the laws of the state*. The twenty-fourth section of the "Act to provide for the creation and regulation of incorporated companies in Ohio," passed May 1, 1832, declares that "any railroad company heretofore or hereafter incorporated may, at any time, by means of subscription to the capital of any other company, or *otherwise*, aid such company in the construction of its railroad, for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing such aid; or any railroad company organized in pursuance of law may lease or purchase any part or all of any railroad constructed by any other company, if said companies' lines of road are continuous or connected as aforesaid, upon such terms and conditions as may be agreed on between said companies respectively, or *any two or more railroad companies whose lines are so connected may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created*: *Provided*, that no such aid shall be furnished, nor any purchase, lease or arrangement perfected, until a meeting of the stockholders of each of said companies shall have been called by the directors thereof at such time and place, and in such manner, as they shall designate, and the holders of at least two-thirds of the stock of such company represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto."

Here is the broad legislative grant of power to this defendant, to enter into

any arrangement with another railroad company for their common benefit, consistent with and calculated to promote the objects for which they were created. The question raised by the demurrer is whether it was necessary for the plaintiff to aver in his declaration that the aid or guaranty in question was given by the *previous assent* of two-thirds of the stockholders of the company, at a meeting called by the directors for that purpose, in order to avoid the inhibition of the proviso contained in the act of 1852. The averment in the declaration is — “which said guaranty was duly signed by the defendant, by its then president, who was authorized to execute the same, and was afterwards, to wit, etc., duly ratified and confirmed by the stockholders of said company.”

§ 247. *Admissions by one party, which have been acted upon by the other, are conclusive upon the party making them.*

This is not a contest between a corporation and one or more of its stockholders, whose rights the proviso of the act was intended to protect. Nor is it a contest between a stockholder and a third person, who claims rights under alleged illegal acts of the officers of the corporation. It is a controversy between a creditor and the corporation itself, in which the latter repudiates its own acts, and seeks to avoid a liability created by itself. The defendant, in legal effect, *admits* its liability by executing the guaranty and sending it forth to the world, challenging faith, credit and confidence in all who may be induced to act upon it. It is a principle of law of universal application (and as just as it is general) that *admissions*, whether of law or of fact, *which have been acted upon by others*, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced; and the principle is founded upon grounds of public policy, that a man shall not be permitted to repudiate his own representations. It was forcibly said by Mr. Justice Campbell in regard to the *validity of this identical guaranty*, that “a corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representation or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.” *Zabriskie v. C., C. & C. R. Co.*, 23 How., 381. It is a legitimate presumption, then, that the defendant, in executing the guaranty, had complied with all legal requirements and regulations, and especially so since it appears by the record that the obligation was given by order of the board of directors, and subsequently ratified by the stockholders at a general meeting.

§ 248. *Sufficiency of the pleadings examined.*

The plaintiff has *not* alleged in his declaration that the guaranty was given by the *previous assent of two-thirds of the stockholders* at a meeting called for that purpose. But we think so far as third persons are concerned, in a suit against the corporation, that fact is wholly immaterial, and therefore need not be averred.

It is further objected by the defendant's counsel that a *traverse of law*, and not purely a matter of fact, is tendered by the plaintiff's declaration. It is said that the allegation in reference to the execution of the guaranty, to wit, of “the defendants being thereunto duly authorized by the laws of Ohio,” etc., is an attempt on the part of the pleader to put in issue a mere legal conclusion. The true test of the sufficiency of the pleading undoubtedly is, whether the allegations in the declaration can be traversed by plea, for it is true that a *traverse* should be taken on matter of fact, and not on mere matter of conclu-

sion of law. But where the *virtute cuius* raises a mixed question of law and fact, there may be a traverse, for that is the only mode by which the facts are to be settled on which the law depends.

Mr. Sergeant Williams says, "that where the words, *virtute propterea per quod*," etc., introduce a consequence from the preceding matter, they are not traversable; but that matter of law connected with fact, or rather matter of right resulting from facts, *is traversable*. In the case of *Barker v. Mechanics' Ins. Co.*, 3 Wend., 94, the averment in the declaration was, that "John Franklin, being the president of said company, and *being thereunto duly authorized*, and acting within the scope of the legitimate purposes of the company, on, etc., made a certain promissory note." The supreme court of New York held the averment good and sustained the declaration. In the case before us we are of opinion that the demurrer is not well taken, and should therefore be overruled.

DWIGHT v. WILLIAMS.

(Circuit Court for Michigan: 4 McLean, 581-588. 1840.)

Opinion by the COURT.

STATEMENT OF FACTS.—This suit is brought on a bond in the nature of a guaranty, in which the defendant covenanted to pay whatever should remain uncollected of a debt due by Lawrence to the Bank of the River Raisen, of \$1,190, and interest thereon, from the 1st of May, 1840; for the payment of which a bond and mortgage had been executed to the bank — which debt was assigned to the defendant, and by him to the plaintiff, "when he, the plaintiff, should, by a due course of law, have been unable to collect the said amount and interest." The defendant by this agreed to pay only the part of said indebtedment which could not be collected by a due course of law. The due course of law was therefore to be used before the defendant became liable, under this covenant, to pay any balance of the debt which remained.

In the declaration it is averred that there was a prosecution on the mortgage, and the mortgage property sold, and that there still remained a debt due on the bond and mortgage of the sum of \$1,499.69, above demanded, and the plaintiff avers that the same sum remains due, and that by due course of law he has been unable to collect the sum or any part thereof, and that due course of law has been had for that purpose. And the plaintiff further avers, "that the said Wolcott Lawrence departed this life on or about the 29th of April, 1843, and that at his decease, and for a long time before that time, was and had been utterly insolvent; and that his estate was worthless to the creditors having claims against the same and utterly and wholly insolvent, and, though long since closed up, paid no dividend to said creditors, and that claims against and debts were and have ever been worthless and good for nothing."

The defendant demurred to the declaration.

The mortgage bond was due the 3d of August, 1840. A bond was executed by Lawrence on 3d August, 1839, the date of the mortgage, to the Bank of the River Raisen, as collateral. On the 7th August, 1840, the bank sold and transferred these securities to the defendant, who, on the 28th March, 1842, by a deed under his hand and seal, assigned and transferred them to the plaintiff. On the 20th of December, 1842, the plaintiff assigned these securities, and all the rights he derived under the assignment, to Sauverhill. Lawrence died the 29th of April, 1843, insolvent, and was so long before his decease. On the 18th November, 1843, Sauverhill filed the bill to foreclose the mortgage, on

which he obtained a decree of sale the 17th March, 1846, and the property was sold on the 18th of June of that year. On the 28th of March, the time of the assignment of the mortgage to the plaintiff, the defendant, in the deed of assignment, covenanted "that when he, the plaintiff, should, by a due course of law, have been unable to collect the said amount and interest, he, the said defendant, would pay to the said plaintiff such an amount as might be necessary to make good any deficiency of principal and interest remaining unpaid."

§ 249. *Upon a guaranty to pay "after a due course of law," the taking of such measures is a condition precedent to the right to sue the guarantor.*

It is contended, 1. That no action can be maintained against the present defendant, admitting the facts set forth in the declaration to be true. The covenant is so clearly expressed that no one can mistake it. It is not an undertaking to pay absolutely, but conditionally. The defendant bound himself to pay whatever balance could not be collected of the debt of \$1,190 from Lawrence, the debtor, "after a due course of law" had been taken. The balance could not be ascertained until the due course of law had been taken, consequently the due course of law was a condition precedent to the suit now brought.

§ 250. *Authorities examined.*

In *Moakley v. Riggs*, 19 Johns., 69, the defendant undertook that the note was good and collectible after due course of law; held, that the holder was bound to prosecute the indorser and maker, with due diligence, before he could resort to the defendant on his guaranty. A delay of seventeen months discharged the defendant. *Betts v. Turner*, 2 Caine, C. E., 306; *Ten Eyck v. Tibbitts*, 1 Caine, 440. In *Taylor v. Bullen*, 6 Cow., 624, the defendant assigned a note to plaintiff, and promised him to warrant the collection of it, and to pay him all costs in all suits legally commenced for its recovery; held, that the commencement of a suit is a condition precedent to the enforcement of the promise. And that it is no excuse for not making the attempt that the maker died intestate, and no administration taken out on his estate. In *Cumpston v. M'Nair*, 1 Wend., 457, was a guaranty thus: "I guaranty the collection of the note." Held, that the guarantor was not liable until after the holder had endeavored to collect the money from the maker; and that it was equivalent to a guaranty "that the note is collectible by due course of law." In *White v. Case*, 13 Wend., 543, in a similar case, the court held legal proceedings to be a condition precedent, "and that the parties must use all the remedies presented by law," "even an attachment if the parties remove." And in *Eddy v. Stantons*, 21 Wend., 255, the defendant assigned a third party note, and "agreed, in case the plaintiff could not set off the note in payment of any balance that might be due from them to the debtors, or collect the same in some other way, or due course of law, to pay the same and all costs." Held, that there were conditions precedent, and that insolvency of debtor was no excuse. In 12 Vt., 68, where a party warranted "note due and collectible," held, the holder was bound to sue and use due diligence, and if the first failed, through defective service, that guarantor was discharged.

§ 251. *The terms of a guaranty must be strictly pursued. The liability is strictissimi juris and cannot be varied even by the act of God.*

It is an acknowledged principle that the terms of a guaranty must be strictly pursued to make the guarantor liable. Lord Ellenborough said, "the claim as against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to show that the terms of the guaranty have been strictly complied with." 3 Eng. C. Law, 404; 29 id., 210; 15 id., 514; 25 id., 413. There is no averment in the

declaration of a performance of the condition precedent, but an excuse, and we are now to inquire as to the sufficiency of the excuse. In a great number of authorities the law is thus declared: "The act of God or of the law cannot vary the terms upon which the guarantor agreed to become liable. It is a part of the consideration which cannot and should not be dispensed with." 13 Wend., 544; 3 Com. Di., 96, 121; 2 Bac. Ab., 335; Chitt. on Con., 334; 19 Ward, 500.

"Where a right of action depends upon the performance of a condition precedent, performance cannot be excused, unless it is dispensed with, or prevented by the opposite party, although it has become impossible." 12 Wend., 452; 6 Cow., 625; 19 Johns., 71; 6 Term R., 760. There is a distinction between the cases where the law creates a duty or charge, and the party is disabled to perform, without any default in him, and hath no remedy over—there the law will excuse him; but where the party by his own contract creates a duty or a charge, he is bound to make it good, notwithstanding any accident or inevitable casualty. Under this view, therefore, the alleged insolvency of Lawrence is insufficient. 19 Eng. C. Law, 393 and note.

§ 252. *Plaintiff must allege the performance of a condition precedent.*

Was it essential that the plaintiff should allege in his declaration the performance of the condition precedent? It was so, if the performance of the condition was necessary to establish his right to sue on the guaranty. It lays at the foundation of the action. 2 Black., 151; 2 McL., 26. In his declaration, has the plaintiff shown due diligence? He received the transfer of the bond and mortgage on the 28th of March, 1842. The mortgage money had then been due more than eighteen months. Suit was not brought on the mortgage until the 18th of November, 1843. One year and eight months elapsed from the time the plaintiff received the mortgage, before a step was taken to enforce it. Lawrence, the mortgagor, died on the 29th of April, 1843, but suit was not brought in his life-time, although he lived more than eleven months after the mortgage was in the hands of the plaintiff. And a decree for the sale of the mortgaged premises was not obtained until the 17th of March, 1846.

§ 253. *Insolvency of principal debtor no excuse for failure to sue him.*

"A due course of law, when applied to the prosecution of a demand in a court of record, confessedly means no more than a timely and regular proceeding to judgment and execution." 10 Wend., 635; 17 Ab., 111; *Philips v. Astling*, 2 Taunt., 206; 3 Penn., 18; 16 Serg. & R., 79. Suppose the statute of the state had provided in all cases of guaranty the guarantor should be held liable, if by a due course of law against the debtor nothing could be collected. Would any court say that a suit duly prosecuted could be dispensed with? Suppose the debtor was insolvent, could that dispense with a suit? The due course of law was a condition precedent, and to give the remedy against the guarantor a suit was as essential where the debtor was insolvent as where he was not so. That condition of the debtor was not made an excuse in the law for not complying with the condition, and the courts could not by construction hold it as an excuse, as that would be to dispense with a positive law.

The contract of the parties is not less binding than a legislative enactment; the contract makes the law between the parties; no excuse being provided for, none can be implied, unless that which arises from the act of the other party. He may dispense with the condition, or if he prevent the other party from performing, the law will excuse the performance. Nothing else can constitute an excuse.

If, within a reasonable time, the plaintiff had brought suit against Lawrence, in his life-time, no one can say what fruits might have been received by it. He may have been in possession of no property which he called his own, yet he may have had friends, or property covered which the law could reach. But it is enough to know that suit was required by the contract as a condition precedent, and that within a reasonable time after the contract. Suit on the mortgage was delayed eighteen months, and after suit brought three years transpired before a decree was obtained. This, it would seem, could not be the ordinary course of the law. And if there was any neglect in this respect, the defendant would be absolved from liability under his contract. In 4 Cowen, 103, it was held that the plaintiff must not only issue a *fi. fa.*, but also a *ca. sa.*, and that it was no answer to say the original debtor was insolvent. A delay of two and a half months has been held fatal. In 1 Cow., 98; 5 Wend., 433, it was held that a term should not be suffered to pass without suing the original debtor, otherwise it would amount to laches.

On the part of the plaintiff it is contended that the instrument was not intended as a guaranty. In effect it certainly is a guaranty on conditions, and it is to be governed by principles of law applicable to such a case. But he insists if it be a guaranty, the inquiry is, what loss has the defendant sustained by the negligence charged. This is not the rule, as it is not within the contract. On the contrary, it is opposed to it, as by the contract suit was to be brought. And it is argued that the plaintiff was not bound to adopt all the courses of the law. That a due course means a proper and just course to realize the debt. We suppose that the contract required the plaintiff to adopt any and every legal course of law which was necessary to reach the property of Lawrence; and that nothing short of this can be considered a due course of law.

It is admitted that by the Revised Statutes of Michigan, 376, 377, a suit at law upon the bond and mortgage cannot be prosecuted while a bill of foreclosure is pending on the same mortgage. The declaration, in its averments, does not show any excuse for not proceeding against Lawrence in his life-time, nor does it appear that he was insolvent from the time that the plaintiff received the mortgage until his death. The declaration alleges that "Lawrence, at the time of his decease, and for a long time before that time," was and had been insolvent. Now this averment is indefinite — "a long time before his decease." How is that to be measured, by days or months? The averment does not cover this period of time with the requisite certainty, and on this ground, independently of every other, the demurrer must be sustained.

LAWRASON v. MASON.

(3 Cranch, 492-496. 1806.)

ERROR to the Circuit Court for the District of Columbia.

STATEMENT OF FACTS.—*Assumpsit* for the price of a quantity of corn furnished on the faith of the following letter of credit:

"ALEXANDRIA, 28th November, 1800.

"Mr. James M'Pherson:

"DEAR SIR— We will become your security for one hundred and thirty barrels of corn, payable in twelve months.

LAWRASON & SMOOT."

§ 254. *A party giving a bill of credit is liable to a person furnishing goods on the faith of it, though it is not addressed to any particular person.*

Opinion by MARSHALL, C. J.

This action is grounded upon a note in writing which was certainly intended by the defendants to give a credit to M'Pherson. They are bound by every principle of moral rectitude and good faith to fulfil those expectations which they thus raised, and which induced the plaintiff to part with his property. The evidence was clear that the credit was given upon the faith of the letter. Unless, therefore, there is some plain and positive rule of law against it, the action ought to be supported. In the case cited from Espinasse (Esp. N. P., 105, 106), the rule is laid down too broadly. If compared with analogous cases, it will be found to be considerably modified. Thus, if money be delivered by A. to B., to be paid over to C., although no promise is made by B. to C., yet C. may recover the money from B. by an action of *assumpsit*.

If it be said that in such a case the law raises the *assumpsit* from the facts, and if the facts do not imply an *assumpsit*, no action will lie, it may be answered that in the present case there is an actual *assumpsit* to all the world, and any person who trusts in consequence of that promise has a right of action. It has been suggested by the counsel for the defendants, that, although an action of *assumpsit* will not lie, yet possibly the plaintiff might support an action for the deceit. But an action for the deceit must be grounded upon the breach of the promise. And if an action will lie in any form, the present seems to be at least as proper as any other.

Judgment affirmed.

DECATUR BANK v. ST. LOUIS BANK.

(21 Wallace, 294-302. 1874.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—Action of contract upon a letter of credit in the following words:

“FIRST NATIONAL BANK,

“DECATUR, ILL., September 13, 1869.

“H. C. Pierce, Esq., Cashier, St. Louis, Mo.:

“SIR—We beg herewith to accredit with you P. E. Frederick, Esq., whose drafts of shipments of cattle to J. S. Talmadge, Chicago, are herewith guarantied to the amount of ten thousand dollars for thirty days from date.

“Yours respectfully,

J. H. LIVINGSTON.”

The time of the guaranty was subsequently extended, and on December 10, 1869, Frederick shipped hogs to Talmadge at Chicago and through the St. Louis Bank drew against such shipment to the amount of \$8,000. Talmadge failed, and the St. Louis Bank brought this suit against the Decatur Bank on its guaranty. The latter contended that the word “cattle” as used in its guaranty did not mean “hogs,” and hence that the bank was not liable. In the court below the verdict was for plaintiff and defendant excepted.

Opinion by MR. JUSTICE DAVIS.

The basis of this suit is the letter of credit of 13th September, 1869. The subsequent correspondence, on any rational interpretation of it, did not have the effect to change the terms of this the original letter, nor was it intended to do so except in two particulars, which are not the subject of controversy. The defense now made, technical though it be, is sufficient to defeat the action if

the condition of the guaranty was not observed, and this fact renders necessary a construction of the instrument. Like all other contracts it must receive the construction which is most probable and natural under the circumstances, so as to attain the object which the parties to it had in contemplation in making it. Frederick was engaged in buying and shipping stock in St. Louis during the fall and winter of 1869, and the presumption is, in the absence of any evidence on the point, that he resided in Decatur, where the plaintiff in error had its place of business. At any rate, he was unknown in St. Louis, without either money or credit, and, as he could not carry on his business without money, it was necessary that he should be accredited to some responsible banking house in that city. This was done through the letter of credit of 13th September. The bank to which this letter was addressed doubtless thought its correspondent trusted in some degree to the pecuniary responsibility of Frederick, but it had no right to suppose that the letter of credit was given solely on this account. On the contrary, the letter is based on the idea that shipments of stock would protect the drafts. If Frederick was responsible, still the Decatur Bank did not trust to this alone, but relied on the security which was to accompany the drafts. This it had a right to do, and its conduct was very natural under the circumstances. Indeed, the business in which Frederick was engaged is usually conducted in this manner. The Decatur Bank doubtless believed, and acted on the belief, that the stock would sell for enough to pay the drafts, and if it did not, the loss would be inconsiderable and such as Frederick could readily meet.

§ 255. *The word "cattle," used in a letter of guaranty, held to include hogs.*

It now seeks to escape liability, not on the ground that stock sufficient to secure the drafts was not shipped, but that it was a different sort of stock from that named in its letter. It is fair to presume that an investment in hogs yielded as good a return as an investment in cattle, and if the consignee in Chicago had not failed, that no trouble would have arisen. As this consignee, named by it, and with whom the St. Louis Bank had no concern, did fail, it seeks to throw the loss on the St. Louis Bank because it interpreted the letter to embrace shipments of hogs as well as neat cattle. The question then arises, was this interpretation correct? That stock of some kind formed part of the guaranty is quite plain, but is the word "cattle" in this connection to be confined to neat cattle alone, that is cattle of the bovine genus? It is often so applied, but it is "also a collective name for domestic quadrupeds generally, including not only the bovine tribe, but horses, asses, mules, sheep, goats and swine." Worcester's Dictionary, *in verbo*, "Cattle." In its limited sense it is used to designate the different varieties of horned animals, but it is also frequently used with a broader signification as embracing animals in general which serve as food for man. In England, even in a criminal case, where there is a greater strictness of construction than in a civil controversy, pigs were held to be included within the words "any cattle." *Rex v. Chapple, Russ. & Ry. C. C., 77.* And in other cases in that country involving life and liberty the word has been construed so as to embrace animals not used for food. *Rex v. Whitney, Moody, C. C., 3; Paty's Case, 2 W. Bl., 721; Rex v. Mott, 2 East, Pl. Cr., 1074-6.*

Did the Decatur Bank use the word in its narrow and restricted meaning or in its more enlarged and general sense? In other words, did it intend to restrict Frederick to the dealing in horned animals alone, and so confine the defendant in error to drafts based on this kind of stock? There was no apparent

motive for doing so. Clearly, security was the object to be attained, and this was better attained by leaving Frederick unrestricted in the choice of animals to send forward to market, provided they were of the kind generally used for food. It is well known that the market varies at the Chicago cattle-yards. At certain times hogs have a readier sale and bring better prices than other kinds of stock, and at other times horned animals alone command the attention of buyers. Every prudent dealer in stock informs himself of the state of the market before purchasing, and the means of doing this are greatly multiplied in later years.

That Frederick pursued this course, and bought and sold according to the indications of the Chicago market, would seem clear from the evidence, for he says he was engaged in buying and shipping *stock* in St. Louis during the fall and winter of 1869. If his operations, except in the single instance on which the drafts in suit are based, were confined to horned stock, why did he not say so? If true, it would have strengthened the defense, because it would have shown that all the dealings between Frederick and the defendant in error, with a single exception, were based on shipments of stock of the bovine genus. These dealings were continued through a period of three months by the renewals of the guaranty, and could not have been infrequent. It would seem, therefore, that the parties in St. Louis dealt with each other on the understanding that the guaranty embraced the different kinds of stock which are used for food, and usually sent for that purpose to the Chicago market. They had the right to give this construction to it, and there is nothing in the evidence tending to show that the plaintiff in error understood it differently, except that the word "cattle," as often used, does not include hogs. But it would be a narrow rule to hold that this word was used in its restricted sense, in the absence of any evidence, other than inferential, on the subject. Especially is this so when the word is susceptible of a different meaning, and important transactions have been based on the idea that it was employed in its enlarged and not in its restricted sense.

§ 256. *A judgment will not be reversed on account of an error in the record which has not injured the appellant.*

This construction of the letter of credit disposes of the case and affirms the judgment. It is true, the judge of the circuit court instructed the jury that the letter of September 21st, which leaves out the terms "on shipments of cattle," constituted the contract of guaranty between the plaintiff and defendant, but the result would have been the same if he had charged the jury, as we are of the opinion that he should have done, that the rights of the parties were to be determined by the terms of the original letter of credit of the 13th September. In either aspect of the case the judgment must have been for the plaintiff below, and to warrant the reversal of a judgment there must be not only error found in the record, but the error must be such as may have worked injury to the party complaining. *Brobst v. Brock*, 10 Wall., 519. The bill of exceptions contains all the evidence in the case, and though the jury may have found their verdict on a wrong theory of the case, yet as the court can see that the verdict was correct, the plaintiff in error is not harmed by the misdirection of the judge. The result is right, although the manner of reaching it may have been wrong.

It was urged at the bar that national banks are not authorized to issue letters of credit, and if so, that the action cannot be sustained. But the record does not raise the question, and it cannot, therefore, be considered. It is true a plea

was interposed which was doubtless meant to raise it, on which issue to the country was tendered, but for aught that appears it was abandoned. No evidence was offered under it, but if this were not necessary the attention of the court at least should have been called to it, and proper instructions asked. If refused, error could have been assigned, and the point would then have been properly before the court for decision. Nothing of the kind was done, and it is too late to raise the question *now*.

Judgment affirmed.

CREMER v. HIGGINSON.

(Circuit Court for Massachusetts: 1 Mason, 323-340. 1817.)

STATEMENT OF FACTS.—Action of *assumpsit* by the surviving partner of Thomas Cremer, of Rotterdam, who had carried on business there, under the firm name of Thomas and Adrian Cremer, against Stephen Higginson and Samuel G. Perkins, surviving partners of George Higginson, of Boston, who had transacted business in Boston under the firm name of Stephen Higginson & Co., upon a letter of guaranty given by Stephen Higginson & Co. to Stephen Higginson, Jr., and Henry Higginson, merchants, of Boston, and at that time partners, under the firm of Stephen and Henry Higginson, and addressed to Messrs. T. and A. Cremer.

“BOSTON, December 15, 1808.

“*Messrs. Thomas and Adrian Cremer, Rotterdam:*

“Our friends and connections, Messrs. Stephen and Henry Higginson, contemplate, under certain circumstances, making a considerable purchase of goods on the continent, and for that purpose are about to send an agent to Europe. They wished to obtain a letter of credit from us to increase their means, and to be used or not, as circumstances may require. As we are now indebted to you, and have no funds on the continent of Europe, we told them we could not give a positive letter of credit for any sum, but that we had no doubt you would be disposed to furnish them with funds under our guaranty. The object of the present letter is therefore to request you, if convenient, to furnish them with any sum they may want, as far as \$50,000; say \$50,000. They will reimburse you the amount they receive, together with interest, as soon as arrangements can be made to do it; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount, and are with great regard, gentlemen,

Your friends and servants,

“STEPHEN HIGGINSON & Co.

“Signature, S. V. S. WILDER.”

It was proved in the cause that Mr. S. V. S. Wilder, an agent referred to in said letter of guaranty, shortly after the date of it, went to Europe, having a general letter of credit from Stephen and Henry Higginson; and on or about June 10, 1809, he forwarded the letter of guaranty to Messrs. T. and A. Cremer, who acknowledged the receipt of it, June 19, 1809, in letters written by them to Stephen Higginson & Co., Stephen and Henry Higginson, and to Mr. Wilder, in which they agreed to give to Stephen and Henry Higginson the credit asked for under the guaranty.

Charge by STORRY, J.

There are several questions of law in this case, upon which it is now my duty to instruct you.

§ 257. *The letter of December 15, 1808, was a guaranty.*

The first point is, what is the true construction of the letter of the defendants to the plaintiffs, of the 15th of December, 1808, which is the main hinge of the whole of this controversy. I am clearly of opinion that, in point of law, it is not an absolute undertaking for the payment, in the first instance, of all advances made to Stephen and Henry Higginson, not exceeding \$50,000. It is in fact an original collateral undertaking to guaranty the payment of such advances; and consequently the debt is properly the debt of Stephen and Henry Higginson, and the defendants are liable only upon their default, and to the extent of the guaranty.

§ 258. *The guaranty was not conditional.*

It has been asserted that the guaranty is conditional, having reference to the then state of our commerce; and that the embargo being removed, the implied condition upon which the advances were to be made, viz., the impracticability of Stephen and Henry Higginson's remitting funds to Europe, was completely done away before any advances were made, and that the defendants are, therefore, absolved from all responsibility. There is nothing in this argument. The letter contains no such implied condition; and it would be extremely dangerous for courts of law to indulge themselves in searching after such hidden and conjectural meanings in such an instrument. It is sufficient for us that the language of the letter speaks not in such ambiguous or hypothetical terms.

§ 259. *Plaintiffs were not bound to know how defendants' agent applied the funds furnished.*

As little ground is there for the argument that the plaintiffs were, by the terms of the letter, bound to look to the application of the funds advanced by them to the agent of Messrs. Stephen and Henry Higginson, under the guaranty. The plaintiffs were not bound to see whether the agent properly applied the advances or not; or whether he purchased with them French goods, or any other goods. He was to act solely under the instructions of his principals, with which the plaintiffs had nothing to do; and the defendants are liable for all advances, *bona fide* made under the guaranty, even though the agent may have applied them contrary to the instructions of his principals.

§ 260. *The guaranty covered only advances to the firm of S. and H. H.*

Having thus fixed the interpretation of the letter on this point, that it is a mere guaranty of the debt of third persons, the next question upon its construction is, to whom are the advances to be made? If there be anything clear in this cause, it is that the advances are to be made to Stephen Higginson, Jr., and Henry Higginson, then copartners in trade, under the firm of S. and H. Higginson. It follows, therefore, that it covers only advances made to them jointly on their joint credit, and not advances made to them severally upon their several credit. Unless then it shall be completely established that the advances were made on the joint account of the firm, there is an end of the plaintiffs' case.

§ 261. *The guaranty was exhausted when the advances once amounted to fifty thousand dollars.*

Another question upon the construction of this letter is, whether it contains a limited or a continuing guaranty; in other words, whether it be a guaranty for advances made to the amount of \$50,000, and when that sum is once advanced, it is exhausted; or, whether it covers any further advances made from time to time, after the \$50,000 have been once advanced, provided, at the time of such advances, the balance then due to the plaintiffs does not, with

such advances, equal the stipulated sum of \$50,000. Upon examining the terms of this, I am of opinion that it is a guaranty limited to a single advance of \$50,000, and that when once this sum is advanced, the guarantors are no longer liable for any future advances, whatever may be the state of the accounts between the parties.

§ 262. *In construing a guaranty, the presumption is that it is not a continuing one.*

The language of a letter should be very strong that would justify a court in holding the guaranty to be a continuing guaranty, which is to cover advances from time to time, to the stipulated amount, *toties quoties*, until the guarantor shall give notice to the contrary. I see nothing in this letter to justify such a conclusion; and in every doubtful case, I think that the presumption ought to be against it. If, therefore, in the present case, the advances to Stephen and Henry Higginson ever equaled \$50,000, all subsequent advances, although the debt of Stephen and Henry Higginson may have been, at the time, diminished by payments, so as to be far within that sum, are beyond the reach of the guaranty.

§ 263. *A guaranty of advances to a firm does not cover loans made to a partner after dissolution of the firm and with notice of that fact.*

The next point in the cause is as to the effect of the dissolution of the partnership of Stephen and Henry Higginson. From the moment that dissolution was made known to the plaintiffs, all right to make future advances upon the credit of the firm was completely done away. To be sure, the plaintiffs, by agreeing to make the stipulated advance of \$50,000, and specifying that in writing to Mr. Wilder, and agreeing to accept his bills to that amount, might have rendered themselves liable to pay to a third person, who should take the bills upon the credit of that written agreement, to the full amount. And in relation to contracts actually made by Mr. Wilder upon the footing of that agreement, and advances made, or agreed to be made, by the plaintiffs to satisfy such contracts, before notice of the dissolution, the plaintiffs would be entitled to hold the defendants liable under the guaranty, if the contracts were made with third persons upon the faith and credit of the plaintiffs' acceptance. But as to all other future advances, notice of the dissolution of the partnership was a complete revocation of all authority to make such advances, at least so far as respects the defendants. The dissolution was publicly announced, in May, 1809, in the newspapers in Boston, to take place on the 1st day of September of the same year. The defendants had due notice of such dissolution, and had a right to consider that all advances made by the plaintiffs, after a knowledge of such dissolution, were advances made on the credit of the partners severally, and not on the partnership account, or on the credit of the guaranty of the defendants. And even if there was a secret understanding between Stephen Higginson, Jr., and Henry Higginson, after such dissolution, that the shipments made by Mr. Wilder, and the advances made by the plaintiffs for the payment thereof, should be considered as made for their joint interest, in the same manner as if the partnership were not dissolved, and the plaintiffs, upon the supposition of such joint interest, actually made such advances, still, if this was unknown to the defendants, and they never had notice of such understanding, they are not bound by their guaranty for the payment of such advances.

§ 264. *Rule to determine to which guaranty the several loans are to be charged.*

As to the manner in which the payments and remittances, made by

Stephen and Henry Higginson, or by Stephen Higginson, Jr., to the plaintiffs are to be applied, the law is perfectly clear. Where a debtor, owing several debts, makes any payment to a creditor, he has a right to apply it to what debt he pleases; if he makes no specific appropriation, the creditor may apply it as he pleases; and where neither party appropriates it, the law will apply it according to its own notion of the intrinsic equity and justice of the case. In the present case, the plaintiffs had a guaranty of the defendants for the advances to the amount of \$50,000, and a guaranty of Henry Higginson for advances to the amount of fifty thousand florins; and they further agreed, at least as early as the 8th of January, 1800, to give to Stephen Higginson, Jr., on his own account, an additional credit of \$50,000. Now, where a creditor holds several funds, or, what is the same thing, has agreed to advance money upon the footing of several distinct credits, he is bound to state, at the time of the advance, upon which credit it is actually made. At least, if he does designate in his books or correspondence the particular credit upon which particular advances are made, he is not at liberty to change the credit afterwards upon any new occurrence, which may materially affect the rights of third persons. In the present case, the plaintiff has charged certain advances as made on the credit of the guaranty of the defendants, and others as on the guaranty of Henry Higginson, and others are without any specific statement of any guaranty on which they were made. As to the two former advances, the plaintiffs are bound by their original charges, and cannot now transfer them from the one guaranty to another. And as to the last, they must be deemed, under the peculiar circumstances of this case, to have been made on the several credit of Stephen Higginson, Jr., to whom they are charged.

§ 265. *Defendants were discharged from liability on their guaranty by acts of plaintiffs.*

There is another point in this cause which, if it were alone, would, in my judgment, be conclusive against the plaintiffs. Assuming that all the advances of the plaintiffs were actually made upon the credit of the partnership of Stephen and Henry Higginson, yet it appears that in August, 1810, the plaintiffs, at the request of Henry Higginson, and with the implied assent of Stephen Higginson, Jr., and upon a statement that the partnership had been dissolved for a whole year before that time, did actually transfer the partnership balance, then due, in certain proportions, to the several and separate accounts of Stephen Higginson, Jr., and Henry Higginson, and gave credit to them severally for their respective shares of such balance, until after they both became insolvent (more than three years afterwards), without the facts having been in any way communicated to the defendants. In my judgment, this giving a new and unlimited credit to them severally upon their several accounts, for that balance, without any communication with or assent by the defendants, was a complete discharge of the defendants from their original guaranty. It was in the highest degree injurious to them, and must be considered, so far as respects the defendants, as an agreement by the plaintiffs to hold that balance upon the sole credit of the partners themselves in the proportions with which they were charged in their separate accounts. If a creditor will undertake to give a new credit to his debtor, and thereby materially to change the situation of a surety, and *a fortiori* of a guarantor, the latter is absolved from all responsibility, unless he has notice of, and becomes party to, the new transactions.

§ 266. *Notice of the amount advanced under a guaranty must be given the guarantor.*

The last point of law which it is necessary to consider is, whether any notice was necessary to have been given of the amount of the advances made by the plaintiffs to the defendants. It appears that the plaintiffs did inform the defendants of their readiness to make the stipulated advance of \$50,000, as soon after their receipt of the letter of guaranty as was practicable; so that the point is narrowed to the consideration of the question, whether notice was necessary of the amount of the advances, after they were actually made. And I am most distinctly of opinion that it was the duty of the plaintiffs, within a reasonable time after the advances were actually made, to give notice thereof to the defendants, and that reliance was placed upon their guaranty to insure the repayment; and if notice was not given in a reasonable time, nor until after a material change in the circumstances of the debtors, such laches of the plaintiffs was a complete discharge of the defendants from their guaranty. The first notice given to the defendants of any advances in the present case was not until near the close of the year 1813, more than three years after all the advances were made, and when both of the debtors had become insolvent. During this period an active correspondence was kept up between the plaintiffs and the defendants; nearly fifty letters having passed between them, in which not one syllable is to be found relative to any advances to Stephen and Henry Higginson, or either of them. Nor is this extraordinary silence imputable to any accident or mistake. It appears from a letter of the plaintiffs to Col. Perkins (a witness in the case), that it was studied and intentional. Under these circumstances I am bound to declare that the law holds the plaintiffs guilty of such laches as discharges the defendants from all liability for the advances actually made.

Verdict for the defendants.

LAWRENCE v. McCALMONT.

(2 Howard, 426-454. 1844.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court for the southern district of New York. On the 21st of November, 1838, J. and A. Lawrence obtained from the agents (Messrs. Gihon & Co.) at New York, of McCalmont Brothers & Co., of London, the following letter of credit:

“NEW YORK, 21st November, 1838.

“*Messrs. McCalmont Brothers & Co., London:*

“GENTS—We have granted to Messrs. J. and A. Lawrence, of this city, a credit with you of £10,000, say ten thousand pounds sterling, to be availed of within six months from this time, in such drafts as they may direct, at four months' date, against actual shipments of goods for their account, and coming to their address; said goods to be forwarded through you or your agents. The above credit is granted under their engagement to cover your acceptances before maturity, by direct remittances from this country of approved sixty day bills—seconds of exchange to be handed to us for transmission to you. You are to charge one per cent. commission on the amount accepted, and to keep the account at five per cent. interest per annum.

“We are, gents, your obedient servants,

“JOHN GIHON & Co.”

The letter of credit was delivered on Mr. Lawrence's proposal of his mother's (the plaintiff in error's) security for the credit. On the 17th of December, 1838, Mrs. Lawrence gave the following guaranty:

"Messrs. McCalmont Brothers & Co., London:"

"GENTS — In consideration of Messrs. J. and A. Lawrence having a credit with your house, and in further consideration of one dollar paid me by yourselves, receipt of which I hereby acknowledge, I engage to you that they shall fulfil the engagements they have made and shall make with you, for meeting and reimbursing the payments which you may assume under such credit at their request; together with your charges, and I guaranty you from all payments and damages by reason of their default.

"You are to consider this a standing and continuing guaranty without the necessity of your apprising me, from time to time, of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guaranty is to apply and continue to transactions afterwards between the firms as changed, until notified by me to the contrary.

"Yours, respectfully,

"SUSAN LAWRENCE."

Under these documents, McCalmont Brothers & Co. made the stipulated advances, which were repaid; and on the transactions included within the six months from 21st of November, 1838, nothing has been claimed by the London house. About the expiration of the six months, Mr. Lawrence (one of the firm of J. and A. Lawrence), at New York, called on the agents of McCalmont Brothers & Co., and asked if it was agreeable for the agents to continue the credit for £10,000. The reply of one of the agents was, that there was no objection to continue it on the same terms as before, stating that it was to be on the mother's guaranty attached to the previous credit. Mr. Lawrence then answered that he did not expect it on any other terms, or without the guaranty. The agent then wished time to examine whether the guaranty was for a particular credit, or was a continuing guaranty; and having referred to the letter of guaranty, they drew up and delivered to Mr. Lawrence a second letter of credit (Mr. Lawrence and the agents both agreeing that it was a continuing guaranty, and as such no new letter was needed from the mother). The second letter of credit, dated on 12th of June, 1839, was as follows:

"NEW YORK, June 12, 1839.

"Messrs. McCalmont Brothers & Co., London:"

"GENTS — With reference to our letter of 21st November last, opening a credit on your good selves, favor Messrs. J. and A. Lawrence, for £10,000, to be drawn within six months from that date, and which expired by limitation last month. We hereby renew the same for a like period from the date hereof, and under the same stipulations, with this proviso, that the bills be drawn by, or in favor of, parties permanently resident in Europe; and if made from the continent, they be made at the customary date, say three months.

"We remain, etc.,

"JOHN GIBON & Co."

Under this second letter of credit, bills were drawn and paid by McCalmont Brothers & Co., to an amount exceeding in the whole the £10,000 stipulated for. The bills being all drawn at four months. The firm of J. and A. Lawrence not having made any remittances to pay the new advances, and the firm having failed, the agents of the London house, on the 29th day of May, 1840,

addressed the following letter to Mrs. Susan Lawrence, giving her notice of the non-payment of the advances:

"NEW YORK, May 29, 1840.

"*Mrs. Susan Lawrence:*

"MADAM—We inclose on behalf of Messrs. McCalmont Bros. & Co., a copy of the account of Messrs. J. and A. Lawrence with them, showing a balance due of £10,349 8s. 5d.—say ten thousand three hundred and forty-nine pounds eight shillings and five pence sterling, on first January last, with interest. These gentlemen not having fulfilled their engagements to reimburse this account, we claim payment of you under your guaranty to Messrs. McCalmont Bros. & Company.

Respectfully yours,

"J. GIBON & Co.,

"Agents of McCALMONT BROS. & Co., of London."

She declining to pay the deficit, the present action of *assumpsit* was brought against her to enforce the payment. At the trial upon the general issue, in addition to the facts already stated, it was in evidence that during the whole period of these transactions, Mrs. Lawrence resided at Brooklyn (New York), in the same house with her sons, J. and A. Lawrence. There was also evidence in the cause to show that McCalmont Brothers & Co. had, by their agents, certain notes belonging to the firm of J. and A. Lawrence, and indorsed by the firm for collection, and the proceeds when received were to be applied towards the liquidation of the debt due to the London house, subject to their encashment on being paid at maturity, under which the sum of £1,309 16s. 6d. had been realized. The notes thus deposited for collection, which were dishonored at maturity, were protested accordingly, and the original plaintiffs offered the protests and notices to J. and A. Lawrence of the dishonor in evidence, but the evidence as to some of the notices was not full. Much other evidence was given at the trial, which, however, it is not necessary to state.

The counsel for Mrs. Lawrence then asked the court to charge the jury as follows:

1. That the said credit of 21st November, 1838, is a standing and continuing credit during the six months.
2. That defendant's guaranty of 17th December, 1838, is confined to the said credit, both as to time and amount.
3. That the acceptances and claims of the plaintiffs demanded in their declaration in this suit are not covered by the guaranty of the defendant aforesaid.
4. That the new credit aforesaid of the 12th of June, 1839, is not a continuance or repetition of the first credit, but a departure from it, and is not covered by or embraced in the defendant's said guaranty.
5. That the nominal consideration of one dollar, and the past consideration stated in defendant's said guaranty, are not, nor is either of them, sufficient to sustain the said guaranty.
6. That the evidence that the said J. and A. Lawrence agreed to give a guaranty at the time said credit of 21st November, 1838, was given is not sufficient in law to render valid the consideration expressed in defendant's said guaranty, or to sustain the said guaranty.
7. The facts being ascertained, the question whether the notice given to the defendant by the plaintiffs of the failure of the said J. and A. Lawrence to remit to cover the plaintiffs' acceptances was reasonable is a question of law, and no notice, sufficient in law, was given of such failure to the defendant.
8. If the sufficiency of such notice be a question exclusively of fact, a reason-

able and sufficient notice was not given to her of such failure of J. and A. Lawrence to remit as aforesaid.

9. The notes received by the plaintiffs, through their agents to collect, ought, when there was a failure of payment, to have been regularly protested, and due notice thereof served on the defendant and J. and A. Lawrence; and, on failure thereof, a credit should be allowed for the same.

The judge thereupon charged the jury that the plaintiffs were not precluded from recovering under the guaranty in evidence by reason of any supposed want of consideration therefor; and the same was not without sufficient consideration. That the said guaranty of the 17th December, 1838, was not limited to the credit of November 21, 1838, but was a standing and continuing guaranty, and did apply to, and was sufficient to embrace, transactions arising after the said credit of November, 1838, was expired. That the new credit of June 12, 1839, and the advances and transactions under it, were not in law without the scope of the guaranty of December 17, 1838, and that the plaintiffs were, under the evidence, entitled to recover for the same under the said guaranty. That the defendant was entitled to a reasonable notice of the default of the principal debtors, to enable her to take measures for her indemnity; that it was for the jury to consider whether, under all circumstances in evidence, the defendant had not had such notice. That as to the notes turned over by the principal debtors to J. Gihon & Co., as the same were merely lodged with the latter, on their engagement that the proceeds of them, when received, were to be passed to their credit, the want of protest of any such notes as were dishonored, or of notice thereof to the said J. and A. Lawrence, would not entitle the defendant to charge the plaintiffs with the amount of such notes, or to claim a deduction for that amount.

And with that charge left the said cause to the jury, unto which charge, and to the refusal of the judge to charge otherwise, and as requested by defendant as aforesaid, the defendant's counsel then and there excepted. The jury found a verdict for the plaintiffs for \$47,105.97; upon which judgment was rendered for the plaintiffs; and upon that judgment and the exceptions taken at the trial, the present writ of error has been brought.

§ 267. *A guaranty must be liberally construed.*

Some remarks have been made on the argument here upon the point in what manner letters of guaranty are to be construed; whether they are to receive a strict or a liberal interpretation. We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation, we do not mean that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments—generally drawn up by merchants in brief language; sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world. The remarks made by this court in the case of *Bell v. Bruen*, 1 How., 169, 186 (§§ 282–286, *infra*), meet our entire approbation. The same doctrine was asserted in *Mason v. Pritchard*, 12 East, 227, where a guaranty was given for any goods he hath or may supply W. P. with to the amount of £100; and it was held by the court

to be a continuing guaranty for goods supplied at any time to W. P. until the credit was recalled, although goods to more than £100 had been first supplied and paid for, and the court on that occasion distinctly stated that the words were to be taken as strongly against the guarantor as the sense of them would admit of. The same doctrine was fully recognized in *Haigh v. Brooks*, 10 Ad. & Ell., 309, and in *Mayer v. Isaac*, 6 Mees. & W., 605, and especially expounded in the opinion of Mr. Baron Alderson. It was the very ground, in connection with the accompanying circumstances, upon which this court acted in *Lee v. Dick*, 10 Pet., 482 (§§ 224-226, *supra*), and in *Mauran v. Bullus*, 16 Pet., 528 (§§ 288-290, *infra*). Indeed, if the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury.

§ 268. *The guaranty in this case was continuing.*

Passing from these general considerations, let us now address ourselves to the points made at the argument. The first point is, that the second advance was made upon terms and under an agreement materially variant from that on which the guaranty was given, without any communication with the guarantor or her consent thereto. The variances insisted on are two: first, in requiring the bills to be drawn by or in favor of parties permanently resident in Europe; secondly, that if the bills were drawn from the continent of Europe, they should be made at the customary date, say three months. We think that there is no variance whatsoever which is not fairly within the scope of the original guaranty, and was so contemplated by J. and A. Lawrence, as well as by the agents of the London house. This is explicitly proved by the evidence; for, upon the question arising, both the Lawrences and the agents agreed that it was a continuing guaranty, and as such no new letter of guaranty was needed. It is true that Mrs. Lawrence was no party to this interpretation of the instrument; but then it is strong evidence to establish that it was neither a forced nor unnatural interpretation of the words. And the agents of the London house agreed to make the second advance upon the faith of it.

Now, looking to the very words of the guaranty, we see that it contemplated — not a single advance, and then it was to end — but a continuing guaranty, and the very words are found in it. It also contemplated not only agreements which had been already made between J. and A. Lawrence and the agents, but also future agreements. The guarantor says: "I engage that they shall fulfil the agreements they have made, and shall make with you for meeting and reimbursing the payments which you may assume." And again: "You are to consider this a standing and continuing guaranty without the necessity of apprising me from time to time of your engagements and advances for the house." "So that new engagements and new advances were contemplated to be made to which the guaranty should attach without notice thereof." And this is not all; for the guaranty goes on to provide for its continuance in case of a change in the partners of either firm (a change which would ordinarily be fatal to a guaranty); and that the guaranty should apply to and continue upon transactions afterwards between the firms so changed, until notified by her to the contrary. It seems plain from all this language, that a series of new transactions, new agreements and new engagements were within the contemplation of the parties; not advances for six months alone, but advances

from time to time; for an indefinite period, until notice to the contrary should be given by the guarantor. It is difficult to conceive of any language more definite and more full to express the real intention of the parties. The original advance was, indeed, agreed to be made in the manner stated in the first letter of credit; and if there be any variance between the terms of the first and the second letter of credit, that was left solely and exclusively for the immediate parties, J. and A. Lawrence and the agents, to adjust and consider. They might enter into any new engagements as to the mode of drawing the bills, and the time which they were to run, at their pleasure, without breaking in upon the true intention of the guaranty. All the stipulations of the first letter of credit were retained in the second, and an additional provision made, that if bills were drawn from the continent of Europe, they should be made at the customary date and by a permanent resident. But this left J. and A. Lawrence at full liberty to draw direct on London at four months, if they chose; and in point of fact no bills were ever drawn by them except direct on London, and not from the continent. The additional liberty given or condition imposed was not availed of; and if it had been, it would not have in any manner exonerated the guarantor from her responsibility. Without, therefore, looking to the question whether these variances might or might not have been material, if new arrangements and engagements had not been within the scope of the guaranty, we are of opinion that the objection is, in the present case, not maintainable. This view of the matter disposes also of the second, third and fourth points made at the argument.

§ 269. *A valuable consideration, however small, will support a contract of guaranty.*

The fifth point is, that there is no valid consideration to support the guaranty. This is pressed under two aspects; the first is, that the consideration was past and not present; for the letter of credit had been already delivered to J. and A. Lawrence by the agents of the London house. The second is, that the payment of the \$1 is merely nominal and not sufficient to sustain the guaranty, if it had been received; and it is urged that it was not received. As to this last point, we feel no difficulty. The guarantor acknowledged the receipt of the \$1, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guaranty as to other contracts. A stipulation in consideration of \$1 is just as effectual and valuable a consideration as a larger sum stipulated for or paid. This very point arose in *Dutchman v. Tooth*, 5 Bing. N. C., 577, where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the court held the guaranty good, and the consideration sufficient. In *Haigh v. Brooks*, 10 Ad. & Ell., 309, 323, the court held that a surrender by the guarantee of a former guaranty, even if it was not of itself binding upon the guarantor, was a sufficient consideration to take the case out of the statute of frauds and to sustain a promise made on the footing thereof. But independently of all authority, we should arrive at the same conclusion. The receipt of the \$1 is acknowledged; no fraud is pretended or shown; and the consideration, if standing alone in a *bona fide* transaction, would sustain the present suit.

As to the other point, that the consideration was past, it admits of several answers, each of which is equally decisive. In the first place, although the Messrs. Lawrence had received the letter of credit before the guaranty was given, yet it was a part of the original agreement contemporaneous with the letter of credit, that it should be given; and if the guaranty had not been given, the whole advance might have been recalled as a fraud upon the London house. In the next place, it does not appear that all the bills for the £10,000, under the first letter of credit, were drawn before the guaranty was actually given; and if they were not, certainly it would attach upon the bills drawn under the first credit after it was actually given. The contract was then a continuing contract on both, and partially performed only by one. In the next place the guaranty itself uses language susceptible of being treated as a present continuing consideration *in fieri*. It is "in consideration of Messrs. J. and A. Lawrence having a credit with your house;" now, the word "having" imports a present or future advance, just as much as a past. The word "having" is in the present tense; and if the parties then understood the letter of credit to be *in fieri*, and to be absolute only upon a condition subsequent, namely, the giving of the guaranty, the word is the most appropriate which could be used. The case of *Haigh v. Brooks*, 10 Ad. & El., 309, approaches very near to the present. There the guaranty was "in consideration of being in advance to L., etc., I guaranty," etc. The court of king's bench thought that the words "being in advance" did not necessarily import a past advance, but might be applied to a present or future advance.

But that which puts the whole matter in the clearest light and beyond the reach of legal controversy, is that the advances now sued for were all made after the second letter of credit was given; and if the guaranty applied (as we hold it did) to those subsequent advances under the new engagements, then the consideration was complete as upon a present and not as upon a past consideration. In every view, therefore, in which we can contemplate the objection, it has no just foundation in law.

§ 270. *Whether due notice was given the guarantor of the principal's failure to pay is a question of fact for the jury.*

As to the sixth point on the question, whether due notice of the failure of Messrs. J. and A. Lawrence to repay the advances had been given, it was a mere question of fact for the consideration of the jury, as to whether the guarantor had reasonable notice or not. They have found a verdict for the plaintiffs, and we are not at liberty to disturb it in a court of error.

§ 271. *Where a party indorses notes for collection, or as collateral security, he is not entitled to notice of their non-payment as an indorser.*

As to the seventh point, the notes having been left for collection only with the agents of the London house, although indorsed by the Messrs. Lawrence, they do not fall within the strict rules of commercial law applicable to negotiable paper. Admitting, for the sake of the argument, that notice was not punctiliously given by the agents, still, it resolves itself into a mere question of due diligence on the part of the agents to collect the notes, and falls under the general law of agency. No evidence was shown at the trial to establish any loss or damage on the part of Mrs. Lawrence for want of due protest and notice (if they were not made), and in the absence of such proof we are not at liberty to presume that the agents did not do their duty. The case of *Swift v. Tyson*, 16 Pet., 1 (BILLS AND NOTES, §§ 382-386), is entirely distinguishable from the present in its leading circumstances. There the question was not

whether a person receiving a note as collateral security or for an antecedent debt was not bound to due diligence in its collection, otherwise he made it his own, which was not doubted; but whether, taking it as collateral security or in payment of an antecedent debt, he was not to be treated as a *bona fide* holder for a valuable consideration, unaffected by any unknown equities between the original parties. This court held that he was.

Upon the whole we are all of opinion that there was no error in the rulings of the court, and the judgment is, therefore, affirmed, with costs.

RUSSELL v. CLARK.

(7 Cranch, 69-99. 1812.)

APPEAL from U. S. Circuit Court, District of Rhode Island.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a suit in chancery, instituted for the purpose of obtaining from the defendants payment of certain bills of exchange drawn by Jonathan Russell, an agent of Robert Murray & Co., and indorsed by Nathaniel Russell; which bills were protested for non-payment, and have since been taken up by the indorser. The plaintiff contends that the house of Clark & Nightingale had rendered itself responsible for these bills by two letters addressed to him, one of the 20th and the other of the 21st of January, 1796, on the faith of which his indorsements, as he says, were made. The letters are in these words:

“PROVIDENCE, 20th January, 1796.

“*Nathaniel Russell, Esq.:*

“DEAR SIR — Our friends, Messrs. Robert Murray & Co., merchants in New York, having determined to enter largely into the purchase of rice and other articles of your produce in Charleston, but being entire strangers there, they have applied to us for letters of introduction to our friend. In consequence of which, we do ourselves the pleasure of introducing them to your correspondence as a house on whose integrity and punctuality the utmost dependence may be placed; they will write you the nature of their intentions, and you may be assured of their complying fully with any contract or engagements they may enter into with you. The friendship we have for these gentlemen induces us to wish you will render them every service in your power; at the same time, we flatter ourselves the correspondence will prove a mutual benefit.

We are, with sentiments of esteem,

“Dear sir,

“Your most obedient servants,

“CLARK & NIGHTINGALE.”

“PROVIDENCE, 21st January, 1796.

“*Nathaniel Russell, Esq.:*

“DEAR SIR — We wrote you yesterday a letter of recommendation in favor of Messrs. Robert Murray & Co. We have now to request that you will render them every assistance in your power. Also that you will, immediately on the receipt of this, vest the whole of what funds you have of ours in your hands in rice, on the best terms you can. If you are not in cash for the sales of the China and Nankins, perhaps you may be able to raise the money from the bank, until due; or purchase the rice upon a credit, till such time as you are to be in cash for them; the truth is, we expect rice will rise, and we want to im-

prove the amount of what property we can muster in Charleston, vested in that article, at the current price; our Mr. Nightingale is now at Newport, where it is probable he will write you on the subject.

"We are, dear sir,

"Your most obedient servants,

"CLARK & NIGHTINGALE."

The bill alleges that these letters bind Clark & Nightingale to pay to Nathaniel Russell any sum for which he might credit Robert Murray & Co., either because, 1st. They do, in law, amount to a guaranty; or that, 2d. They were written with a fraudulent intent to be understood as a guaranty; or that, 3d. They contain a misrepresentation of the solidity and character of the house of Robert Murray & Co.

Soon after the protest of these bills for non-payment, Robert Murray & Co. failed and became bankrupts. Previous to their bankruptcy they assigned a great proportion of their effects, including the cargoes for the purchase of which these bills were drawn, to John J. Clark and John B. Murray, in trust for Clark & Nightingale, and for sundry other creditors and purposes mentioned in several trust deeds which are recited in the bill, and which appear in the record. The plaintiff claims to be paid his debt out of this fund. The answer of John J. Clark was filed, and a certain William Russell, a partner of the house of Joseph and William Russell, who gave a letter of credit and guaranty to the drawer of the bills indorsed by the plaintiff, Nathaniel Russell, was made a party defendant. Against Joseph and William Russell a judgment had been obtained by Nathaniel Russell for the amount of the bills indorsed by him, but they had become insolvent, and no part of this judgment had been discharged. Many depositions having been taken and sundry exhibits filed, a decree of dismissal, without argument, and *pro forma*, was rendered in the circuit court for the district of Rhode Island, and the cause comes into this court by appeal from that decree.

It is contended by the defendants that the letters which have been recited create no liability on the part of Clark & Nightingale, but are to be considered merely as letters of introduction. Whatever may be the construction of the letters, they insist that the plaintiff, if entitled to recover, has complete remedy at law, and that a court of chancery can take no jurisdiction of the cause. It is believed to be unquestionable that a suit in chancery could not be sustained on these letters against Clark & Nightingale, unless some additional circumstance rendered an application to this court necessary.

The plaintiff contends that such application is necessary, because there are a great variety of facts belonging to the transaction which could not be introduced into a court of law, or which would not avail him in that court, but which are proper for the consideration of a court of equity. Because some of these facts rest within the knowledge of the defendants; and because he cannot, at law, subject the trust fund to his claim.

§ 272. *The construction of a guaranty is the same at law and in equity.*

So far as respects the question whether these letters constitute a contract of guaranty, there can be no doubt but that the construction in a court of law or a court of equity must be precisely the same, and that any explanatory fact which could be admitted in the one court would be received in the other.

§ 273. *General rules to determine the jurisdiction of equity.*

On the question of fraud the remedy at law is also complete, and no case is recollected where a court of equity has afforded relief for an injury sustained

by the fraud of a person who is no party to a contract induced by that fraud. It is true that if certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required, in a court of chancery, to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law.

It is also true that if a claim is to be satisfied out of a fund, which is accessible only by the aid of a court of chancery, application may be made, in the first instance, to that court, which will not require that the claim should be first established in a court of law. In the case under consideration the answer confesses nothing. So far from furnishing any evidence in support of the plaintiff's claim, it denies, in the most full and explicit terms, the whole equity of the bill. This ground of jurisdiction, therefore, is totally withdrawn from the case.

It remains to inquire whether the plaintiff can be let in to claim on any part of the trust fund; and this depends principally on his claim being within any one of the trusts declared. The first trust deed, which was executed by Robert Murray & Co. on the 23d day of March, 1798, is declared to be in trust to apply the moneys arising from the trust property "in payment and satisfaction of the debts and balances which shall appear to be found to be due and owing from the said parties of the first part (Robert Murray & Co.) to them, the said John J. Clark and John B. Murray (the trustees), and to such other of the creditors" of the said Robert Murray & Co. as they should, by any instrument of writing, within twelve months, appoint. It may be doubted whether this declaration of trust would be applicable to a collateral undertaking not at the time carried into judgment. In the second deed, one of the trusts declared is to repay Clark & Nightingale for any sums they may pay or be liable to pay under a suit at the time depending against them. That suit was dismissed. Without deciding whether Russell could avail himself of this trust, having failed in the particular action then depending, the court will proceed to inquire how far Clark & Nightingale were liable to the plaintiff for the debt due to him from Robert Murray & Co.

§ 274. *The words of the guaranty must show a clear intention to bind the guarantor, in order to have that effect.*

The law will subject a man, having no interest in the transaction, to pay the debt of another only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual who contracts with one man on the credit of another not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume. In their letter of the 20th, Clark & Nightingale indicate no intention to take any responsibility on themselves, but say that Mr. Russell may be assured Robert Murray & Co. will comply fully with their engagements. In their letter of the 21st, they speak of the letter of the preceding day as a letter of recommendation, and add: "We have now

to request that you will endeavor to render them every assistance in your power."

How far ought this request to have influenced the plaintiff? Ought he to have considered it as a request that he would advance credit or funds for Robert Murray & Co., on the responsibility of Clark & Nightingale, or simply as a strong manifestation of the friendship of Clark & Nightingale for Murray & Co., and of their solicitude that N. Russell should aid their operations as far as his own view of his interests would induce him to embark in the commercial transactions of a house of high character, possessing the particular good wishes of Clark & Nightingale? It is certain that merchants are in the habit of recommending correspondents to each other without meaning to become sureties for the person recommended; and that, generally speaking, such acts are deemed advantageous to the person to whom the party is introduced, as well as to him who obtains the recommendation.

These letters are strong, but they contain no intimation of any intention of Clark & Nightingale to become answerable for Robert Murray & Co., and they are not destitute of expressions alluding to that reciprocity of benefit which results from the intercourse of merchants with each other. "The friendship," say they, in their letter of the 20th, "we have for these gentlemen induces us to wish you will render them every service in your power; at the same time we flatter ourselves this correspondence will prove a mutual benefit." Mr. Russell appears to have contemplated the transaction as one from which a fair advantage was to be derived. He received a commission on his indorsements. The court cannot consider these letters as constituting a contract by which Clark & Nightingale undertook to render themselves liable for the engagements of Robert Murray & Co. to Nathaniel Russell. Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagements.

§ 275. *A party making a fraudulent recommendation is liable in damages.*

It remains to inquire whether these letters contain such a misrepresentation of the circumstances and character of the house of Robert Murray & Co. as to render them accountable to the plaintiff for the injury he has sustained by trusting that company. The question how far merchants are responsible for the character they give each other is one of much delicacy, and of great importance to the commercial world. That a fraudulent recommendation (and a recommendation known at the time to be untrue would be deemed fraudulent) would subject the person giving it to damages sustained by the person trusting to it seems now to be generally admitted. The case of *Pasley v. Freeman*, reported in 3 Durn. & E., 51, recognizes and establishes this principle. Indeed, if an act, in itself immoral, in its consequences injurious to another, performed for the purpose of effecting that injury, be not cognizable and punishable by our laws, our system of jurisprudence is more defective than has hitherto been supposed. But this does not appear to the court to be the case described. It is proved, incontestably, that when the letters on which this suit depends were written, Robert Murray & Co. were in high credit, and were carrying on business to a great extent, which was generally deemed profitable. The bill charges particular knowledge in Clark & Nightingale that this apparent prosperity was not real. But this, as well as every other allegation of fraud, is explicitly denied by the answer; and the answer, being responsive to the bill, is evidence. Had the plaintiff been able to exhibit proofs which

would have rendered this fact doubtful, it might have been proper to have directed an issue for the purpose of trying it; but he has exhibited no such proofs. In writing the letters then recited in the bill, Clark & Nightingale stand acquitted of the imputation of fraud.

§ 276. — *but a party is not liable if he makes the recommendation under a mistake of fact.*

But it is contended by the plaintiff that the representation they made of the circumstances of Robert Murray & Co. was, at the time, untrue; and that this misrepresentation, whether made ignorantly or knowingly, was equally injurious to Nathaniel Russell, and equally charges them with the loss he has sustained by trusting to their assurances. The fact that Robert Murray & Co. were not, in January, 1796, in solvent circumstances, is not clearly made out; but the cause does not rest entirely on this fact. The principle that a mistake in such a fact as the real internal solidity of a mercantile house, whose external appearance is unsuspicious, shall subject the person representing their solidity to another to the loss sustained by that other in trusting to this representation, is not admitted.

Merchants know the circumstances under which recommendations of this description must be given. They know that when one commercial man speaks of another in extensive business, he must be presumed to speak from that knowledge only which is given by reputation. He is not supposed to have inspected all the books and transactions of his friend, with the critical eye which is employed in a case of bankruptcy. He must, therefore, be supposed to speak of the credit, not of the actual known funds, of the person he recommends; of his apparent, not of his real, solidity. In such a case, it is certainly incautious and indiscreet to use terms which imply absolute and positive knowledge. It may, perhaps, be admitted that, in such a case, fraud may be presumed on slighter evidence than would be required in a case where a letter was written with more circumspection. Yet, even in such a case, where the communication is honestly made, and the party making it has no interest in the transaction, he has never been declared to be responsible for its actual verity. The reason of the rule is, that merchants generally possess, and are therefore presumed, in their correspondence, to speak from, that knowledge only of the circumstances of other merchants which may be acquired by observing their course of business, their punctuality, and their general credit.

This principle appears to have been fully considered in the case of *Haycraft v. Creasy*, reported in 2 East, 92, in which case all the authorities were reviewed. It does not appear that a single decision has been ever made asserting the liability of the writer of such a letter. The case of *Haycraft v. Creasy* denies his liability; and that case appears to this court to have been decided in conformity with all previous adjudications. It is, therefore, the opinion of the court, that Clark & Nightingale, having believed, and had reason to believe, so far as is shown by the evidence in this cause, that the representation they made to the plaintiff of the character and circumstances of Robert Murray & Co. was true, are not liable to the plaintiff, in consequence of that representation, for the credit he gave to that company.

A claim is also set up to the funds in the hands of Clark & Nightingale, founded on the circumstance that they consist, in part, of the rice purchased with the bills indorsed by the plaintiff. But as no specific lien is alleged to have existed, and as the particular fraud alleged to have been committed to acquire those funds is not proved, this claim is unsustainable. The plaintiff,

then, cannot be considered as a trust creditor in consequence of any claim he can assert against Clark & Nightingale.

The second deed, which is dated on the 24th day of March, 1798, is also in trust "to pay to Joseph and William Russell the amount that shall be recovered and paid from them to Nathaniel Russell," etc., "upon account of a letter of credit," etc., "and for which the said Nathaniel Russell hath recovered a judgment against the said Joseph and William Russell." No part of this judgment has ever been paid, and Joseph and William Russell are insolvent. The state of things, then, has perhaps not yet occurred, in which Joseph and William Russell could demand the execution of the trust; and the court, though with some hesitation, feels constrained to decide that, under the terms of this trust, Nathaniel Russell, claiming through Joseph and William Russell, cannot demand its execution directly to himself.

It also appears that in September, 1796, Robert Murray & Co. assigned to Loomis & Tillinghast certain personalties in trust. This assignment was surrendered to Clark & Nightingale in consideration of notes to a large amount, in which Loomis & Tillinghast were bound for Robert Murray & Co. It appears that Clark & Nightingale are otherwise secured with respect to these notes; at least there is reason to believe that they are secure. Clark & Nightingale, having taken this assignment with notice of the trust, take it clothed with the trust. They are trustees for the same uses and to the same extent with Loomis & Tillinghast. A paper appears in the cause which purports to be the assignment to Loomis & Tillinghast. The assignment is in trust, first, to repay themselves any sums which they may pay on account of certain undertakings made by them for Robert Murray & Co., and, secondly, in trust "to pay to Joseph and William Russell all such moneys as they shall be liable to pay, as guaranty as aforesaid, to Nathaniel Russell upon bills," etc., reciting the bills for which this suit is instituted.

§ 277. *Right of a person, for whom a trust is created, to maintain a suit in equity. Necessary parties.*

It is settled in this court that the person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity to have it paid directly to himself. This trust being to pay Joseph and William Russell a sum they are liable to pay to Nathaniel Russell, and being created in such terms that the money is certainly payable to them, the purposes of equity will be best effected by decreeing it, in a case like the present, to be paid directly to Nathaniel Russell. Indeed, a court ought not to decree a payment to Joseph and William Russell, without security that the debt to Nathaniel Russell should be satisfied. But it is not shown by any legal evidence that this paper is the assignment which was made in trust to Loomis & Tillinghast, and transferred by them to Clark & Nightingale. Its verity is not admitted by the defendants, nor proved by the plaintiff. Nor are the circumstances under which the transfer was made, nor the present circumstances of the trust, sufficiently before the court to enable it to decide with certainty whether the prior trust to Loomis & Tillinghast is satisfied, or otherwise so secured that the trust fund may now be applied to the debt of Joseph and William Russell.

Could these defects be supplied the court would still be unable to decree in favor of the plaintiff for want of proper parties. The incapacity imposed on the circuit courts to proceed against any person residing within the United States, but not within the district for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in

cases where the real merits of the cause may be determined without essentially affecting the interest of absent persons, it may be the duty of the court to decree as between the parties before them. But in this case the assignees of Robert Murray & Co. are so essential to the merits of the question, and may be so much affected by the decree, that the court cannot proceed to a final decision of the cause till they are parties. They may contest the validity of all the deeds under which both parties claim, and assert in themselves, for the benefit of the creditors generally, a right to the whole fund. Certainly this court ought not, on light grounds and without due precaution, to change the hands in which this fund is placed until any claim of the assignees to it may be decided.

Should this difficulty be obviated by suspending the effect of the decree till the validity of the trust deeds should be decided, or by directing security to be given, another presents itself which cannot be removed. The assignees have a right to contest the claim of Nathaniel Russell, and may either deny its original validity, or show that it has been paid. They are, then, essential parties, and the court ought not to decree in favor of the plaintiff without them. It is possible that they may consent to make themselves parties in this cause, and, as a court may, instead of dismissing a bill brought to a hearing without proper parties, give leave to make new parties, the court will in this case set aside the decree of the circuit court dismissing this bill, and remand the cause to the circuit court, with leave to make new parties.

BENJAMIN v. HILLARD.

(23 Howard, 149-167. 1859.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—In September, 1847, Hillard & Mordecai employed the firm of Hopkins & Leach to make at Elmira, in New York, and deliver to them at Wilkesbarre, Pennsylvania, a steam-engine, and apparatus necessary to put the same in complete operation, of the best materials and in the most substantial and workmanlike manner, according to specifications, and warranted to be of sufficient capacity and strength to drive six run of stones, and the gearing and machinery necessary for flouring and gristing purposes. Also, to make and deliver the cast-iron, wrought-iron, steel and composition work for driving six run of stones, and the machinery attached, of the best materials and workmanship. These they were to erect and put up on a foundation prepared by Hillard & Mordecai, who were to afford the proper aid for that purpose. The machinery was to be completed and delivered at Wilkesbarre upon the first safe and navigable rise in the water of the river (Chemung) in the ensuing spring; and Hopkins & Leach were to give a responsible individual for security for the money paid on the contract; and for its fulfillment, Hillard & Mordecai agreed to pay \$2,000 the 1st of December, 1847; \$2,000 the 1st of February, 1848; and the remainder upon the completion of the work, for which payments they were to be allowed interest. Before the first payment, the defendant subscribed an agreement, indorsed on the contract, as follows: "For value received, I hereby guaranty the performance of the within contract on the part of Hopkins & Leach; and in case of non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." This suit was

brought on this guaranty by Hillard & Mordecai for the insufficiency of the work done by Hopkins & Leach. On the trial, they adduced testimony to show that the engine and apparatus set up by Hopkins & Leach were not of the best material, nor of substantial and workmanlike construction, and had not strength to drive six run of stones, and in improving them they had sustained expense and loss; that from the middle of December, 1847, till December, 1858, the time when the work was finished, they had advanced \$5,500, and that only a trifling balance existed at that date, which was paid before the work had been tested by use; that afterwards, and in that month, defects were discovered, of which Hopkins & Leach had notice. In consequence of which, they made efforts to improve their work; but in June, 1849, the plaintiffs procured an examination to be made by three machinists and engineers, whose report upon the imperfection of the machinery was communicated to Hopkins & Leach and to the defendant, and who were required to amend their work. This notice and report were read to the jury, the defendant excepting to their competency. The defendant, after the case of the plaintiff was submitted to the jury, insisted to the court that his contract was merely a guaranty, either of the performance of the agreement by Hopkins & Leach by the delivery of the machinery, or the refunding of the moneys that might be paid before that event; and that the advances of the plaintiffs, being in drafts or notes, and not within the time limited by the contract, the defendant was not liable at all, or, if liable, only to the extent of the payment of \$4,000, until they had fully performed their contract; and the plaintiffs having fully paid off Hopkins & Leach, and receipts being given, the defendant had a right to consider his guaranty as at an end.

§ 278. *Generally a surety is bound to same extent as his principal.*

The court overruled a motion to non-suit the plaintiff, and instructed the jury that the defendant was responsible on his contract, not only for the non-payment of the money advanced to Hopkins & Leach in case they failed to make and deliver the engine and machinery, but also for the full and faithful performance of all the agreement of Hopkins & Leach. The general rule is, to attribute to the obligation of a surety the same extent as that of the principal. Unless from the terms of the contract an intention appears to reduce his liability within more narrow bounds, a restriction will not be imposed by construction contrary to the nature of the engagement. If the terms of his engagement are general and unrestricted, and embrace the entire subject (*omnem causam*), his liability will be measured by that of the principal, and embrace the same accessories and consequences (*connexorum et dependentium*). It will be presumed that he had in view the guaranty of the obligations his principal had assumed. Poth. on Ob., 404; 3 M. & S., 502; *Boyd v. Moyle*, 2 Com. B., 644. In the case before us the contract of the surety is not in the alternative, but consists of two terms: one that the principals shall perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract includes; the other that if there be a non-performance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs to the extent for which their principals are liable.

The defendant, to sustain his defense that the plaintiffs had varied their agreement with Hopkins & Leach, adduced testimony to the effect that the latter had informed them of their inability to complete the work "by the first safe and navigable rise in the river," and that they assented to the delay proposed by them till another rise; that a portion of the work was sent in April and

a portion in June and a portion in October, and that the plaintiffs were not ready to receive it until October, and it was not erected until December, 1848, at which time a settlement took place, and the plaintiffs paid the small balance then due.

The circuit court instructed the jury that the waiver by the plaintiffs of the punctual delivery of the engine and machinery did not constitute such a change in the contract as to discharge the guarantor. That a mutual alteration of the contract by the principal parties would operate to discharge the defendant as a guarantor; but an acquiescence on the part of the plaintiffs in a longer time than was specified in the contract for fulfillment, especially as the time of fulfillment was somewhat indefinite, would not, as matter of law, operate to discharge the defendant; and the court declined to charge the jury "that if they believed that the performance of the contract was essentially altered or varied, or the time of the delivery of the machinery at Wilkesbarre extended upon good consideration, without the knowledge or consent of the defendant, the plaintiffs were not entitled to recover."

The agreement of Hopkins & Leach comprised the manufacture of complicated machinery of distinct parts and different degrees of importance, and these were to be transported to a distance, there to be set up in connection with other works about which other persons were employed. That such a contract should not be fulfilled to the letter by either party is not a matter of surprise. The covenants are independent; and there is nothing that indicates that a failure on either part to perform one of these covenants would authorize its dissolution, or that the breach could not be compensated in damages.

§ 279. *Extension of time as to principal does not of itself discharge surety.*

The evidence does not allow us to conclude that there was any intention to change the object or the means essential to attain the object of the original agreement. In its execution there were departures from its stipulations; but these seem to have been made on grounds of mutual convenience, and did not increase the risk to the surety. He was fully indemnified by his principals until after the settlement between the plaintiffs and Hopkins & Leach. It is clear that the mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or guarantor. There must be another contract substituted for the original contract, or some alteration in a point so material as in effect to make a new contract without the surety's consent, to produce that result. But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, mutually accommodate each other, so as better to arrive at their end, we can find no ground for the surety to complain. The circuit court presented the question fairly to the jury, and the exceptions to the charge cannot be supported. *Trop. de Caution*, 575; *Baubien v. Stoney*, Speer, Eq. (S. C.), 508; 11 Wend., 312.

§ 280. *A guaranty of the quality of machinery is not discharged by a settlement between the other parties.*

The defendant adduced testimony to show that the plaintiffs accepted the engine and machinery; that an account was stated between the plaintiffs and Hopkins & Leach of the work done and money paid, and an acknowledgment of its settlement entered upon it and signed by the parties; that Hopkins & Leach exhibited this account to the defendant, and demanded a return of the securities they had deposited with him for his indemnity, and that they were

yielded on the credit given to that acknowledgment. He requested the court to instruct the jury that if they believed that the defendant, relying upon the receipt given by the plaintiffs, settled with Hopkins & Leach, and surrendered to them securities he held to indemnify him against the liability he assumed by his guaranty, and such surrender and discharge were made after the settlement between Hopkins & Leach and the plaintiffs, and upon the faith of it, the plaintiffs are bound by such settlement and receipt, so far as the same relates to the defendant, they having put it in the power of Hopkins & Leach to procure the surrender of such securities for the defendant. This prayer finds its answer in the agreement of Hopkins & Leach, and the guaranty of the defendant.

The material of which the machinery was to be composed, and the workmanship and capacity of the manufacture, were warranted. The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it. The cause of the present suit is not the same as that included in the stated account, or acknowledgment entered upon it. The present suit originates in the contract between Hopkins & Leach and the plaintiffs. The former could not plead that settlement in bar of a similar suit against them; and, consequently, their guarantor cannot. They have misconceived the import of that settlement without the agency of the plaintiffs, and are not entitled to charge them with the consequent loss.

§ 281. *Measure of damages for breach of contract.*

The circuit court instructed the jury that if they found the engine, boilers and apparatus for steam power were sufficient to drive six run of stones suitable for grinding, the damages to be found should be such as would enable the plaintiffs to supply the sufficiency, and that they were not required to assume the contract price as the full value of such machinery. The principle thus laid down coincides with that in *Alder v. Keighley*, 15 Mees. & W., 117. "No doubt," say the court in that case, "all questions of damages are, strictly speaking, for the jury; and, however clear and plain may be the rule of law on which the damages are to be found, the act of finding them is for them. But there are certain established rules, according to which they ought to find; and here is a clear rule, that the amount that would have been received, if the contract had been kept, is the measure of damages if the contract is broken." This rule was reaffirmed in *Hadley v. Baxendale*, 10 Exch., 341. The exception to the introduction of the notice to the defendant, and the report accompanying it, cannot be sustained. It was proper for the plaintiffs to notify the principals and their surety of the defects in their work, and to call upon them to amend it. The report was not introduced as testimony of the defects, nor can we assume that it was used for that purpose. Upon the whole record our conclusion is, there is no error, and the judgment of the circuit court is affirmed.

BELL v. BRUEN.

(1 Howard, 160-183. 1843.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—The original action was founded upon a guaranty given by Matthias Bruen to Bell and Grant, in favor of Wm. H. Thorn, by the following letter:

"NEW YORK, 23d April, 1831.

"*Messrs. Bell and Grant, London:*

"DEAR SIRS — Our mutual friend, Mr. Wm. H. Thorn, has informed me that he has a credit for £2,000, given by you in his favor with Messrs. Archias & Co., to give facilities to his business at Marseilles. In expressing my obligation to you for the continuation of your friendship to this gentleman, I take occasion to state that you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty.

"I am, dear sirs, your friend and servant,

"M. BRUEN."

To this letter the following answer was given by Bell and Grant:

"LONDON, 14th June, 1831.

"*Matthias Bruen, Esq., New York:*

"We are in the receipt of your favor of the 23d April, guarantying the credit opened on behalf of Mr. Wm. H. Thorn with Messrs. Archias & Co., of Marseilles, for £2,000, for the purpose of facilitating his business with that place; and, moreover, desiring us to consider as under your guaranty, also, all credits existing, or that we may hereafter open for said friend, of which we take due note. And we trust that Mr. Thorn, as well as your good self, will have every reason to be satisfied with the confidence which we feel a pleasure in assigning to both of you."

The declaration contains four counts: 1. That the plaintiffs, on the 31st of March, 1836, were requested by Thorn to open a credit in his favor, authorizing the firm of La Cave & Echicopar, of Cadiz, to draw on the plaintiffs to the extent of £2,500. That on the 22d November, 1836, La Cave & Echicopar drew for £385, which was advanced on the 12th February, 1837, by the plaintiffs, according to Thorn's request. 2. That on the 10th of October, 1834, at the request of Thorn, a credit was opened in his favor, authorizing R. Anderson & Co., of Gibraltar, to draw for £4,000. On the 16th December, 1834, Anderson & Co. drew for £318 12s. 6d., which plaintiffs paid 19th March, 1837. 3. That on the 15th of August, 1836, the plaintiffs opened a credit in favor of Thorn, authorizing Amac, Zipcey & Co., of Smyrna, to draw for £3,500. Of this sum, the house at Smyrna drew £1,640, which plaintiffs paid 8th April, 1837. 4. That on the 8th March, 1837, plaintiffs opened a credit to Thorn himself for £3,500, for which amount he drew bills, and which were paid 17th June, 1837.

Much other correspondence and evidence was given to the jury that need not at present be referred to, but which appears in the statement of the case made out by the reporter, and presented to us. The evidence being closed, the defendant prayed the circuit court to instruct the jury, as matter of law, that the letter of guaranty, of April 23, 1831, was confined to credits to be opened to the house of Archias & Co., or other houses with whom Thorn might deal at Marseilles; and therefore the plaintiffs could not recover from the defendant the advances made upon the bills of exchange given in evidence; being for the sums paid, as stated in the four counts of the declaration. Thereupon the court did decide, as matter of law, "that by the true construction of the said letter of guaranty, of April 23, 1831, the same only embraced credits which should be opened for account of Wm. H. Thorn to the house of Archias & Co., of Marseilles, and that the evidence of the other matters in this behalf proved did not give the said letter of guaranty a more enlarged application. And, therefore, that the jury ought to find a verdict for the defendant."

§ 282. *A contract must be construed according to the law of the country in which it is to be executed.*

The jury found accordingly; and it is this instruction of the court alone that we are called upon to examine and revise. Does the letter of guaranty extend to and cover the debts of Wm. H. Thorn sued for? is the question. It was an engagement to be executed in England, and must be construed and have effect according to the laws of that country. *Bank of United States v. Daniel*, 12 Pet., 54, 55. But it is necessary to remark that the law governing the agreement is the same in this country and in England; had it been made between merchants of different states of this Union, and intended to be executed at home, the same rules of construction would be adopted, and the same adjudications would apply. It is insisted for the plaintiffs that the circuit court erred in determining the question absolutely as a question of law upon the construction of the letter; that it also erred in declaring the other circumstances did not allow of an application of the guaranty to the transactions in question; such other circumstances, being admitted, their effect on the extent and application of the guaranty was for the jury; and by deciding on their effect as matter of law, they were withdrawn from the jury.

§ 283. *Correspondence and other evidence may be admitted to explain and apply a written guaranty.*

The letter of Bruen was an agreement to pay the debt of another on his making default; by the statute of frauds, 29 Chas. II., such agreement must be in writing, and signed by the party to be charged; it cannot be added to by verbal evidence; nor by written, either, if not signed by the guarantor, unless the written evidence is, by a reference in the letter, adopted as part of it. But as the statute does not prescribe the form of a binding agreement, it is sufficient that the material parts of it appear either expressed, or clearly to be implied; and correspondence and other evidence may be used to ascertain the true import and application of the agreement; by the aid of which extrinsic evidence, the proper construction may be made. Such is the doctrine of this court, as will be seen by reference to the cases of *Drummond v. Prestman*, 12 Wheat., 515; *Douglass v. Reynolds*, 7 Pet., 113 (§§ 234-239, *supra*); *Lee v. Dick*, 10 Pet., 482 (§§ 224-226, *supra*).

In the present instance, the question having arisen and construction been called for, the matters referred to in the letter of the defendant were considered (as circumstances attending the transaction), to aid the court in arriving at a proper understanding of the engagement; so soon as it was understood, its construction belonged to the court, and was "matter of law," within the general rule applicable to all written instruments. It rested with the court to decide whether the guaranty extended to and covered the credits set forth in the declaration; and was the common case of asking the court to instruct the jury that the plaintiff had not proved enough to entitle him to recover, admitting all his evidence to be true. In England the same end is attained by moving for a non-suit.

§ 284. *A mercantile guaranty is limited by its recitals in restraint of its general words.*

For the defendant it is contended: That the letter of April 21, 1831, is a contract preceded by a recital, and that the engagement extends no further than the recital. The recital introduces in direct terms, or by reference, the entire arrangement made between plaintiffs and Thorn, by the letters of the 22d of February, 1831, and March 22, 1831; and the words "this credit," in the

defendant's letter of 23d April, 1831, mean the first £2,000; and the words "and any and every other credit," mean the subsequent credits, to be opened under the same arrangement. The general rule is well settled in controversies arising on the construction of bonds, with conditions for the performance of duties, preceded by recitals, that where the undertaking is general, it shall be restrained, and its obligatory force limited within the recitals. The leading case is *Arlington v. Merrike*, 2 Saund., 403. It has been followed by many others. *Liverpool Waterwork Co. v. Harpley*, 6 East, 507; *Wardens, etc., v. Bostock*, 2 Bos. & Pull. (N. R.), 175; *Leadley v. Evans*, 2 Bingham, 32; *Peppin v. Cooper*, 2 Barn. & Ald., 431, are some of the principal cases affirming the rule.

Where a mercantile guaranty is preceded by a recital, definite in its terms, and to which the general words obviously refer, the same rule applies, of limiting the liability within the terms of the recital, in restraint of the general words. We find the courts constantly referring to the cases arising on bonds with conditions, for the rule of construction, and applying it to commercial guaranties; the most approved text-writers on this subject do the same; does the engagement before us fall within the rule? It recites:

"Our mutual friend, William H. Thorn, has informed me that he has a credit for £2,000, given by you in his favor with Messrs. Archias & Co., to give facilities to his business at Marseilles." The agreement is: "I take occasion to state that you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty."

§ 285. *General words in a guaranty cannot be so restrained by a recital as to render a part of the guaranty unmeaning and useless.*

We are of opinion that the engagement should be construed as if it read: "You may consider this credit with Archias & Co. as being under my guaranty; as well as any and every other credit you may open in favor of William H. Thorn with any and every other person, as also being under my guaranty." And that therefore the first branch of the undertaking has reference to the recital; and that the latter part is independent of it. To hold otherwise, would reject the general words—"as well as any and every other credit"—as unmeaning and useless; the agreement having the same effect, by the construction claimed for the defendant, if these words were struck out, as if they are left in it.

The general words, it is insisted, related to the character of the credit opened with Archias & Co., because it was an open and continuing credit, for £2,000. That this appears by the letters of Thorn to Bell and Grant, and to Archias & Co.; which are sufficiently referred to in the recital of the letter to make them part thereof, and to extend it to the continuing credit with Archias & Co. That the two letters of Thorn were sufficiently referred to, and could be read to establish the nature of the credit, and that it was open, we have no doubt; but their adoption was just as certain without the general words as with them. The special reference to the recital, adopting it as explained by the letters, leaves the general words still without meaning, unless the guaranty extends beyond the credit opened with Archias & Co. To make a proper application of the general words, it becomes necessary to lay down a definite rule of construction applicable to them, as the authorities are in conflict, and, to say the least, in considerable confusion, on the subject. The arguments are in direct conflict.

For the plaintiffs in error (Bell and Grant) it is contended: "That the guaranty by letters is to be taken, in case of doubt or ambiguity, on its face or

otherwise, in the broadest sense which its language allows, and in which it has been acted on by the parties." *Drummond v. Prestman*, 12 Wheat., 415; *Douglass v. Reynolds*, 7 Pet., 113 (§§ 234-239, *supra*); *Lee v. Dick*, 10 Pet., 482 (§§ 224-226, *supra*); *Mauran v. Bullus*, 16 Pet., 528 (§§ 288-290, *infra*); *Mason v. Pritchard*, 12 East, 227; *Merle v. Wells*, 2 Camp., 413; *Bent v. Hartshorne*, 1 Metc., 24; *Hargreave v. Sinee*, 6 Bingh., 244; 10 Eng. Com. Law, 69; *Mayer v. Isaac*, 6 Mees. & W., 605; and *Bastow v. Bennett*, 3 Camp., 220, are relied on to support the construction claimed as the true one.

On part of the defendant (Bruen) it is insisted: "That the apparent diversity of terms between the recital and the engagement in the defendant's letter raises a doubt upon the face of the guaranty as to its true extent; and, upon the doubt thus raised, the construction will be in favor of the surety." The following authorities are relied on to sustain the construction here claimed: *Pothier on Obligations*, part 2, § 34; *Code Napoleon*, arts. 2011, 2015; *Russell v. Clark*, 7 Cranch, 69 (§§ 272-277, *supra*); 1 *Mason*, 336 (§§ 257-266, *supra*); 2 *Caines*, C. E., 29, 49; 10 *Johns.*, 180, 325; 8 *Wend.*, 516; 7 *Wend.*, 422; 2 *Pick.*, 234; 16 *Pet.*, 537 (§§ 288-290, *infra*); 1 *Stark.*, 192; 8 *Taunt.*, 224; 3 *B. & A.*, 594, 595; 1 *Crompt. & Mees.*, 52, 54; 3 *Wilson*, 530; 1 *Term R.*, 287; 2 *id.*, 370; 3 *East*, 484; 4 *Taunt.*, 673; 8 *Moore*, 588; 2 *Perry & D.*, 249; 10 *Ad. & Ell.*, 30. The adjudged cases referred to, giving a construction to bonds with conditions, and contracts made directly between debtor and creditor, afford little aid in arriving at the true understanding of a commercial guaranty. Bonds, etc., are entered into with caution, and often after taking legal advice; they contain the entire contract, beyond which the courts rarely look for circumstances to aid in their construction. And if there be sureties bound by them, and the meaning is doubtful, the construction is restricted, and made most favorable to the sureties. Such is the result of the authorities cited for the defendant.

On the other hand, letters of guaranty are (usually) written by merchants; rarely with caution, and scarcely ever with precision; they refer, in most cases, as in the present, to various circumstances, and extensive commercial dealings, in the briefest and most casual manner, without any regard to form; leaving much to inference, and their meaning open to ascertainment from extrinsic circumstances and facts accompanying the transaction, without referring to which they could rarely be properly understood by merchants, or by courts of justice. The attempt, therefore, to bring them to a standard of construction founded on principles neither known nor regarded by the writers, could not do otherwise than produce confusion. Such has been the consequence of the attempt to subject this description of commercial engagement to the same rules of interpretation applicable to bonds, and similar precise contracts. Of the fallacy of which attempt, the investigation of this cause has furnished a striking and instructive instance. These are considerations applicable to both of the arguments.

§ 286. *A guaranty should be so construed as to ascribe to the parties the most probable and natural conduct.*

The construction contended for as the true one on part of the plaintiffs is that the letter of the defendant must be taken in the broadest sense which its language allows, thereby to widen its application. To assert this as a general principle would so often and so surely violate the intention of the guarantor, that it is rejected. We think the court should adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable

and natural conduct of the parties. In the language of this court in *Douglas v. Reynolds*, 7 Pet., 122 (§§ 234–239, *supra*), “every instrument of this sort ought to receive a fair and reasonable interpretation according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification or liberal construction beyond the fair import of the terms.” Or, it is “to be construed according to what is fairly to be presumed to have been the understanding of the parties without any strict technical nicety,” as declared in *Lee v. Dick*, 10 Pet., 493 (§§ 224–226, *supra*). The presumption is of course to be ascertained from the facts and circumstances accompanying the entire transaction. We hold these to be the proper rules of interpretation applicable to the letter before us.

The general words not being restricted by the recital, they fairly import that Matthias Bruen was bound to Bell and Grant for the credits they opened in favor of William H. Thorn with Archias & Co., and for the credits also they opened in favor of Thorn, with any and every other person, covering those set forth in the first three counts in the declaration; and we think that the circuit court erred by instructing the jury to the contrary. Whether the guaranty covered the credit extended to Thorn himself directly it is not thought necessary to inquire, as no argument was founded on such an assumption; Thorn, who was introduced as a witness in the circuit court by the plaintiffs, on his cross-examination declared that the £3,500 mentioned in the last count in the declaration “had no relation whatever to the guaranty of the defendant,” it being under the guaranty of a different person.

It was insisted also that when Thorn failed, and the dealings between him and the plaintiffs ceased, they were bound to notify the guarantor of the existence of the debts due them by Thorn, and for which Bruen was held liable, in a reasonable time after the dealings ceased; that Thorn failed April 10, 1837, and the notice was not given until December 31, 1838, the debts sued for in the first three counts of the declaration being then due; therefore the notice was too late and the defendant discharged. The record shows that this ground of defense was not brought to the consideration of the circuit court; we do not therefore feel ourselves at liberty to express any opinion upon the question.

Again it is insisted: The original arrangement made between the plaintiffs and Thorn in March, 1831, was subsequently in the spring of 1834 abandoned and deserted, and in the autumn following a new and inconsistent one, enlarging the credits to be given and diminishing the security, was made, rendering notice to the defendant necessary, but to which no notice could have given legal effect to charge the defendant for subsequent credits. To this and all other questions raised here, on which the court below was not called to express any opinion, we can only give the same answer given to the next preceding supposed ground of defense.

It is ordered that the judgment of the circuit court be reversed and the cause remanded for another trial thereof.

HOBART v. JOHNSON.

(Circuit Court for New York: 19 Blatchford, 339–362. 1881.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—The complaint alleges that the First National Bank of Newark, located in Newark, New Jersey, was duly organized as a bank under the act of June 3, 1864 (13 U. S. Stat. at Large, 99); that, on the 14th of June,

1880, it became insolvent; that the plaintiff was appointed its receiver; that its assets were insufficient to pay its debts; that the comptroller of the currency, under section 12 of said act, has ordered and made an assessment on the shareholders of said bank "equally and ratably, to the amount of \$100 *per centum* of the par value of the shares of the capital stock of the said association held or owned by them respectively at the time of its failure or suspension," and has ordered the plaintiff to institute suits to enforce against each shareholder his personal liability as such to said extent; that the defendant was, at the time of said suspension and failure of said bank, a shareholder of its capital stock to the amount of twelve shares, of the par value of \$100 per share, and held, or was entitled to hold, in her possession or control, the usual stock certificate, as such shareholder; and that, therefore, the defendant is liable to the plaintiff for \$1,200, with interest from July 14, 1880, the date of the order of assessment. The defendant has put in an answer to the complaint. One of the separate defenses set up in the answer is, that the defendant, in December, 1852, became, and ever since has been, and still is, the wife of Henry W. Johnson, who, at the time of the commencement of this action, was, and still is, a resident and citizen of the state of New York; that the said twelve shares were purchased by her, through her duly constituted agent, in the state of New Jersey, while she was such married woman, and the certificate therefor was delivered to her said agent within that state, and that she never became or was the owner of any of the shares of the said bank otherwise than in the manner above stated. To that defense the plaintiff demurs, on the ground that it is insufficient in law upon the face thereof.

§ 287. *Liability of married women as shareholders in national banks.*

It is provided by section 12 of said act of 1864, "that the capital stock of any association formed under this act shall be divided into shares of \$100 each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares. . . . The shareholders of each association formed under the provisions of this act . . . shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

It is provided by the act of the legislature of the state of New Jersey, approved March 27, 1874 (Rev. Stat. of New Jersey of 1874, p. 469, § 5), "that any married woman shall, after the passing of this act, have the right to bind herself by contract, in the same manner and to the same extent as though she were unmarried, and which contracts shall be legal and obligatory, and may be enforced at law or in equity, by or against such married woman, in her own name, apart from her husband, provided that nothing herein shall enable such married woman to become an accommodation indorser, guarantor, or surety, nor shall she be liable on any promise to pay the debt, or answer for the default or liability, of any other person."

It is admitted that this New Jersey statute took effect before the defendant became the owner of the shares in question, although the date when she became such owner is not set forth in the answer. It is contended for the defendant that the liability created by the act of congress is in the nature of a

liability of suretyship, and that this suit is one to enforce a promise or undertaking to pay the debt of another, and is, therefore, within the proviso of the New Jersey statute, and a recovery cannot be had against the defendant on such promise. This view does not appear to be tenable. The contract made by the shareholder is entered into by the act of becoming a shareholder. Every creditor of the bank, becoming such, becomes, *eo instanti*, a creditor of the shareholder in respect to the liability in question. The shareholder becomes thereby a principal debtor. The debt of the bank is his debt at the instant of its creation, and the debt of the bank is referred to only as a measure of the debt of the shareholder. It is true that the payment of the debt of the bank by the bank extinguishes the debt of the shareholder. But the idea of guaranty or suretyship or of a promise to pay the debt or answer for the liability of another is altogether destroyed by the fact that the debt of the bank is incurred for the benefit of the shareholder exclusively, and is thus the debt of the shareholder, as a principal. The shareholder has no remedy over against the bank or against his co-stockholders. This inherent idea of guaranty or suretyship is wanting. As the case is not within the proviso of the New Jersey statute, that statute makes the defendant liable on her contract.

Moreover, it must be assumed either that the defendant had a separate estate or contracted with a view to create, by owning the stock, a separate estate. In either view, the contract was for her benefit as the holder of a separate estate. Under such circumstances, by way of estoppel, she will not be allowed to claim and enjoy, as regards the bank, and creditors, and her co-stockholders, the benefit of her position as a shareholder, and then repudiate the statutory obligation attached to it. *Mrs. Matthewman's Case*, L. R., 3 Eq. Cases, 781; *In re Reciprocity Bank*, 22 N. Y., 9; *National Bank v. Case*, 9 Otto, 628. There must be judgment for the plaintiff on the demurrer.

MAURAN v. BULLUS.

(16 Peters, 528-537. 1842.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—The defendants in error and Joshua Mauran, Jr., of the city of New York, on the 8th of September, 1836, entered into articles of copartnership in the trade and business of general shipping merchants, and of buying and selling merchandise on their own account, and also on commission for the account of others; which was to continue three years. Mauran agreed to pay into the firm, as capital stock, such sums as he should be able to realize on closing the business of merchandizing, in which he had been engaged. Bullus agreed to pay a sum of from \$28,000 to \$30,000 in cash. And it was stipulated that Mauran should not withdraw from the concern more than \$2,000 per annum, nor Bullus more than \$3,000, unless by consent of the copartners in writing. Mauran covenanted that within a reasonable time he would pay the debts owing by him, out of his private funds; and that on or before the 8th of September instant, he would give to Bullus satisfactory security for the performance of this covenant.

On the 9th of September, 1836, the defendant below wrote to Bullus the following letter: "Mr. Edward Bullus — Dear Sir: As you are about to form a connection in the mercantile business in the city of New York with my son, Joshua Mauran, Jr., under the firm of Mauran & Bullus; and, as the said J. Mauran, Jr., having been, and is at this time, prosecuting mercantile business

in that city, on his own account; now, therefore, in consideration of the same, and at the request of Joshua Mauran, Jr., I hereby agree to bear you harmless in regard to the closing up and settlement of the said Joshua Mauran, Jr.'s, former business; and I hereby guaranty you against any loss or liability you may sustain from the former business of said Joshua Mauran, Jr., etc. Signed, Joshua Mauran."

The action was brought by Bullus on this guaranty. On the trial an account against the old concern of Joshua Mauran, Jr., with the firm of Mauran & Bullus, was given in evidence, from which it appeared that the old concern was indebted to the new, the sum of \$5,403.75. And it was proved by Joshua Mauran, Jr., that the partnership continued until August, 1839, when the firm failed. That Bullus paid into the partnership stock \$29,695.86, and that the witness was unable to pay anything. That at the time of forming the copartnership, his father, the defendant, was in New York, with whom he conversed relative to the terms of the partnership. That he showed his father the articles, or the minutes from which they were drawn, and is satisfied that the conditions were fully known to him. But the witness stated that he did not know of his father's having any knowledge that the firm were to settle and pay the debts owing by the witness.

The witness stated that certain loans were made by the firm to him, in anticipation of the receipts from the old concern, which were charged. After the completion of the articles of copartnership, the witness delivered to his father a paper drawn by the attorney who drew the articles, for his father's signature, and that his father did not sign the paper, but, after his return to Providence, sent the letter of guaranty. Many of the debts of his old concern, the witness stated, became due before sufficient funds could be collected from the same to meet them, and these debts were paid by the firm. That this was a mode of settlement of the accounts of the old concern not originally contemplated. His father often inquired what the deficiency of the old concern would amount to, but he did not know, to the knowledge of the witness, that the old concern was indebted to the firm. That the firm, on their failure, assigned all their property and estate to William D. Robinson, including the debts of the old concern, which amounted to the sum of \$12,418.93. These debts were credited to the stock of Joshua Mauran, Jr.; and at the time they were all, except one of George Bucklin, of about \$1,800, considered bad; and that one had been released, though the witness considered him bound in honor to pay it. Various accounts between the firm and Joshua Mauran, junior and senior, and other persons, were given in evidence.

The defendant introduced his son Suchet Mauran as a witness, who stated that his father brought with him on his return from New York, about the 8th of September, 1836, a bond binding him to pay the debts of Joshua Mauran, Jr. It was under seal, and the witness read it; and it was, as he believes, in the handwriting of Mr. Bonney, of the city of New York, who wrote the articles of copartnership. That his father would not sign the bond, but sent the letter of guaranty. The bond remained among the loose papers of his father for some time, but after a diligent search could not be found. That the bond, by its terms, required his father to pay all the outstanding debts of Joshua Mauran, Jr., to his creditors, or to whoever might pay them.

The evidence being closed, the defendant below moved the court to give the following instructions: 1. That said letter of guaranty of the defendant, dated the 9th of September, contained no authority to the said Mauran &

Bullus to pay any part of the debts of the said Joshua Mauran, Jr.'s, old concern; that if it authorized any payment of said debts by any person, it was by the said Edward Bullus alone; and that the said Edward Bullus could not recover said sum of \$5,403.75, or any part thereof; inasmuch as he had paid no part thereof, the whole having been paid by the said Mauran & Bullus.

Which instruction the court refused to give, as prayed for; on the contrary, they instructed the jury that if, from the evidence submitted to them, they were of opinion that at the time of signing said letter of guaranty, it was understood both by the plaintiff and the defendant, that the plaintiff was to be at liberty to pay the said debts of the said Joshua Mauran, Jr., either out of his own private funds or out of the partnership funds of the firm of Mauran & Bullus; and, in either case, the plaintiff was to be entitled to indemnity therefor, under and in virtue of the said letter of guaranty; and if they were of opinion, from the facts in said case, that no funds whatsoever had been paid into the partnership by the said Mauran, Jr., as a part of the capital stock thereof, and that all the capital stock had been paid by the said Bullus; and that he was and still remained a creditor of the firm to the full amount of such capital stock, then the plaintiff was entitled to recover, in the present suit, such sums of money as he had paid in discharge of the said debts of Mauran, Jr., either out of his own private funds or out of the funds of the said firm of Mauran & Bullus, for which he had not otherwise received any indemnity.

2. And the defendant's counsel prayed the court further to instruct the jury that, even if said letter had imposed upon said defendant any obligation to pay said debts to the said Edward Bullus, or to the said Mauran & Bullus, that the said Mauran & Bullus, by assigning the uncollected debts due to the said Joshua Mauran, Jr., to the said Robinson, their assignee, and placing them entirely beyond the control or agency and management of the defendant, had discharged the defendant from any liability which might originally have arisen from said letter of guaranty.

Which instruction the court refused to give; but instructed the jury that, if they should find a verdict for the plaintiff, they ought to deduct from the amount of the plaintiff's claim in the writ the full value of the debts of the said Mauran, Jr., so assigned, and charge it against the claim of the plaintiff, and render a verdict in his favor for the balance only after such deduction.

To the instructions refused and those given the defendants excepted. The jury, under the instructions of the court, found a verdict in favor of the plaintiff for \$3,764.25, on which a judgment was entered. The defendant prosecuted this writ of error.

§ 288. *The facts and circumstances under which a letter of guaranty is given properly go to the jury upon a question of intention.*

The questions in this case arise on the instructions of the court; and they very properly, as we think, refer the jury to the facts and circumstances under which the guaranty was given. It is only by such reference that that instrument can be correctly understood and construed. In the construction of all instruments, to ascertain the intention of the parties is the great object of the court; and this is especially the case in acting upon guaranties. The guaranty under consideration, in the first place, refers to the fact that Bullus, to whom it was addressed, was about to form a connection in the mercantile business in the city of New York with the son of guarantor. And from the evidence, it appears that he was well acquainted with the nature and extent of that partnership, for he had read the articles of copartnership, or the memoranda from

which they were drawn. As it appears from the statement of Bonney, that the articles were drawn in August, and placed in the hands of Bullus, who returned them with the blanks filled and some alterations, there can be little doubt that the defendant below read them while at New York. That he was well acquainted with the conditions of the partnership his son testifies.

With this knowledge we come to the next sentence in the guaranty, which is: "And as the said Joshua Mauran, Jr., having been, and is at this time, prosecuting mercantile business in that city, on his own account." It will be recollected that, in the articles of copartnership, Joshua Mauran, Jr., covenanted that he would give to his partner satisfactory security that he would pay all the debts which he then owed, and all the responsibilities incurred by him, in carrying on his former business, without drawing upon the partnership fund. Of this covenant, the defendant below not only had full notice, but it was proved that on his return from New York to Providence he took with him a bond drawn by the person who drew the articles of copartnership, binding him to pay the debts of his son. This bond he did not execute, but wrote to Bullus the letter of guaranty.

With these facts in view, after stating the fact that his son had been in business in New York as above, and that Bullus was about commencing a partnership with him, the defendant says: "Now, therefore, in consideration of the same, and at the request of Joshua Mauran, Jr., I hereby agree to bear you harmless in regard to the closing up and settlement of the said Joshua Mauran, Jr.'s, former business. And I hereby guaranty you against any loss you may sustain from the former business of said Joshua Mauran, Jr." Now, looking at the facts connected with the guaranty, and the circumstances under which it was given, there would seem to be no doubt of the understanding and intention of the parties. Bullus having a capital of nearly \$30,000, he was unwilling to advance it as the stock of the new firm, unless he should be indemnified against the debts which had grown out of the former business of his partner. And Joshua Mauran, Sr., with the view of securing so considerable a capital, and so advantageous a connection in business for his son, was willing to indemnify Bullus against these debts. And he preferred the guaranty to the bond which was prepared. The latter would have imposed an unconditional obligation to pay these debts, whilst the former only required him to pay Bullus the sum advanced by him in discharge of them.

§ 289. *Where a guaranty is given to A. against the former debts of his new partner, and these debts are paid by the firm, and the firm owes A. the whole of its capital, A. can recover on the guaranty the money paid on such debts.*

But it is earnestly contended that as these debts were paid by the firm, and not by Bullus only, he cannot maintain an action in his own name on the guaranty. It is very clear that the firm could not maintain an action on this instrument. The indemnity was personal, and limited to Bullus. But the best answer to this argument is the finding of the jury, under the instruction of the court. They were instructed "that if, from the evidence, they should find that, at the time of signing the letter of guaranty, it was understood both by the plaintiff and the defendant that the plaintiff was to be at liberty to pay the debts of Joshua Mauran, Jr., either out of his own private funds, or out of the partnership funds; and in either case the plaintiff was to be entitled to indemnity therefor, under the letter of guaranty," etc., they should find for the plaintiff. They did so find, and consequently the facts hypothetically stated in the instruction are established. And the only question that can arise on this part of

the instruction is whether the facts found were properly submitted to the jury.

Now out of what fund these debts were to be paid could not be a matter of any importance, it would seem, to the guarantor. The objection that Bullus cannot recover, because the debts were paid with the partnership funds, under the circumstances, is purely technical. Every dollar of the money thus paid, though used in the partnership name, was in fact the money of Bullus. To meet this technical objection, and carry out the intention of the parties, we think the instruction was proper. The facts on which it was founded did not contradict the written agreement, nor in any degree affect the liability of the party beyond the clear import of the guaranty. By the articles of copartnership, either partner, with the consent in writing of the other, might withdraw from the firm any amount of money. This was known to the guarantor. And also the fact that the whole capital of Bullus was paid into the firm. If this be admitted, it followed that any payments made by Bullus in discharge of the debts could only be paid out of the firm.

The jury also found, in pursuance of the latter part of the same instruction, that Bullus was a creditor of the firm to the full amount of its capital stock. These facts found by the jury disembarass the case from the technicalities thrown around it by the counsel of the guarantor. They show that it was the understanding of the guarantor that Bullus should be indemnified against the previous debts of his partner, whether he paid them out of the partnership fund or otherwise.

§ 290. — *and it is not material that the guarantee was not legally liable for the debt.*

The construction that the guarantor is only bound to indemnify, in case payment of these debts had been enforced against Bullus by legal measures, is not sustained by the words of the instrument. In the first place, he was not and could not be made legally responsible for these debts. The guarantor, then, must have contemplated a voluntary payment, or at least not a payment by legal compulsion. The guarantor agrees to bear Bullus "harmless in regard to the closing up and settlement of the said Joshua Mauran, Jr.'s, former business." Here is a strong recognition of an agency by Bullus in the settlement of these debts. To sustain the credit of the firm it was necessary to pay the debts in question; and we find that in a very short time after the firm commenced business, the payments of these debts were commenced, and such payments were made from time to time by the firm until near the time of its failure. The moneys received from the debts due to the previous concern were credited on the books of the firm, and the payments made by it on the same account were charged. But the mode of keeping the account by the firm can have no bearing in the case, as the facts found by the jury obviate all objections on this ground. Suppose Bullus had been charged on the books of the firm with the moneys paid in discharge of the debts; the objection as to the partnership interest could not in that case be made. But the money thus applied would have been no more the money of Bullus than that which was paid by the firm. The facts found by the jury present the case in its true character, and give a strong equity to the plaintiff below. Generally, all instruments of suretyship are construed strictly, as mere matters of legal right. The rule is otherwise where they are founded on a valuable consideration. But in the present case the relationship of Mauran, the partner, and the guarantor, connected with the other circumstances, constitute as clear a case for indemnity as could well be imagined. That the debts of

Mauran, Jr., were paid by Bullus or with his assent, in virtue of the guaranty, there is no reason to doubt. Indeed, this fact is substantially found by the jury.

The assignment by the firm of the uncollected debts of Joshua Mauran, Jr., to Robinson, does not release the guarantor. In this respect the instruction of the court was correct. The jury were directed, if they should find for the plaintiff, to deduct from the amount thus found the full value of the debts of Joshua Mauran, Jr., which had been assigned by the firm, and render a verdict for the balance. The debts of Mauran, Jr., assigned by the firm were proved to be bad, with but one exception; and that appears to have been deducted by the jury from the sum paid by the firm in discharge of those debts.

Upon the whole we are satisfied that substantial justice has been done between the parties by the judgment of the circuit court; and we think there is no principle of law arising out of the instructions which require a reversal of the judgment. It is, therefore, affirmed.

§ 291. A guaranty must have a consideration to support it, but if made at the time of the principal contract the same consideration is sufficient to support both. If made subsequently, there must be a distinct consideration to support it. *Beebe v. Moore*,* 3 McL., 337. See § 200.

§ 292. The words "for value received" in a contract of guaranty import a consideration sufficient to establish a *prima facie* case against the guarantor. *Martin v. Hazzard Powder Co.*,* 2 Colo. T'y, 599.

§ 293. A guaranty of paper payable at a certain bank does not cover paper not made payable at that bank. *Dobbins v. Bradley*,* 4 Cr. C. C., 293.

§ 294. Demand and notice in cases of guaranty.—To charge a guarantor on a contract to deliver goods at a certain day, a demand must be made on the principal on that day, and reasonable notice given to the guarantor of the principal's failure to deliver. *Beebe v. Moore*,* 3 McL., 337. See §§ 185, 188, 190, 191, 193, 199.

§ 295. Where a guaranty is neither absolute nor definite, notice of a credit given thereon should be given to the guarantor within a reasonable time after the credit was given. *Dobbins v. Bradley*,* 4 Cr. C. C., 293.

§ 296. Where a guaranty is accepted and the party actually acts on it, it is not necessary that notice be given of the amount and terms of the advances made. All that the party need to do is to make a demand of the debtor at the expiration of credit, and on his default give notice to the guarantor within a reasonable time; but the insolvency of the debtor will excuse the demand. *Wildes v. Savage*, 1 Story, 32.

§ 297. When a letter of guaranty is prospective and looks only to a future transaction, in order to invest it with the obligation of a contract, the party to whom it is addressed must give notice of his intention to act upon it. The guarantor has a right to know whether it is accepted, in order that he may make such arrangements as will secure himself for his responsibility. *Henderson v. Reilly*,* 1 MacArth., 27.

§ 298. In all collateral undertakings, where the liability of the guarantor depends on the doing of some act by a third person, notice of a demand on him or an excuse for not making it must be shown in order to charge the guarantor. *Hank v. Crittenden*, 2 McL., 560.

§ 299. In an action upon the following guaranty given by defendant: "23d December, 1829. If you will furnish Mr. E. T. with a suit of clothes, to be paid for next April, I will guaranty payment for them. G. S."—it was held that plaintiff could not recover unless he showed that he had given notice to defendant within a reasonable time of his acceptance of the guaranty, and of the value of the clothes furnished. *Burns v. Semmes*,* 4 Cr. C., C. 702.

§ 300. Upon every guaranty for future advances it is the duty of the party making the advances to give notice to the guarantor of his acceptance thereof, and of his consent to act under the guaranty and to make the advances. But where the agreement to accept is contemporaneous with the guaranty no such notice is necessary. *Wildes v. Savage*, 1 Story, 31.

§ 301. In an action against defendant as guarantor it was held that, within a reasonable time after the note of the principal debtor became payable, it was plaintiff's duty to make demand upon the principal and give notice of non-payment to the defendant, and that nothing could excuse the want of such demand and notice except the insolvency of the principal debtor. If the guaranty is that payment is to be made at a certain time, contrary to the face of the note, a notice at the expiration of that time is indispensable. *Dunbar v. Brown*,* 4 McL., 166.

§ 802. A guaranty of a bond different from that expressed in the bond.—It seems that a contract of guaranty of a bond may be independent of and distinct from that expressed in the bond, and may impose obligations on the guarantor independent of that of the principal. *Zabriskie v. Cleveland, etc., R'y Co.*, 28 How., 399.

§ 803. Guaranty confined to language used.—A guaranty cannot, in reason, be extended beyond the obvious purport of the language. *Russell v. Perkins*, 1 Mason, 370.

§ 804. Assignment of debt to guarantor—Suit by him against debtor—Payment by him extinguishes debt.—If, after the liability of a guarantor becomes absolute, the guarantor takes an assignment of the debt from the original creditor, not as payment, but as security, then the guarantor may maintain an action against the debtor in the name of the creditor; but payment by the guarantor to the creditor extinguishes the debt, and he cannot sue in the name of the creditor thereon. *Brown v. Decatur*, 4 Cr. C. C., 478.

§ 805. Guaranty not released by fraudulent representations by another.—B. contracted to sell to M. certain timber lands, but no timber was to be cut without written permission of the vendor until the lands were paid for. With B.'s assent M. assigned the contract to L., and B. gave permission to L. to cut timber in consideration of the latter's guaranty of the payments stipulated in the original contract. In an action by B. against L. upon the guaranty, it was held that the fraudulent representations of M. to L. in the contract between them, in which representations B. did not participate, did not release L. from liability upon his guaranty. *Lumber Co. v. Buchtel*,* 11 Otto, 633.

§ 806. Guaranty of acceptance made by one partner drawing bills on the firm—Statute of frauds.—Where one member of a partnership was authorized to procure funds at a foreign port and draw bills for the amount, and he did so, directing the bills to be charged to the whole concern, and signed the bills with his own name alone, it was held that the partnership was liable on the bills, and that their undertaking was in the nature of a guaranty of acceptance and payment, and was not within the statute of frauds, because the undertaking was to answer for their own debt and not that of another. *Van Reimsdyk v. Kane*, 1 Gall., 641.

§ 807. Guaranty construed—Legal proceedings against debtor condition precedent to recovery thereon.—The complaint alleged that defendants promised that if the plaintiff would endeavor to collect the amount of the loss described from the Grand Trunk Railway Company, they, the defendants, would pay the said claim if the Grand Trunk Railway Company did not do so. Held, that the cause of action was in effect a guaranty by defendant; and that some proceeding at law was a condition precedent to recovery upon it. *Phoenix Ins. Co. v. Louisville, etc., R. Co.*,* 8 Fed. R., 142. See § 184.

§ 808. Liability upon guaranty extinguished by subsequent contract.—Where a deceased partner had, in his life-time, transferred his individual debt against a third person to the firm, getting credit therefor and guarantying its collection, it was held that by a contract between his executor and the surviving partner, whereby the latter purchased all the interest of the deceased's estate in the partnership, subject to all possible liabilities of such estate for the transactions of the firm, and agreeing to indemnify the estate against all liability growing out of such transactions, the liability of the estate upon the guaranty of the deceased was extinguished. *Brown v. Slee*,* 13 Otto, 828.

§ 809. Guaranty in bonds running to whomsoever takes them.—Plaintiff's declaration alleged that the defendant railroad had leased the St. Louis, Lawrence & Denver Railroad, and had become bound to pay the company \$60,000 annually, to enable it to negotiate its bonds and raise money; and that defendant had caused or consented to the representations contained in the said bonds to the effect that the interest on them was guarantied by defendant during the entire term of its lease, a period longer than that within which the bonds by their terms fell due. Upon demurrer it was held that defendant's promise was a direct one to who ever took the bonds on the faith of it, and amounted to a guaranty by defendant to any such party. *Opdyke v. Pacific Railroad*,* 8 Dill., 55.

§ 810. Action against guarantor for money had and received by one furnishing goods under a guaranty.—Where goods are received by a creditor on a letter of guaranty and the guarantor credited with their value in the account between him and his creditor, such action will not enable one who furnishes the goods under the guaranty to maintain an action against the guarantor for money had and received. *Burns v. Semmes*,* 4 Cr. C. C., 702.

§ 811. Bill of sale as indemnity—Lien for another debt.—A bill of sale to plaintiff of certain hides in the vat, to indemnify him as surety for the defendant on an obligation which is subsequently satisfied, will not give plaintiff a lien on the hides as security against a liability on another debt of the defendant. (The hides had passed into the hands of a purchaser, and a prayer for a delivery of the hides was refused.) *Talbot v. McPherson*,* 2 Cr. C. C., 281.

§ 812. The guaranty, by a city, of the payment of notes given by land owners for work done on streets imposes an obligation on the city to pay at maturity, and is not a guaranty

of the ultimate solvency and liability of the land owners. *City of Memphis v. Brown*, 1 Flap., 200.

§ 313. A city having entered into a contract for paving its streets inserted this clause in its agreement with the contractors: "The city will and does hereby guaranty to the contractors the payment of said amounts as so assessed against the property owner or owners for the pavement," etc. *Held*, that this was a guaranty of payment and not of collection, and that a suit was maintainable against the city without a previous suit against the property owners. *Held* also, that the fact that the courts subsequently decided that the property owners could not be made to pay did not release the city from its liability as guarantor. The city cannot set up the illegality of the proposed detail of payment as a defense. *City of Memphis v. Brown*, 20 Wall., 809 (CORP., §§ 2218-23).

§ 314. Previous authority to draw is an acceptance.—An authority given by a factor to his principal, to draw on him for the proceeds of property sold, is an acceptance of a bill drawn against such proceeds in accordance with the terms of the letter. *Ogden v. Gillingham*, Bald., 44.

§ 315. Authority to draw on either of two persons.—Where a letter of credit gives a person authority to draw on "A. B., or me," a failure to obtain payment of A. B. will authorize a draft on the writer. *Lanusse v. Barker*, 3 Wheat., 145.

§ 316. Promise to accept bills, made to the drawer, but shown by him to others—Privity.—A letter of credit written by persons who are to become the drawees of bills drawn under it, wherein they promise to accept such bills when drawn, and which, though addressed to the person who is to be the drawer of the bill, is designed to be shown to such persons as the drawer may desire, to induce them to advance money on or take the bills when drawn, will be an available contract in favor of the persons to whom the letter of credit is shown, who advance money and take the bills on the faith thereof, and is not void for want of privity between them and the persons writing the letter of credit. *Russell v. Wiggin*, 2 Story, 229.

§ 317. Letter of credit creating no debt, but only an authority to create a debt—Waiver.—W., of London, having funds belonging to the plaintiff, gave him a letter of credit on the defendants at Hamburg for money there and credit at Stratsund. The plaintiff obtained money at Hamburg, and a letter of credit to Stratsund, of which he made no use, and which he informed the defendants he should not use after he went to Paris, but would draw direct on W. From Paris he wrote to the defendants that he had learned that W. had failed and that he should draw on them. They declined to honor his bills, but he drew on them from Boston for the amount of the credit at Stratsund. *Held*, in an action on the draft, that the letter of credit on Stratsund did not create any debt or contract between the immediate parties thereto, but that it was only an authority to create a debt by a draft on the defendants from Stratsund, and that the plaintiff had waived his right to draw on them. *Lienow v. Pitcairn*,* 2 Paine, 517.

§ 318. Revocation of letter of credit must be express.—Where a letter of credit contains an explicit contract its revocation by implication will not be favored, but the revocation must be express and unequivocal. *Lanusse v. Barker*, 3 Wheat., 148.

§ 319. Construction of agreement as to whether a letter of credit has been used.—This was an action for a commission upon a certain amount alleged to have been drawn in bills upon plaintiffs under a letter of credit given by them to the defendant. The circular issued by the plaintiffs, with reference to which the letter of credit was given and accepted, stated that the "bank commission on credits or bills east of the Cape of Good Hope (was) to be two per cent." The question whether the commission was due depended on whether the credit had been used. It was held that the mere drawing of any bill under the letter of credit in favor of a third person, who, upon the faith of the credit, took and received the same for value, and was entitled to hold and use the same upon his own account, was a use of the letter of credit, although such bill was subsequently destroyed and never presented for acceptance or payment. *Baring v. Lyman*,* 1 Story, 396.

§ 320. Purchaser assuming a contract of indemnity of the seller.—Green & Barker, being owners of five-ninths of a ship, of which Carrington was also a part owner, and the supercargo and manager of the business, wrote to Smith & Co., making themselves responsible for all contracts which Carrington should make with them on the business of the ship. Clark afterwards purchased the interest of Green & Barker, and wrote Smith & Co., saying: "Green & Barker's contract with you shall, in every respect, be fully complied with, the same as it would have been done with them, had they continued owners." It was held that this made Clark responsible to Carrington as far as Green & Barker were responsible, and that he was, therefore, liable for five-ninths of a judgment recovered by Smith & Co. against Carrington upon the contract. *Clark v. Carrington*,* 7 Cr., 808.

§ 321. Judgment against person to be indemnified admissible in suit on contract of indemnity.—In a case of warranty and indemnity, a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit against him on his contract of indemnity. *Ibid.*

4. Covenants and Warranties.

[See SALES.]

SUMMARY—*Warranty of quality; breach; recoupment*, § 322.—*Statement in charter-party as to time of sailing*, § 323.

§ 322. When a warranty of quality of goods sold is broken, the resulting damages may be shown in recoupment in an action for the price of the goods. *West, Bradley & Cary Manuf. Co. v. Ansonia Brass and Copper Co.*, § 324.

§ 323. A statement in a charter-party, that the vessel named will sail on a certain day, amounts to a warranty to that effect, and is a condition precedent to a right to recover on the charter-party. *Deshon v. Fosdick*, §§ 325, 326.

[NOTES.—See §§ 327-330.]

WEST, BRADLEY & CARY MANUFACTURING COMPANY v. ANSONIA BRASS & COPPER COMPANY.

(Circuit Court for Connecticut: 4 Federal Reporter, 145-147. 1880.)

Opinion by SHIPMAN, D. J.

STATEMENT OF FACTS.—This is an action of general *assumpsit* which was tried by the court, the parties having by agreement waived a trial by jury. The plaintiff's account, upon which the suit was brought, is for clock springs of various kinds which were furnished by the plaintiff to the defendant between July 8, 1875, and February 23, 1876, upon the defendant's orders. The principal of the account was \$1,552. It is not denied by the defendant that it received the goods which were thus furnished, and that they have not been paid for. The defense is the recoupment of damages resulting from the breach of the plaintiff's warranty of the quality of the clock spring which it sold to the defendant. In the summer of 1874 the plaintiff, through Mr. Alanson Cary, its authorized agent, solicited from the defendant orders for clock springs. The defendant was largely engaged in the manufacture of clocks. The plaintiff was an extensive steel-spring manufacturer, and had just commenced to make polished clock springs. The defendant had been buying its springs from Edward E. Dunbar, of Bristol. The Dunbar spring was of excellent quality and had a good reputation. Mr. Cary, before any orders were given, showed the defendant his samples of springs and received specimens of the Dunbar spring, and had two interviews with the defendant's superintendent and the foreman of the movement department at Ansonia, and one interview with the superintendent and the New York agent at New York. At Ansonia, Mr. Cary said that he (meaning the plaintiff) would guaranty his springs to be equal to the Dunbar spring, and that they would run more evenly than those which the defendant was using. It was understood that plaintiff's springs would be but seven and a half feet in length, while the Dunbar spring was nine feet long. The representation and the guaranty of Cary were that his seven-and-a-half-foot spring would be equal in efficiency to the nine-foot spring of Dunbar. The eight-day spring of Dunbar ran with uniformity at least eight days. This guaranty was given as an inducement to the defendant to become the plaintiff's customer. The additional inducements were a lower price than that of the Dunbar spring and an exchange trade.

While these negotiations were going on, and before any orders had been given to the defendant, Mr. Cary sent defendant, on September 24, 1874, one of the plaintiff's clock springs, and wrote the defendant, among other things, as follows: "One thing we can guaranty, that they [the springs] will run more uniform than anything you have ever used, and will, also, guaranty them equal to any French spring made." Samples were sent by the plaintiff and tested to a certain extent. These negotiations finally culminated in an experimental order for five hundred springs, about November 1, 1874, which were sent November 12, 1874, and the defendant replied that he would have them thoroughly tested and give a decision. The test was apparently satisfactory, for orders followed and continued to be given until February 23, 1876, at which date goods to the amount of about \$14,450 had been furnished and had been paid for, with the exception of the bill of \$1,552, now in suit. During the first part of the time, modifications in thickness and in minor particulars were suggested or directed by the defendant, which suggestions were complied with.

§ 324. *Warranty of quality.*

The representations which were made by the plaintiff were not mere expressions of opinion, but amounted to a warranty of quality; and this warranty was not intended to be temporary, and to terminate with the selection of particular sizes and dimensions, but it was intended to be a guaranty, for a reasonable time after the defendant had given its custom, that the plaintiff's springs should be equal in quality and efficiency to the Dunbar springs of nine feet in length, which were used for the same respective purposes. The defendant did not test its movements except by starting them in running order. They were speedily put into cases or they were boxed and sent to the New York office. There the movements were fitted and were set running. The eight-day movements ran eight days, and no imperfection was apparent. They were sold to wholesale dealers and by them to retailers.

After a while complaints began to come back to the defendant in regard to these clocks, and it was discovered that the springs lost their elasticity after being wound a number of times, and, being seven and a half or eight feet long, they ran down before the expiration of the eight days. There was a want of permanent power in the spring, but to what the lack was due the plaintiff's witnesses did not know. This defect existed only in the eight-day springs, and it existed both in the time and strike springs. Clocks were returned, orders were countermanded, and defendant subjected to annoyance, loss of reputation, and to direct pecuniary damage. The testimony as to the general annoyance to which it was subjected by reason of this imperfection was abundant. The evidence as to items of direct pecuniary damage was not abundant. The plaintiff's bill and interest thereon to September 25, 1879, was \$1,984.55. The immediate and direct pecuniary damage to the defendant, resulting from the plaintiff's breach of warranty upon said eight-day clock springs, was, with interest from the dates of the respective items of damage, at least the sum of \$1,984.55, and I do not find affirmatively that it exceeded said sum. I therefore find the issue for the defendant, and that judgment should be for the defendant to recover its costs.

DESHON v. FOSDICK.

(Circuit Court for Louisiana: 1 Woods, 286-290. 1872.)

Opinion by WOODS, J.

STATEMENT OF FACTS.—The petition alleges that on March 10, 1871, the ship E. Sherman, then lying in the port of Boston, was chartered by plaintiffs, who were the owners, to defendants for the purpose of transporting cotton from the port of New Orleans to some European port, at a rate of freight agreed upon. That in pursuance of the contract, the ship sailed for New Orleans, and arrived on the 12th day of April. That on her arrival she was accepted by the defendants, but on April 19th they repudiated the contract and declared they would not accept, and would not receive the ship. The plaintiffs aver that by reason of the premises they have been damaged in the sum of \$6,793.73, with interest, from judicial demand, for which they ask judgment.

The defendants plead: 1. A general denial. 2. That they did by letter and telegrams agree to charter said ship on the understanding and representation that she would sail from Boston on Wednesday, the 8th day of March, 1871, but that she did not sail for several days after that time, and that as soon as defendants were advised of that fact they gave notice to plaintiff, Wm. Deshon, who was master of said ship before she was tendered to them under said charter-party, that they were not bound to take her under said charter-party, and no tender was thereafter made to defendants.

The evidence in the case establishes these facts: On the 9th of March, 1871, the defendants telegraphed from New Orleans to Howes, Ryder & Co., in Boston, the agents of plaintiffs, as follows: "Shall we close Sherman; Liverpool; three farthings; Havre, 1 1-2, Continent, 13-16."

On the 10th of March the foregoing dispatch was answered by Howes, Ryder & Co., as follows: "Close Sherman, three farthings Liverpool; 13-16, Continent; full cargo." On March 10th, after the receipt by defendants of this dispatch, and before it was answered by them, defendants received a letter written by Howes, Ryder & Co., on the 6th of March, in which they say: "Our ship E. Sherman will sail on Wednesday for your port. We have given our captain letters of introduction to your house, and, if he is not chartered before he arrives, hope you will look after him immediately and offer him some good business. He has given me authority to close him at three quarters Liverpool. At any time you can offer her that before he arrives, please let us hear from you, and we hold the opportunity to accept the first offer made at those rates from any house," etc.

After the receipt of this letter and of the telegram of Howes, Ryder & Co., of the 10th of March above given, and on the evening of that day, the defendants sent the following telegram to Howes, Ryder & Co.: "Sherman closed. Liverpool, three farthings; Havre, one and a half, or Continent, thirteen-sixteenths." It is further shown by the testimony of the defendant Fosdick that, had he not received on the 10th the letter of Howes, Ryder & Co., advising him that the Sherman would sail for Boston on 8th of March, he would not have sent his telegram of that date closing the contract chartering the ship.

§ 325. *What necessary to complete a contract.*

The pleadings and evidence present two questions for decision. The first is, Did the telegram of defendants of the 9th of March, and the reply thereto of Howes, Ryder & Co., of the 10th, complete and conclude the contract of the parties? A negative answer must be given to this question. The telegram of

the 9th was an inquiry to which the telegram of the 10th was an answer. It meant simply, Will you charter your vessel on the terms named? The answer is, in effect, an affirmative reply. This does not make a contract until the defendants have sent another dispatch accepting that ship on the terms specified. But it is to be observed that the terms in the answer of Howes, Ryder & Co. do not correspond with the inquiry propounded in the telegram of defendants. They inquire, "Shall we close Sherman, Liverpool, three farthings; Havre, one and a half; Continent, thirteen-sixteenths?" In the answer of Howes, Ryder & Co., nothing is said about the rates to Havre, and the words "full cargo" are added. So that by the passage of these two telegrams the minds of the parties had not concurred upon the terms of the contract. A second dispatch from defendants was necessary to complete the contract, and this was sent on the night of March 10th, after the reception by defendants of the letter of Howes, Ryder & Co., dated March 6th.

§ 326. *A stipulation that a vessel will sail on a day stated is a condition precedent. If she does not sail for two days after, it is a breach of the contract.*

Other questions to be determined are, Did the statement, made in the letter of the 6th, that the Sherman would sail on the 8th, form a part of the contract? And if it did, was it a mere representation, or was it a condition precedent? I can see no reason why the element by which the date of the sailing of the ship was fixed should be excluded from the contract any more than the rates of freight. Howes, Ryder & Co. were corresponding with defendants, both by letter and telegram, in reference to the chartering of the ship. Before defendants finally closed the contract, they had before them the telegram of Howes, Ryder & Co., fixing the rates of freight, and their letter naming the day when the ship would sail from Boston. It is fair to presume that both operated on the mind of defendants in inducing them to charter the ship, and the express testimony is that such was the fact. We may then conclude that the sailing of the ship on the 8th of March was a part of the contract.

But was it a condition precedent? Did it amount to a warranty that the ship should sail on the day named? This question appears to be settled by the case of *Lowber v. Bangs*, 2 Wall., 728, and the cases cited in the opinion of the court. In that case it was held "that a stipulation in a charter-party that the chartered vessel, then in distant seas, should proceed from one port named to another port named with all possible dispatch, is a warranty that she will so proceed, and goes to the root of the contract; it is not a representation simply that she will so proceed, but a condition precedent to the right of recovery." In *Glaholm v. Hays*, 2 Mann. & G., 257, cited by counsel, and referred to by the court in *Lowber v. Bangs*, the language of the charter-party was, "the vessel to sail from England on or before the 4th of February next," and this was held to be a condition precedent. In *Ollive v. Booker*, 1 Exch., 416, the vessel was described as "now at sea, having sailed three weeks ago," and it was held that the time at which the vessel sailed was material, and the statement in the charter-party amounted to a warranty. See, also, *Oliver v. Fielden*, 4 Exch., 135; *Crookewit v. Fletcher*, 1 Hurl. & N., 912; *Behn v. Burness*, 8 Law Times, 207, April, 1863.

Holding, therefore, that the statement made by Howes, Ryder & Co., the agents of the owners, in their letter of March 6th, that the Sherman would sail on the 8th, entered into the contract of the parties and amounted to a warranty, and there being no dispute of the fact that she did not sail until the

10th, I am of opinion that plaintiff has shown no case for a recovery, and that there must be a finding and judgment for costs in favor of defendants.

§ 827. Contract to make a specific article — Warranty as to its usefulness — Hidden defects.— Where a party contracts to make a specific article the rule is that the article must be fit for use, and not merely that the maker shall use his best skill to make it so. In such a case, also, the maker is liable for hidden defects in the materials used. *Cunningham v. Hall*, 1 Spr., 405.

§ 828. A description of flour as "Haxall" is a warranty that the flour was manufactured at mills using that brand. And the purchaser may recover any difference in the value of that and an inferior brand. *Lyon v. Bertram*, 20 How., 149 (§§ 1580-84).

§ 829. Delivery of a specific thing in satisfaction of a debt — Warranty of authority so to dispose of it.— In ordinary cases of the delivery and acceptance of a specific thing in satisfaction or compromise of a debt, there is an implied understanding or condition that the debtor guaranties his authority to dispose of the thing in that way, and that a failure in this behalf will place the parties back in their original relations to each other; but where a clear understanding not to guaranty such right of disposition appears, no guaranty will be implied. *Chapman v. Wilson*, 5 Fed. R., 815.

§ 830. A covenant in a conveyance, by an executor, of land belonging to his testator, made, as expressly stated, as such executor and not otherwise, recited "that the said premises were in due form of law entered upon and taken by executor as aforesaid to satisfy a debt actually due," etc., "and that all the forms of law relating to the setting off of real estates for the payment of debts due therefrom have been duly complied with." *Held*, that the covenant was only for the regularity of the proceedings and not for title to the property. *Thayer v. Wendell*, 1 Gall., 40.

III. CONSIDERATION.

1. In General.

SUMMARY — *Contracts under seal*, § 831. — *No defense that contract did not bind plaintiff*, § 832. — *Promise for a promise*, § 833. — *Sale of goods for illegal purpose*, § 834.

§ 831. A contract under seal is presumed to have been made upon good consideration, so long as the instrument remains unimpeached; and want of consideration is no answer to an action thereon. *Storm v. United States*, §§ 835-840.

§ 832. Where defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of its covenants to say that the agreement did not bind plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have, in fact, been performed in good faith, and without prejudice to defendant. So, where S. contracted to furnish the United States with certain forage supplies, breaches of the covenants occurred, and the United States brought suit against S. on his bond for faithful performance; the defense was set up that the agreement might have been terminated at any time at the election of the United States, and hence was not binding for want of mutuality; it appeared that supplies had been furnished to the United States and paid for by them, and it was held that the United States were entitled to maintain their action on the bond. *Ibid*.

§ 833. A promise by plaintiff, apart from any question of performance, may be a good consideration for a promise by defendant. So where, in an action upon a promissory note, defendant's pleas admitted that plaintiff's promise to do a certain thing was the consideration for the note, it was held that the jury were not authorized to find that the consideration of the note had failed because plaintiff had failed to perform his undertaking. *Held*, also, that a consideration moving to one of several co-promisors is sufficient to support the promise of all. *Philpot v. Gruninger*, §§ 341-344.

§ 834. A vendor of goods usually can maintain an action of contract for their price, even if he knew at the time of sale that the purchaser intended to use the goods for an illegal purpose. So an action of contract can be maintained for the price of liquors lawfully sold in Rhode Island by a party having knowledge that the purchaser intended to resell them in Massachusetts contrary to the laws of that state, there being no agreement that the liquors should be resold unlawfully, and plaintiff having done nothing beyond the mere sale to aid the purchaser in his unlawful design. *Green v. Collins*, §§ 845-56.

[NOTES.— See §§ 357-378.]

STORM v. UNITED STATES.

(4 Otto, 76-86. 1876.)

ERROR to U. S. Circuit Court, District of California.

§ 335. *What errors will be revised.*

Opinion by MR. JUSTICE CLIFFORD.

Errors of the circuit court resting in parol cannot be re-examined in this court by writ of error. Instead of that the writ of error addresses itself to the record; and the rule is, that whenever the error is apparent in the record, whether it be made to appear by bill of exceptions, an agreed statement of facts or by demurrer, the error is open to re-examination and correction. Whatever error of the court is apparent in the record, whether it be in the foundation, proceedings, judgment or execution of the suit, may be re-examined and corrected; but neither the rulings of the court in admitting or excluding evidence, nor the instructions given by the court to the jury, are a part of the record unless made so by a proper bill of exceptions. *Suydam v. Williamson*, 20 How., 433.

STATEMENT OF FACTS.—Two of the defendants, to wit, Storm and Shrader, entered into a written contract with the assistant quartermaster of the army, acting in behalf of the United States, to deliver at the several places therein mentioned, in and about the harbor of San Francisco, in such quantities and such monthly proportions as the quartermaster should determine, one million pounds of barley, one million pounds of oats, two million pounds of hay, called oat hay, and five hundred thousand pounds of straw; it being stipulated that the contractors should receive, as payment for the supplies delivered and accepted under the contract, the following prices, in gold coin, or equivalent in legal-tender notes, to wit, \$10.65 for each one thousand pounds of barley, \$12.65 for each one thousand pounds of oats, \$5.90 for each one thousand pounds of hay, and \$4.30 for each one thousand pounds of straw.

Forage and straw to be delivered, it was stipulated, should be of the best quality in the market; and if, in the opinion of the commanding officer at the place of delivery, it was unfit or of a quality inferior to that prescribed by the contract, it was stipulated that a survey should be held by one or more officers, to be designated by the commanding officer, and that the board of survey should have power to reject the whole or such portions of the same as appeared unfit for issue, or of a quality inferior to the contract. Supplies of the kind were to be not only of the best quality in the market, but clean and fit for immediate use. In case of failure or deficiency in quantity or quality delivered, power was vested by the contract in the assistant quartermaster or his successor to supply the deficiency by purchase in open market; and the contract provides that the contractors shall pay the difference in cost in gold coin, or its equivalent in legal-tender notes.

Public contractors of the kind are required to give bond with sureties to the United States for the faithful performance of their contracts; and the declaration shows that the contractors in this case gave bond to the United States, with the other two defendants as sureties, in the sum of \$12,000, conditioned that if the contractors observe, perform, fulfil and keep the covenants and stipulations of their written agreement, the obligation shall be void; otherwise, to remain in full force and virtue.

Breaches of the conditions occurred, as the United States alleged, and they instituted the present action of debt on the bond against the principals and

their sureties. Distinct breaches of the agreement were assigned in the declaration, as fully appears in the record. Service was made, and the defendants appeared and filed an answer, setting forth the following defenses: 1. They deny all and singular the allegations of the declaration. 2. That at the close of December, 1870, there was due and owing to the contractors under the agreement the sum of \$1,476.43, for supplies furnished and accepted by the commanding officers at the respective places of delivery. 3. That the contractors up to that time and during that month had delivered all such quantities and proportions of forage and straw as were required by the assistant quartermaster, and of the best quality in the market. 4. That the assistant quartermaster during the whole of that time had funds on hand to pay and discharge the full amount due to the contractors, as contemplated by the agreement. 5. That the quartermaster wrongfully refused to pay the amount due and owing to the contractors or any part thereof. 6. That the contractors, in consequence of such wrongful refusal and neglect to pay and discharge the amount due and owing to them, on the 3d of January, 1871, personally notified the assistant quartermaster that they elected to treat the agreement as rescinded and abandoned, and that they did not intend to furnish any more supplies under the same.

Subsequently the parties went to trial, and the verdict and judgment were for the plaintiffs in the sum of \$2,615.40. Exceptions were duly filed by the defendants, and they sued out a writ of error and removed the cause into this court. Since the case was entered here the defendants below have filed a brief as required by the rules of the court; but it does not contain either a statement of the case or an assignment of errors. Such a party, under such circumstances, is not entitled to be heard; but inasmuch as the plaintiffs below have filed a printed brief in the case, without objecting that the defendants have not complied with the twenty-first rule, the court will proceed to examine the questions presented in the bill of exceptions exhibited in the record. Sufficient appears there to show that the plaintiffs offered the described agreement in evidence to sustain the issues on their part, and that the defendants objected to the introduction of the same, insisting that the agreement was not mutually obligatory, that it was given without consideration, and that it was inoperative and void; but the court overruled the objection, and the agreement was read in evidence to the jury.

Evidence was also introduced by the plaintiffs to prove the quantity and value of the grain, forage and straw bought in open market by the plaintiffs, by reason of the failure of the defendants to deliver the quantity and quality which they agreed to furnish, in order to show the difference between the contract price and the price paid by the plaintiffs in the open market, and the consequent loss to the plaintiffs, as alleged in their complaint. Inquiries were made of the witness as to the quantities and qualities of the supplies so purchased in behalf of the plaintiffs during the three months next following the time of the attempted rescission of the agreement by the defendants, and the witness gave the price paid for each parcel, and added that the prices paid were the regular market prices in gold coin, and perhaps a little less than he charged to other customers. He stated, on cross-examination, that sometimes when he did not have the supplies wanted on hand he went out and purchased what was necessary to fill the order, and that he usually filled the orders on the same or the following day.

Without entering fully into the details of the testimony it is proper to remark

that he testified that he furnished sixty-nine thousand and eight pounds of oats, seventy-seven thousand five hundred and eighteen pounds of hay, and twenty-five thousand seven hundred and eighty-nine pounds of straw before the month closed in which the defendants gave the notice of their intention to rescind the contract. In the course of his examination-in-chief the witness gave the name of a firm of whom he bought some hay to fill some one of the orders, and the defendants inquired of whom he purchased the quantity of oats charged to the United States in his account; to which interrogation the plaintiffs objected, and the court sustained the objection and excluded the question.

Due exceptions were taken to the preceding rulings, and the defendants asked the witness if he did not commute with some of the subordinate officers for some portion of the forage to which they were entitled, paying them in money instead of forage, grain or straw; and, if so, he was asked to state what quantity of such supplies were charged on his books during those three months as having been purchased in open market which were not so purchased, but were commuted by the witness with the officers, paying them money instead of delivering the required supplies; to which the witness replied that he could tell by looking at his books. He was then requested by the defendants to look at his books and to state what amount of such supplies within that period was charged by him which was not purchased in open market and delivered to the United States. Prompt objection was made to the question as irrelevant and immaterial, and it was excluded by the court.

Testimony, undisputed and uncontradicted, was introduced, showing that during the first six months of the year the quartermaster's requisitions for oats, barley, hay and straw for the military posts named in the agreement were not in excess of the quantity prescribed by law, nor in excess of the quantity required in the requisitions and estimates of the post quartermasters, and that the United States paid for the quantity estimated in such requisitions and no more, and that such payments were only made after receipts and vouchers were received from the proper officer at the military post showing to the satisfaction of the quartermaster that the requisition had been filled as in the ordinary and usual course of business of the quartermaster's office.

Enough has already been remarked to show that the action is an action of debt founded on the bond given by the defendants to secure the faithful performance of covenants contained in their previously described written agreement. Reference has already been made to all the exceptions taken by the defendants to the rulings of the court during the trial before the jury; but it is also objected in argument here that the bond described in the complaint was not produced at the trial, and that no copy of it was ever filed in the case. Such an objection, if it had been made in the court below, might have been available for the defendants, unless the plaintiffs had overcome it by producing the instrument, or by showing its loss and due search for it without success, and had offered secondary proof of its contents. Parol proof of the contents of a lost instrument of the kind is admissible, provided it appear that proper search has been made for it without success. Had the defendants intended to insist that the bond should be given in evidence, they should have made that intention known at the trial; and, if not given in evidence, they might have requested the court to direct a verdict in their favor, and, in case their request had been refused, they would have had the right to except to the ruling of the court in refusing their request for instruction. Nothing of the kind was done; and, for aught that appears in the record, it may be that the bond was given

in evidence, or, if not, that the defendants waived the right to require its production.

§ 336. *What errors may be examined on writ of error.*

Errors apparent in the record, though not presented by a bill of exceptions, may be re-examined by writ of error in an appellate tribunal; but alleged errors, not presented by a bill of exceptions, nor apparent on the face of the record, are not the proper subjects of re-examination by writ of error in this court. Parties dissatisfied with the ruling of a subordinate court, and intending to seek a revision of the same in the appellate court, must take care to raise the questions to be re-examined, and must see to it that the questions are made to appear in the record; for nothing is error in law except what is apparent on the face of the record by bill of exceptions, or an agreed statement of facts, or in some one of the methods known to the practice of courts of error for the accomplishment of that object. *Suydam v. Williamson*, 20 How., 433; *Garland v. Davis*, 4 id., 131; *Steph. on Plead.*, 121; *Slacum v. Pomery*, 6 Cranch, 221; *Strother v. Hutchinson*, 4 Bing. N. C., 83.

Two additional remarks should be made respecting the written agreement before proceeding to examine the questions presented in the bill of exceptions: 1. That it was duly executed by the assistant quartermaster and the contractors, under the hand and seal of the respective parties. 2. That it contains the provision that it "may be terminated at such time as the quartermaster-general may direct," and that it is made subject to the approval of the department and division commanders.

Substantial breaches of the covenants of the agreement having occurred, the United States brought suit on the bond given to secure its faithful performance; and, when the United States offered the agreement in evidence to support the issues on their part, the defendants objected to its admissibility, insisting that it is a *nudum pactum*; that it appears on its face that it might have been terminated at any time at the election of the plaintiffs; that it is not mutually binding, and that, inasmuch as it is wanting in that respect, it is without consideration, and is inoperative and void. Though no such error is assigned in this court, still it is obvious from the course of the argument exhibited in the brief that the defendants intend to maintain the same proposition in this court. Attempt was not made to invalidate the bond in that respect in the court below, nor is any such attempt made here by the defendants. What they do attempt to show is, that the agreement is inoperative, because it contains the provision that it may be terminated at such time as the quartermaster-general may direct, and in consequence of the provision that it is made subject to the approval of the department and division commanders.

§ 337. *A party who has received consideration cannot be heard to say that the opposite party was not bound to perform.*

Beyond doubt, the written agreement went into operation; and it is not even suggested that the department and division commanders ever expressed any disapproval of its terms and conditions, nor does the record furnish any evidence to raise a doubt that it was fully approved by all whose assent was necessary to give it a binding obligation. Suppose it to be true that the quartermaster-general might terminate it, if he should see fit, it is a sufficient answer to the suggestion to say that he never did interfere in the matter, and that the contract continued in full force and operation throughout the whole period for which the necessary supplies were purchased by the United States in open market. Where the defendant has actually received the consideration

of a written agreement, it is no answer to an action brought against him for a breach of his covenants in the same to say that the agreement did not bind the plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have in fact been performed in good faith, and without prejudice to the defendant. Addison on Contr. (6th ed.), 15; *Morton v. Burn*, 7 Ad. & Ell., 25.

Agreements are frequently made which are not, in a certain sense, binding on both sides at the time when executed, and in which the whole duty to be performed rests primarily with one of the contracting parties. Contracts of guaranty may fall under that class, as when a person solicits another to employ a particular individual as his agent for a specified period, and engages that, if the person addressed will do so, he, the applicant, will be responsible for the moneys the agent shall receive and neglect to pay over during that time. The party indemnified in such a case is not bound to employ the party designated by the guarantor; but, if he do employ him in pursuance of the promise, the guaranty attaches and becomes binding on the party who gave it. *Kennaway v. Trelocavan*, 5 Mees. & W., 501.

Cases often arise where the agreement consists of mutual promises, the one promise being the consideration for the other; and it has never been seriously questioned that such an agreement is valid, and that the parties are bound to fulfil their respective stipulations. *Miles v. Blackall*, 11 Ad. & Ell. (N. S.), 365; *Emerson v. Slater*, 22 How., 35. Such a defense could not be sustained, even if the action was upon a simple contract; but the agreement here is under seal, and the action is an action of debt founded on the bond given to secure the performance of the agreement; and it is an elementary rule that a bond or other specialty is presumed to have been made upon good consideration, so long as the instrument remains unimpeached. *Taylor*, Evid. (6th ed.), 103; *Lowe v. Peers*, 4 Burr., 2225; *Dorr v. Munsell*, 13 Johns., 431. Want of consideration is not a sufficient answer to an action on a sealed instrument. The seal imports a consideration, or renders proof of consideration unnecessary; because the instrument binds the parties by force of the natural presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause. *Parker v. Parmele*, 20 Johns., 134; 1 Smith, Lead. Cas. (7th Am. ed.), 698; 1 Chitty on Contr. (11th Am. ed.), 20; *Paige v. Parker*, 8 Gray, 213; *Wing v. Chase*, 35 Me., 265; 2 Bl. Com., 446; *Fallowes v. Taylor*, 7 Term R., 473.

§ 338. *Questions propounded to a witness merely to ascertain the names of persons desired to be called to disprove the case of the opposite party may be excluded.*

Seasonable exception was taken by the defendants to the ruling of the court excluding the question propounded to the witness called by the plaintiffs, of whom he purchased the quantity of oats which he furnished to the United States. Three grounds are suggested to show that the defendants were entitled to have an answer: 1. That the answer might have affected the credibility of the witness. 2. That the defendants, if the name of the seller of the oats had been given, might have called him as a witness, and perhaps might have proved by him that the price paid was not as great as represented, or that a less quantity than that charged had been delivered. 3. That the answer might have shown that persons had an interest in the sale of the oats who are prohibited by the contract from having any share in furnishing such supplies. None of the reasons assigned to support the exception are entitled to any

weight when considered in connection with the explanations given in the bill of exceptions. Evidence of an undisputed character had previously been introduced, showing that the requisitions for such supplies were not in excess of the quantity prescribed by law, and that the United States did not purchase and pay for any greater quantity than that specified in the requisitions, and that the purchases were made in the open market, and that the prices paid did not exceed the fair market value of supplies purchased.

§ 339. *Discretion of courts in allowing questions calculated to affect the credibility of a witness.*

Litigants ought to prepare their cases for trial before the jury is impaneled and sworn; and, if they do not, they cannot complain if the court excludes questions propounded merely to ascertain the names of persons whom they may desire to call as witnesses to disprove the case of the opposite party. Courts usually allow questions to be put to a witness to affect his credibility, but it is plainly within the discretion of the presiding judge to determine whether, in view of the evidence previously introduced and of the nature of the testimony given by the witness in his examination in chief, it is fit and proper that questions of the kind should be overruled and to what extent such a cross-examination shall be allowed. *Sturgis v. Robbins*, 62 Me., 293; *Prescott v. Ward*, 10 Allen, 209; *Wroe v. State*, 20 Ohio St., 460; 1 Greenl. Ev., § 449.

Purchases to supply deficiency arising from the failure of the contractors to perform their contract were required to be made in open market, in order to ascertain the excess of cost, if any, beyond the contract price; and the bill of exceptions shows that the evidence to prove that the purchases made by the United States were so made was undisputed and uncontradicted. Still, the defendants asked the witness called to prove those facts whether he did not commute with some of the subordinate officers for a portion of the forage to which they were entitled, instead of delivering the same to such subordinate officers, to which no direct answer was given; but when the witness was asked if he could state what quantity of such supplies were charged on his books as delivered, which was adjusted by commuting the same with the subordinate officers, he answered that he could by looking at his books. Prior to that the witness had stated that the prices charged were regular market prices in gold coin, which is in strict conformity to the terms of the agreement; but the defendants requested the witness to examine his books and to state what the amount was which had been commuted; to which interrogatory the plaintiffs objected and the court excluded the question.

§ 340. *Evidence — what questions may be excluded.*

Interrogatories calling for immaterial testimony may be excluded in the discretion of the court, as shown by the authorities to which reference has previously been made. Doubt upon that subject cannot be entertained, and it is equally certain that it is error to exclude a question, proper in form, which calls for evidence material to the issue. Difficulty frequently arises in determining whether a particular question falls within the one or the other of these categories, and in solving that doubt it often becomes necessary, especially in an appellate court, to ascertain what the state of the case was when the question was propounded, and what the effect of the evidence would have been if it had been admitted.

No attempt is made to impeach the fairness of the requisitions made by the quartermaster, or to show that they were greater than the public service required; nor is it contended that the prices paid to supply the deficiencies were

higher than the regular market prices in gold coin. What the defendants suggest is that the agent employed to provide and deliver the deficiency paid some of the subordinate officers in money, instead of delivering the required amount of forage and grain, as he should have done. Both the agent and the subordinate officers in question agreed to the commutation; nor is it suggested that the quartermaster approved the commutation, or that he had any knowledge of the irregular transaction of the agent. Proper charges were made by the agent, and the same were duly paid by the proper disbursing officer. Viewed in the light of these suggestions it is clear that no injury resulted to the contractors. They did not suffer by the irregularity, nor is it perceived that it is a matter with which they have any concern, and it certainly furnishes no grounds for reversing the judgment.

Judgment affirmed.

PHILPOT v. GRUNINGER.

(14 Wallace, 570-578. 1871.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—Action on a negotiable note for \$3,000, made by plaintiffs in their firm name. The defense was a total and also a partial failure of consideration. In October, 1864, Lawrence Gruninger, the testator of the defendant in error, sold to Philpot and one Picket his interest in a certain oil well, "on lot 15 on the Smith farm," and also his interest in a well on "the Blood farm." In the following April, Philpot, Sherman & Co., and others, agreed to put certain interests in lands and oil wells into a concern to form a stock company, and May 6th, of the same year, the date of the note in suit, Gruninger added to the agreement above mentioned this memorandum: "May 6, 1865. It is agreed this day that Lawrence Gruninger is to put into the company one-half the working interest of 'lot 11 on Smith's farm,'" etc. On the same day Gruninger sold to P., S. & Co. one-eighth of the working interest of well No. 2, lot 7, on the Blood farm, being an interest in a different well from that sold to Philpot and Picket, as above stated.

At the trial below Philpot claimed that the note in suit was given to Gruninger in consideration of the agreement by him that he would become a member of the proposed stock company, and put certain property into it; and also that he would transfer to them his interest in well No. 2, on the Blood farm, which agreements he had failed to perform. Gruninger claimed that the note was given in consideration of the transactions of the previous October in settlement of an existing debt. Judgment was given for Gruninger, and Philpot appealed.

Opinion by MR. JUSTICE STRONG.

That a part of the consideration of the note was the debt due for the oil well which Gruninger had sold six months before to Philpot and Picket, or that the note was intended as an adjustment of that debt, is but faintly denied; but the plaintiffs in error insist that a part at least of the consideration was the agreement of the promisee to contribute to the formation of the proposed company, an agreement which they allege he has failed to perform; and they complain that the jury were misled by an instruction that they might consider whether the signing of the agreement, or the undertaking of Gruninger to put into the company the interests mentioned, was anything more than an inducement to the making of the note by the defendants, furnishing a motive for

giving it, but constituting no part of the consideration. It is, however, not easy to see how the jury could have been misled, to the injury of the plaintiffs in error, by calling attention to a possible distinction between the motive which may have induced giving the note and its consideration, even if no such distinction can be made. For if it be assumed, as was claimed, that the promisee's undertaking to unite in the formation of a joint stock company was a part of the consideration, it could not aid the promisors. It would not be a step toward showing that the consideration had failed. Gruninger's neglect or refusal to perform his agreement is not to be confounded with the agreement itself. The latter was the consideration, not its performance. He might be answerable in damages for non-performance, but his undertaking to perform would have been the price of the defendants' promise. That undertaking they still have, and with it the full consideration.

§ 341. *A promise is a good consideration for a promise.*

Nothing is more common than a promise in consideration of a promise, and the defendants' pleas in this case aver that Gruninger's undertaking was the price of their stipulation. Were it then conceded, as the defendants claimed, the jury would not have been warranted in finding that the consideration of the note had failed.

§ 342. *Distinction between "motive" and "consideration."*

It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is "the cause or meritorious occasion requiring a mutual recompense in fact or in law." Dyer, 306b. Surely a creditor may do a favor to his debtor, or may enter into a new and independent contract with him, induced by which the debtor may assent to giving a note for the previously-existing indebtedness. Without the favor or the new contract there is in such a case a full consideration for the note, and the parties may not have contemplated that the favor or the new contract was to be paid for. To regard them as entering into the consideration of the note would be to make a contract for the parties to which their minds never assented.

§ 343. *A consideration moving to one co-promisor will support the promise of all.*

It is argued that if Sherman did not owe the debt due from Philpot and Picket to Gruninger (as the jury might have found), there was no motive or inducement, much less even consideration, for his becoming a joint promisor in the note, unless it was Gruninger's agreement, and hence it is inferred that the jury were misled in being allowed to consider that agreement as merely a motive or inducement to his assumption. But he was then a partner of Philpot and Picket, and a joint owner with them of the property for which the debt had been contracted. A consideration moving to his co-promisors was enough to support his promise. The note was given for a smaller sum than the price for which the property had been sold to them. It was accepted as a settlement of the promisee's claim, and a conveyance of the property was made to all the defendants, including Sherman. There was, then, adequate consideration for his promise apart from Gruninger's agreement to put other property into the proposed company. For these reasons, we think, there was no error in the instructions given by the court to the jury.

§ 344. *Date of partnership articles alone is insufficient to prove the time of commencement of firm liability.*

The second assignment is that the court erred in excluding articles of copartnership between the defendants, dated November 8, 1864. They were offered to show that the partnership did not commence until after the sale of the oil well was made to Philpot and Picket, which was on the 19th of October, 1864, and therefore that Sherman was not a debtor to Gruninger at that time or when the note was afterwards given. The proposed evidence seems to have been intended to show that the debt due for the well was not the consideration of Sherman's promise, and to raise the inference that Gruninger's agreement to join in forming the stock company was. We have already considered that, and from what we have said it appears that the rejection of the evidence did not injure the defendants. That there was error in the rejection has not been seriously contended.

Judgment is affirmed.

GREEN v. COLLINS.

(Circuit Court for Massachusetts: 8 Clifford, 494-507. 1871.)

STATEMENT OF FACTS.—Plaintiffs, being citizens of Rhode Island, sold a lot of liquors to defendant, a citizen of Massachusetts. The sale was made on a credit of thirty days, and defendant failing to pay this suit was brought. It appeared that plaintiffs, who were wholesale dealers in liquors, duly licensed, sold the goods in question in the ordinary course of their trade, and shipped them into Massachusetts in pursuance of the instructions of defendant. It further appeared that the sale of ardent spirits was at that time lawful in Rhode Island and illegal in Massachusetts.

§ 345. *Errors of the court in refusing instructions may be revised on motion for new trial.*

Opinion by CLIFFORD, J.

Errors of the court in improperly refusing to instruct the jury, as requested by either party, may be corrected on motion for new trial, as well as errors committed in rejecting proper testimony, or in admitting that which was improper, or in giving erroneous instructions to the jury. Certain prayers for instructions to the jury were presented in this case by the defendant, and the court refused to instruct the jury as he requested; and the verdict of the jury having been for the plaintiff, the defendant moved the court that it be set aside, and for a new trial, upon the ground that the prayers for instructions were improperly refused.

§ 346. *General Statutes of Massachusetts prohibiting traffic in intoxicating liquors and invalidating contracts made upon consideration of their sale.*

Provision was made by section 61 of chapter 86, Gen. Stat. Mass., that all payments or compensations for spirituous or intoxicating liquors sold in violation of law shall be held to have been received without consideration, and against law, equity and good conscience. No action of any kind, it is also therein provided, shall be had or maintained in any court for the price of any liquors sold in any other state for the purpose of being brought into this commonwealth, to be here kept or sold in violation of law, under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained any such illegal purpose. Gen. Stat. Mass., p. 448. Whether the

plaintiffs knew or had reasonable cause to believe that the defendant purchased the liquors with the intention of transporting the same into this state, "to be here kept or sold in violation of law," was a matter in issue between the parties at the trial, and there was some evidence introduced on both sides of the question. Strong doubts were entertained by the court whether the affirmative of the issue was proved; but it must be assumed, for the purpose of this investigation, that the evidence was sufficient to warrant the jury in finding the issue for the defendant. Conceded, as the fact is, that the contract of sale and purchase was valid at the place where it was made, it is unnecessary to enter into any inquiry or discussion upon that subject; and the plaintiffs contend, inasmuch as the sale of the liquors was valid where it was made, that the evidence introduced by the defendant is not an answer to the action, even if it does show that they had knowledge at that time that he intended to remove the liquors into this state, to be kept and sold in violation of the law of the state. Both the manufacture for sale and the sale of spirituous or intoxicating liquor, or of mixed liquor, part of which was spirituous or intoxicating, were at that time prohibited in this state by section 28 of chapter 61 of the General Statutes of the state; and section 30 provided that whoever sold such liquor in violation of the provisions of that chapter should pay \$10 for the first offense, and be imprisoned not less than twenty nor more than thirty days. Gen. Stat. Mass., 442. Such prohibition was also extended, by section 37 of the act, to the bringing of any spirituous or intoxicating liquor into the state, or to the conveying the same from place to place within the state, with intent to sell the same, or have it sold by another, and the person who did those acts was declared to be liable to the prescribed penalty and punishment if he had reasonable cause to believe that the liquor was intended to be sold in violation of that chapter. Nothing of the kind was done by the plaintiffs, but the defendant contends that they are not entitled to any remedy in the circuit court, sitting in this district, because they knew, or had reasonable cause to believe, at the time they sold the liquors, that he, the defendant, intended to transport the same into this state, to be here kept and sold in violation of that enactment of the state legislature. Stated as above, the proposition is not in the precise language of the prayer for instruction; but it is not contended that the prayer for instruction meant anything more than the proposition, as the sale was an absolute one, and it is not pretended that there was any arrangement between the parties as to the place where the liquors should be sold.

§ 347. *By what law the validity of a contract is determined.*

Generally speaking, the validity of a contract is to be decided by the law of the place where it was made, unless it was agreed, either expressly or tacitly, that it should be performed in some other place, and then the general rule is that the contract, "as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance." Story on Conf. of L., §§ 242, 280; *United States Bank v. Donnelly*, 8 Pet., 372; *Wilcox v. Hunt*, 13 Pet., 379; *Andrews v. Pond*, 13 Pet., 65; *Don v. Lippmann*, 5 Cl. & F., 13; *Fergusson v. Fyffe*, 8 Cl. & F., 121. Contracts valid by the law of the place where they are made are generally valid everywhere *jure gentium*, and by tacit assent. 2 Kent, Com. (ed. 1866), 454. Remedies, therefore, are the same whether the suit is brought in the district where the contract was made, or in another district of the same circuit, or in any other federal court having jurisdiction of the parties and of the subject-matter in controversy.

§ 348. *A vendor usually can sue in contract for the price of goods sold, although he knew at the time of sale that the goods were to be used for an illegal purpose.*

Viewed in the light of these several suggestions, the principal question presented is whether the evidence which shows that the plaintiffs knew, or had reasonable cause to believe, that the defendant, at the time of the sale, intended to transport the liquors into this state, to be here kept and sold in violation of the law of the state then in force and unrepealed at the time the suit was commenced, constituted a defense. Marked differences of opinion are observable in the determination of courts of justice in cases where the facts were in most respects the same as in the case before the court; but the better opinion appears to be that the mere knowledge by the vendor that the vendee at the time of the purchase of property intends to use it for an illegal purpose, will not, as a general rule, prevent the vendor from recovering from the vendee the value of the property.

§ 349. — *exceptions to the rule.*

Exceptional cases may arise in which a different rule must be applied, as where the property purchased is intended for treasonable purposes, or to commit murder, or to promote some other offense of such enormity, and so violative of the fundamental laws of society, that silence on the part of the citizen is itself a crime, or would be evidence tending to show that the seller was an accessory before the fact to the commission of the offense. Many cases may doubtless be cited where it is held that a contract cannot be enforced which contemplates what the law forbids, whether the act forbidden be *malum in se* or only *malum prohibitum*, but those cases do not apply to a contract of sale which is valid by the law of the place where it is made, and where the only circumstance imputed as affecting its validity is the mere fact that the seller knew, or had reason to believe, that the purchaser intended to remove the property purchased into another jurisdiction, and to sell it there in violation of the law of that jurisdiction. *United States Bank v. Owens*, 2 Pet., 527; *Harris v. Rannels*, 12 How., 79 (§§ 452-456, *infra*); *Kennett v. Chambers*, 14 How., 38. Such exceptional cases may doubtless arise, but the general rule, and the one by which this case must be governed, is that in an action to recover the price of goods sold, it is no defense that the vendor knew that they were purchased to be sold in another jurisdiction, in violation of the law of that jurisdiction, provided it was not a part of the contract that they should be used for that purpose, and provided, also, that the vendor neither did nor agreed to do anything in aid or furtherance of the unlawful design, beyond the mere sale, with knowledge of the intent of the purchaser. *Tracy v. Talmage*, 14 N. Y., 167-210; *Curtis v. Leavitt*, 15 N. Y., 15-47.

§ 350. *Contracts in fraud of the laws of a state are invalid everywhere.*

Contracts made in evasion or fraud of the laws of another state are invalid everywhere in our courts, as if a contract is made to transport spirituous or intoxicating liquors not entitled to protection as an imported article, in the original package, from one state into another in violation of the laws of the latter state, every such contract is void, even in the state where it was made, whether the sale is there prohibited or not; but the mere knowledge of the illegal purpose for which the goods are purchased will not have any such effect upon the contract of sale, as between the purchaser and the seller. *Story, Conf. of L.*, § 253. Sales under the circumstances last suggested, and contracts, are valid, but if it enters at all as an ingredient into the contract between the

parties, that the goods shall be so transported to another state, and there be sold in violation of the law of that state, or that the seller shall do some act to assist or facilitate the illegal intention of the purchaser, such as packing the liquors in a way to conceal their character, or any other act to promote the illegal design of the purchaser, then the seller will be deemed a participant in the illegal transaction, and the contract will not be enforced. *Waymell v. Reed*, 5 Term R., 599; *Lightfoot v. Tenant*, 1 Bos. & Pull., 551.

§ 351. *If a vendor participate in the violation of the law by the vendee the contract of sale is usually invalid. Examination of English authorities.*

Participation of the vendor in the illegal design, as a general rule, renders the sale invalid as between the seller and purchaser; but that principle, as exemplified in some of the cases, is extended quite as far as it ought to be carried; as, for example, it was held, in the case of *Langton v. Hughes*, 1 Maule & S., 593, that a person who sold drugs, well knowing that they were intended to be used in the brewing of beer, contrary to an act of parliament, might be said "to cause or procure, *quantum illo*, the drugs to be mixed," and used for that purpose. Much reason exists for supposing that the inference in that case was extended beyond what is authorized from the fact proved, but if not, then the decision was correct, because if it enters at all as an ingredient into the contract of sale that the seller shall do some act to assist or facilitate the illegal intention of the purchaser, the contract will not be enforced for his benefit. Public policy dictates that the law will not lend its aid to any party whose cause of action is founded upon an immoral or illegal act, and if the seller of goods, even in a state where the sale of such property is lawful, enters into an arrangement with the purchaser, as an ingredient of the contract of sale, that he will assist or facilitate the purchaser in selling the same in another state in violation of the law of that state, such a sale, as a general rule, is thereby rendered invalid, subject to certain exceptions which it is not important to notice in this investigation. Where the contract of sale is complete, and the seller has nothing to do with the disposition which the purchaser intends to make of the goods, Lord Mansfield held that the mere knowledge on the part of the seller that the purchaser intended to export them for sale in violation of the laws of the country where they were to be transported, would not debar the seller of his right of action to recover the value of the goods of the purchaser. *Holman v. Johnson*, Cowp., 341. Precisely the same point was ruled nearly forty years later in the case of *Hodgson v. Temple*, 5 Taunt., 181, where it was expressly held that a person who sells goods, knowing that the purchaser intends to apply them in an illegal trade, is nevertheless entitled to recover the price if he yields no other aid to the illegal transaction than that of selling and delivering the goods.

Certain cases decided between those dates are sometimes referred to as sustaining a more stringent rule, but it is clear that they rest upon the qualification plainly admitted and explicitly annexed to the principle advanced in those two cases, that is, the seller of the goods yielded or rendered some other aid to the illegal transaction than that of selling the goods. *Biggs v. Lawrence*, 3 Term R., 454; *Waymell v. Reed*, 5 Term R., 599; *Clugas v. Penaluna*, 4 Term R., 466. Where the seller takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, he must take the consequences of his own act; but Lord Abinger held, in the case of *Pellecat v. Angell*, 2 Crompt. M. R., 311, that "merely selling to a party who means to violate the laws of his own country" is not a bad contract.

§ 352. — *examination of American authorities.*

Exactly the same rule was laid down in the case of *McIntyre v. Parks*, 3 Metc., 207, where it was held that the sale of lottery tickets made in another state, where the sale was lawful, to a citizen of this state, is a lawful transaction, although the seller knew that the purchaser intended to sell the same in this state, where the sale was prohibited. But if the illegal use to be made of the goods enters into the contract, and forms the motive or inducement in the mind of the vendor to the sale, he cannot recover the price, provided the goods are actually used to carry out the illegal design. *Kreiss v. Seligman*, 8 Barb., 439. The express ruling of the supreme court of this state, in the case of *Dater v. Earl*, 3 Gray, 482, was to the same effect, where it was held that a sale of goods in another state, the seller knowing but not participating in the intent to sell them again in violation of the laws of that state, will support an action in this state for the price. Equally explicit, also, is the rule laid down by the highest judicial authority of certain other states. The price of goods sold and delivered in a state where such sale is legal, say the court in *Smith v. Godfrey*, 8 Fos., 379, can be recovered in another state where such sale would be illegal if nothing remained to be done by the vendor to complete the transaction, and the seller is not in any way to be further connected with it; but if it be an ingredient in the contract that the goods shall be illegally sold, or that the seller shall do any act to assist or facilitate the illegal sale, or if the goods are to be delivered in the place where the sale is prohibited, the rule is otherwise. *McConibe v. McMann*, 27 Vt., 95; *Backman v. Wright*, 27 id., 187; *Jameson v. Gregory*, 4 Metc. (Ky.), 363. Cases very nearly allied, it must be admitted, have been differently decided, but if they are carefully examined and compared one with another, the particular features by which they were distinguished are, with few exceptions, plainly to be seen.

Expressions are certainly to be found in the opinion of the court in the case of *Webster v. Munger*, 8 Gray, 587, which warrant the conclusion that the organ of the court on that occasion was of the opinion that a sale made with the knowledge of the seller that the purchaser intended to use the thing sold in violation of law was illegal, and irrespective of the question whether it was an ingredient of the contract that the goods should be so sold, or that the seller should do any act to assist or facilitate the intended illegal use or sale; but the expression of such views was not necessary to the discussion of the case, as the statement shows not merely that the plaintiff had knowledge of the illegal purpose of the defendant, but that he sold with reference to it, and for the purpose of enabling the purchaser to effect it; and the court here agrees with that court in the conclusion that the instructions given in that case, if viewed in that light, were "thoroughly sound in principle," and that they "do not conflict with the cases decided." Unless viewed in that light, the decision is directly opposed to the rule laid down in the case of *Sortwell v. Hughes*, 1 Curt., 245, decided by Judge Curtis, and which is an authority in this circuit, and, in the judgment of this court, expresses the true rule upon the subject. *Bligh v. James*, 6 Allen, 572.

§ 353. *No action can be maintained for the price of goods furnished to facilitate an immoral object.*

Reference is also made to the case of *Cannan v. Bryce*, 3 Barn. & Ald., 179, as opposed to that rule; but the court is of a different opinion, as the chief justice who gave the opinion says, in express terms, that he is "speaking of a case wherein the means were furnished with a full knowledge of the object to which

they were to be applied," and for "the express purpose of accomplishing that object." Even the price of goods furnished to facilitate an immoral object, it was at one time held, might be recovered of the purchaser, unless it appeared, among other things, that the seller expected to be paid from the profits of the immoral vocation; but since the decision in the case of *Pearce v. Brooks*, Law Rep., 1 Exch., 217, it must be regarded as well settled that no recovery can be had in such a case, if the goods were sold with the knowledge of the use to which they were to be applied, and that they were furnished to facilitate that object. *Bowry v. Bennet*, 1 Camp., 349.

Articles, either of equipage or dress, sold or rented to a female keeping a house of ill-fame for the purpose and of a character to enable her to make a display, will furnish no cause of action to the seller or lessor of the articles, as the act of supplying a female engaged in such immoral practices would warrant a jury in finding that the articles were intended to facilitate the objects of her vocation. Sales under such circumstances may well be presumed to have been made with the intent to facilitate the objects of the purchaser, and, if so, then the contract is clearly void, and it is upon that ground that the decision of the court is placed. Different rules also have sometimes been applied in the construction of contracts made for the sale of goods in one country which are intended to be exported and sold in another in violation of the revenue laws of the latter country, but it is unnecessary to enter that field of inquiry, as there is nothing in the case to raise any such question.

§ 354. — *further and different reasons for the decision in the case at bar.*

Suppose, however, that the legal conclusion here adopted cannot be sustained, still it is clear that the requested instructions were properly refused for other reasons, which will be briefly explained. Unsupported by any legislative provision, the objection to the ruling of the court in refusing to give the instructions would be without any foundation, but the argument is that the defense must prevail in this court because no such action could be maintained in the state court at the time this suit was commenced. Confessedly, no action of the kind could be maintained in the state court at that date, but the provision containing that prohibition, on the 22d day of May, 1868, was unconditionally repealed, and consequently at the time of the trial there was no such prohibition in the state law as is supposed. Sess. Acts Mass., 1868, p. 115. By the docket entries it appears that the parties went to trial on the 4th of June, 1869, and the record shows that the verdict was rendered for the plaintiffs on the following day. Before considering the effect of that repeal it should be repeated that the sale in this case was made in the state of Rhode Island, and that such a sale was valid by the law of that state, as expressly decided by the supreme court of this state. *Bligh v. James*, 5 Allen, 106; *Merchant v. Chapman*, 4 Allen, 362.

§ 355. *Effect of the repeal of a statute.*

When a statute is repealed, the general rule is that it must be considered the same as if it had never existed except as to such transactions as are past and closed, or such as are saved by the repealing statute. *Surtees v. Ellison*, 9 Barn. & Cress., 750; *S. C.*, 4 M. & R., 536; *Key v. Goodwin*, 4 Moore & P., 341. Authorities may certainly be cited which assert that the repeal of a prohibitory statute does not make valid a contract entered into in violation of the statute repealed, but that rule of law has no application to the case before the court, as the contract was made in a place where it was legal, and the only supposed obstacle to a recovery by the plaintiff is that clause of section 61 of

chapter 86 which provided that no action should be maintained in any court of the state for the price of any liquor sold in any other state, for the purpose of being brought here under the circumstances therein described. Attempt is made in argument to bring the case within the rule laid down in *Wright v. Oakley*, 5 Metc., 406, but the attempt is a vain one, as more than a year elapsed after the repeal of the first provision before the second was enacted. Sess. Acts Mass., 1869, p. 724; *Steamship Co. v. Jolliffe*, 2 Wall., 458. Certainly the power of the legislature to pass the repealing statute will not be questioned, as the defendant could not have any vested right to set up the defense that the plaintiff should not have a right of action to recover on a valid contract. *Satterlee v. Matthewson*, 2 Pet., 380; *Watson v. Mercer*, 8 Pet., 108; *Welch v. Wadsworth*, 30 Conn., 156; *Cooley's Con. Lim.*, 293; *Way v. Hillier*, 16 Ohio, 107; *Syracuse Bank v. Davis*, 16 Barb., 190; *Hepburn v. Curts*, 7 Watts, 300; *King v. Tirrell*, 2 Gray, 331; *Gerry v. Stoneham*, 1 Allen, 320; *Garfield v. Bemis*, 2 Allen, 447.

§ 356. *Effect of state statutes on rights of action in federal circuit courts.*

Satisfactory proof was introduced by the plaintiffs that they were duly licensed to sell such liquors at their place of business, and it being conceded that the contract was valid at the place where it was made, it is clear that the provision in question, even if unrepealed, could not have any effect in the circuit court to defeat the plaintiffs' right of action in this case, as they are citizens of another state. Doubts may at one time have existed upon the subject, but it is now well settled that a state law cannot discharge or suspend the obligation of a contract made in another state if it was legal where it was made and was a contract with a citizen of another state, not even if it was to be performed in the state whose law is invoked to defeat the remedy. *Baldwin v. Bank of Newbury*, 1 Wall., 236; *Demeritt v. Exchange Bank*, 20 Law Rep., 606; *Hunt v. Danforth*, 2 Curt., 604; *Suydam v. Broadnax*, 14 Pet., 74; *Union Bank v. Jolly*, 18 How., 503; *Watson v. Tarpley*, 18 How., 520; *Hyde v. Stone*, 20 How., 175.

Contracts are to be construed and carried into effect according to the intention of the parties thereto, and they are presumed to contract with reference to the law of the place where they reside and transact business, unless a different intention is manifest from the terms which they employ. *Judd v. Porter*, Greenl. R., 337. The law of the contract travels with it wherever the parties thereto are to be found, and into whatever forum resort is had for its enforcement. Motion for new trial overruled. Judgment on the verdict.

§ 357. *What constitutes a consideration.*—It is not necessary to constitute a consideration that some benefit accrues to the promisor, but it is sufficient if the person to whom the promise is made parts with something of value on the faith of such promise. *Violett v. Patton*, 5 Cr., 150.

§ 358. *Damage to the promisee — Benefit to promisor.*—The vice-president of a corporation requested L. to execute a *supersedeas* bond in a suit in which judgment had been rendered against the corporation, and promised to give him indemnity. Held, that though he had no personal interest in the suit, yet his promise was founded on a sufficient consideration. Damage to the promisee is as good a consideration as a benefit to the promisor. *Hendrick v. Lindsay*, 3 Otto, 143.

§ 359. *Hope of benefit a consideration.*—An expectation or hope of benefit, if it has an appreciable value, is a sufficient consideration to support a contract of sale. *Garrow v. Davis*,* 10 N. Y. Leg. Obs., 231.

§ 360. *Confederate treasury notes as a consideration.*—The formation of the so-called Confederate States was illegal, and treasury notes issued by it were illegal, and were not a valid consideration for any agreement. *Bank of Tennessee v. Union Bank of Louisiana*,* 2 Am. L. Rev., 348. *Contra*, *Planters' Bank v. Union Bank*, 16 Wall., 493.

§ 361. Notes of the Confederacy actually circulating and used as money at the time a contract was made are a valid consideration for the contract, and a subsequently adopted constitution declaring such contracts void is nugatory as impairing the obligation of a contract. *Delmas v. Insurance Co.*, 14 Wall., 665.

§ 362. Effect of inadequacy or inequality.— Mere inadequacy of consideration or other inequality in a contract is not *per se* a ground for avoiding it. If the parties to a contract are competent and willing to contract, they are the only proper judges of the motives or considerations operating upon them; and it would be productive of the worst consequences if, under pretext, however specious, interests or dispositions subsequently arising could be made to bear upon acts deliberately performed and which had become the foundation of important rights in others. Courts act upon the ground that every person who is not, from his peculiar condition or circumstances, under a disability, is entitled to dispose of his property in such a manner and upon such terms as he chooses, and whether his bargains are wise and discreet, or otherwise, profitable or unprofitable, are not considerations for courts of justice, but for the party himself, to deliberate upon. *Eyre v. Potter*, 15 How., 59.

§ 363. Reciprocity of benefit—Performance of impossibility.— The following contract was entered into: "In consideration of C. entering" a certain tract of land described, "I bind myself that the said eighty acres of land shall sell, on or before the 1st of October next, for \$200 or more, and the said C. agrees to give me one-half of the amount over \$200 said land may sell for in consideration of my warranty. H." "I agree to the above contract. C." *Held*, that the contract was not obligatory on either party; that there was no reciprocity of benefit, and that under it the defendant H. was bound to the performance of a legal impossibility so palpable to the contracting parties that it could not have been seriously intended by the parties to be obligatory on either. It seems that if the contract had been that the land would be worth \$200 on the given day, an action could have been maintained on it. *Stevens v. Coon*,* 1 Pin. (Wis.), 358.

§ 364. Bond for title, where the other party was not obliged to buy.— A suit was brought to enforce the specific performance of a bond for title, whereby the obligors undertook to convey a part of a mine on certain payments being made within a certain time. Before the expiration of the time the property was sold to other parties. It appears, also, that there was no agreement on the part of the plaintiffs to buy the property. *Held*, that the bond was without consideration. *Smith v. Reynolds*,* 8 McC., 157; 8 Fed. R., 697.

§ 365. Where there is a promise to sell, but no promise to buy, there is no contract. It is a promise without a consideration. So where the obligors in a title bond agreed to convey certain property within a certain time if certain payments were made, but the obligees did not agree to buy the property, and no payment was ever made, it was held that there was no contract. *Ibid*.

§ 366. But it seems that if the seller, while it is still within his power to sell, accepts the money, or some part of it, he is bound to make the conveyance. *Ibid*.

§ 367. Advances— Promise to convey property as security— Present consideration.— Where advances are made under an agreement that certain specific property shall be conveyed, and the conveyance is made within a reasonable time thereafter, the advances will be considered as a present consideration; but it seems that a general promise to convey certain property as security for advances, without specifying the property, is not binding, and that advances, when so made, constitute an antecedent debt. *Gatman v. Honea*,* 12 N. B. R., 495.

§ 368. Oral promise to pay check— No funds.— The oral promise of a bank to pay a check drawn upon it by B. — who then had no funds there on deposit— provided plaintiff would present said check through the clearing house, is a promise without consideration. *Morse v. Massachusetts National Bank*, 1 Holmes, 209 (§§ 1780-84).

§ 369. Promise by maker of note to pay indorser.— The payee of a note indorsed it, and the note being dishonored he was charged as indorser and paid the note. The maker, in consideration of the premises, promised to pay the payee the amount of the note and the costs of protest. *Held*, that the promise was sufficient to support *assumpsit* for the amount. *Morgan v. Reintzel*, 7 Cr., 275.

§ 370. Note given for the price of land which was not conveyed according to contract.— A. contracted for the purchase of certain land from B., and agreed to deposit his note for the purchase price with C., to be held in escrow till the deed for the land should be also delivered in escrow to C. for A. B. delivered a deed, but not for the lands mentioned in the contract. C. did not deliver the note, but B. brought suit upon it. *Held*, that there was no consideration for the note and no delivery, because C. was not the agent of B. to hold the note, and would not become so until such a deed was delivered as the contract called for. *Glover v. Chase*,* 11 Fed. R., 875.

§ 371. Confession of judgment— Promise to levy execution against another— Consideration.— A bank which was the indorsee of a note persuaded the indorser to confess judgment.

ment on the note, and promised her that, if she did so, it would levy execution against the maker, who it assured her was solvent. There was, at the time, grave doubt on the part of the bank whether a suit could be maintained against the indorser, on account of defective notice. *Held*, that there was a good consideration on the part of the bank for its promise, even though it was subsequently ascertained that the notice was good and the suit would have been maintainable. *Union Bank of Georgetown v. Geary*, 5 Pet., 114.

§ 872. Performance of consideration.—An executory contract for a release is of no force till the consideration is fully performed. *City of Memphis v. Brown*, 20 Wall., 806.

§ 873. Must be legal.—The consideration connected with any agreement must be legal or it cannot be enforced in equity. *Tufts v. Tufts*, 8 Woodb. & M., 461.

§ 874. Illegal consideration expressed—Instrument void.—It seems that where an illegal consideration is expressed upon the face of a written instrument it renders the instrument void. *Greathouse v. Dunlap*, 3 McL., 318.

§ 875. Collateral undertaking, consideration for.—An undertaking by a third party, collateral to the original engagement of the parties, entered into after such original engagement, must have some other consideration to support it than the consideration of the original contract, and it seems that it must be in writing. *Rabaud v. D'Wolf*, 1 Paine, 591.

§ 876. Consideration supporting suretyship.—If a person becomes a surety before the consideration for the contract becomes past and executed, there is no necessity for a consideration from the obligor to the surety. It is one entire and original transaction, and the consideration which would support the contract of the principal would support the contract of the sureties. *United States v. Linn*, 15 Pet., 814.

§ 877. Bond of public officer, consideration for.—In the case of the bond of a public officer, the appointment to office is not the consideration, but it is the emoluments and benefits resulting therefrom, and therefore a bond entered into during the term of office is for a present and continuing consideration. *Ibid*.

§ 878. Importing a consideration.—Every contract which is legal on its face, and imports a consideration, is supposed to be entered into on a valid consideration and to be obligatory till the contrary is shown, if the parties are ostensibly competent to contract. *United States v. Maurice*, 2 Marsh., 112.

2. What is Sufficient.

SUMMARY — *Agreement to bid at a judicial sale*, § 879.—*Subscription*, § 890.

§ 879. Plaintiff had a claim against one C. and against defendant. The latter promised plaintiff that if he would sue C., obtain judgment, and sell certain property of C.'s, he (defendant) would bid for it the amount of the claim; and he further promised to pay certain taxes and premiums of insurance upon the property. *Held*, that there was good consideration for defendant's promise. *Hopcock v. Wicker*, §§ 881, 882.

§ 880. C. subscribed \$2,000 in November, 1866, towards an endowment fund for Denison University, and gave his note, which was taken in payment. In January, 1872, C. subscribed \$500 in addition, paying \$100 in cash. In March, 1872, C. borrowed \$7,500 of the university, and gave a mortgage to secure it. Of this amount \$2,052 was the amount due on his first note of \$2,000, \$400 was the balance due on his second subscription, and the rest was advanced in cash by the university. *Held*, that there was consideration for the notes and promises given by C., and that the university was entitled to prove its claim as against C.'s assignee in insolvency. *Sturges v. Colby*, § 883.

[NOTES.—See §§ 834-409.]

HOPPOCK v. WICKER.

(Circuit Court for Illinois: 4 Bissell, 469-471. 1866.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—The substantial ground of the action in this case is that the plaintiff had a claim consisting of a debt or demand, as alleged in the declaration, against J. P. Chapin & Co., and against the defendant, for the rent of divers lots of land in the county of Fulton, which claim amounted to sixteen or seventeen hundred dollars, and that the defendant promised the plaintiff that if he would bring suit or suits against J. P. Chapin & Co., and obtain a judgment against them, and offer for sale certain property, he would bid for that property the amount of the claim; and the declaration further avers that he promised to pay the taxes on the property and the premium for the renewal of

two policies of insurance which were then held; and that the plaintiff, relying upon this promise of the defendant, commenced suits against J. P. Chapin & Co. for this claim, and recovered judgment against them for the amount; that execution was taken out and levied upon the property, and that it was offered for sale and defendant was notified and had due notice of all these facts, and was requested to comply with his promise and undertaking, by bidding the amount of the judgment or claim; that he failed to do this, by which the plaintiff has sustained damage. This is substantially the ground of the action set forth in the declaration.

§ 381. *A promise by a joint debtor, that if the creditor will sue the co-debtor and obtain judgment he will bid on the property offered for sale, is supported by a good consideration.*

Objection is taken that it is not a good and valid consideration upon which a promise was binding. I am inclined to think that it is. The allegation is that there was a claim against defendant and Chapin & Co., and in consequence of there being this claim, and if the plaintiff would prosecute it to judgment, that the defendant would come in and make these bids. It is unnecessary that the declaration should allege that it was a valid or legal claim against the defendant. It is sufficient that there was a claim against him and others, and that he apparently desired this claim to be prosecuted against the others, and not against him, and certain property to be levied upon, and if it was, he promised to make the bid. It is an unusual case, I admit, but I am inclined to think that the consideration is sufficient to support the promise of the defendant. The first and second counts of the declaration allege substantially the contract as I have stated it. The demurrer would apply most strongly against these two counts. The third and fourth counts set forth with more particularity the circumstances attending the promise and the reason why the arrangement was made between the parties, and of course the demurrer would be less available to these counts than to the first and second, but I think that all the counts are substantially good.

§ 382. *Amount of damages is not to be decided upon demurrer.*

It may be a question whether the plaintiff can recover all the damages which he sets forth. That I cannot decide upon the demurrer. That would come up more in the form of an instruction to the jury as to the measure of damages in the particular case. There is no allegation that the debt was lost in consequence of the defendant not bidding the amount of the judgment. There is no allegation negating the fact that the plaintiff could levy upon other property and thus realize the judgment which he had recovered against J. P. Chapin & Co. The only allegation is that the defendant made this promise, if the plaintiff would do certain things. Plaintiff has done them, and he has not complied with his promise. Now, it is clear that the plaintiff has been damnified in consequence of the defendant's neglect to keep his promise. To what extent is another matter. It is sufficient that he has been damnified; that in consequence of the promise of the defendant he has prosecuted these suits, has been obliged to employ counsel, and has himself been subject to more or less labor, expense and trouble. This is sufficient to show that the plaintiff is entitled to maintain this action. It would come up as an after consideration whether the plaintiff was damnified to the extent which is claimed in the declaration, or which the court is asked to infer from the nature of the declaration. That point I do not feel inclined to decide now.

Demurrer overruled and leave to plead.

STURGES v. COLBY.

(Circuit Court for Ohio: 2 Flippin, 163-168. 1878.)

Opinion by WELKER, J.

STATEMENT OF FACTS.—This was a proceeding by the assignee to settle and have declared the liens of the different lien holders on the bankrupt's estate, and the amount and priority of such liens, and for a sale of the property. The Denison University was made a party defendant, and called upon to answer and state the amount of its claim and the nature thereof. To this the university answered, setting forth its claim and mortgage to secure the same as hereinafter stated. After the coming in of this answer, the plaintiff filed a supplemental petition setting forth that a portion of the debt secured to the university was a gift voluntarily made by Colby while insolvent, and should be set aside as to creditors, it being a *subscription* to the university endowment fund.

To this supplemental petition the university *answered*: 1. Denying the charge of insolvency. 2. If the facts stated in the supplemental petition were true as to the insolvency, the consideration of so much of the university claims as are founded on subscriptions to its funds, as in its answers set forth, was sufficient and valid.

The character of the subscription will appear in the subsequent statements in this opinion. By the answers of the university it is seen that disclosures are called for both by the original and supplemental bills. These answers being responsive to the requirements called for by the petition, no testimony is needed to sustain the answers. It will be seen that to set aside a portion of the university's claim, the supplemental petition alleges that ever since 1864 Colby has been insolvent. This is denied, and it is denied that he was insolvent in January, 1872, or before that time. The answer to the supplemental petition then states, in substance, that in the fore part of the year 1865 the university, through its agents, to carry out more fully the objects of its organization, proceeded to raise an endowment fund of \$100,000, and Colby subscribed \$2,000; and at great expense said university proceeded until the full sum of \$100,000 was subscribed and raised. That said Colby examined said subscriptions and fund raised, and *found* and agreed with this defendant (university), and represented to and agreed with the other subscribers to said fund, that said \$100,000 had been raised. And, therefore, said Colby, in *satisfaction* of his subscription, in November, 1866, gave his note for \$2,000, dated November 1, 1866, at two years, with interest annually from November 1, 1866. Said Colby induced others to settle their subscriptions to said fund.

Said \$2,000 note was taken in payment of said Colby's subscription. That in consequence of said subscriptions, greatly increased expenses and extension of facilities have been entered upon by said university. That in January, 1872, the university was in need of a new building and sought subscriptions for it, and Colby subscribed \$500 and paid down \$100. The building was built on the strength and faith of this and other subscriptions. That March 27, 1872, Colby made a loan of said university of \$7,500, part of said endowment fund, and gave the mortgage set out and attached to the answer to the original bill. Of this \$7,500, the sum of \$2,052 was for amount due on said note of \$2,000 given in settlement and satisfaction of said original subscription; and \$400 was for the second subscription, being the one of \$500. The balance to make said \$7,500 loan was advanced in cash, being \$5,048.

Both of said subscriptions were in manner aforesaid satisfied, *settled* and dis-

charged. The facts of the case being as before stated, we will proceed and see what the law as applicable to this state of facts is.

§ 383. *Subscriptions in aid of college endowments become fixed legal obligations when stipulated conditions are performed.*

In Ohio it is the policy of the law to promote and favor the interests of education. In 16 Ohio St., 27 (*Ohio W. Female College v. Love*), Judge Scott, in giving the opinion of the court, says: "It has at all times been the declared policy of this state to favor and promote the interests of education and the general diffusion of knowledge among the people. To this fact the provisions of the constitution itself, our system of school laws and acts providing for the incorporation of institutions of learning, bear ample testimony."

On page 28 the court further say: "This subscription then was authorized by law. It was evidently intended by the maker that the managing officers of the corporation should rely upon it as a part of the means and resources of the institution. It was but reasonable that they should rely upon the solemn pledge thus given, and incur liabilities upon the faith of it. And that such liabilities were in fact incurred, the petition distinctly avers."

The question here raised is not a new question in courts of bankruptcy. It was before the United States court in and for the district of Delaware, and was decided about the year 1875, in the case of *Capelle v. Trinity M. E. Church*, 11 Bankr. R., p. 536. The following is the syllabus of the case: "A claim was proved by a church corporation, founded upon a verbal promise by a bankrupt to M. that he (the bankrupt) would pay \$800, if M. would subscribe a portion of the indebtedness due from the church to M., the promise being subsequently publicly announced in the church in the presence of the congregation. It appeared by the proof that the expenses had been incurred by the trustees of the church upon the faith of the subscriptions generally, though not that any definite expenditure was made on the faith of this particular subscription. Held, that the promise was founded on a *good legal* consideration upon two alternative grounds. It is one of two mutual promises for the benefit of the church, each being the consideration of the other, and the claim provable by the beneficiary; and, *secondly*, as a promise to the church, partly upon which expenses were incurred, it would sustain an *action of assumpsit*, and might be proved in bankruptcy."

See, also, *Amherst Academy v. Cowls*, 6 Pick., 427, particularly as to consideration and burthen of proof, notes being given. The case of *Farmers' College v. McMicken*, 2 Disney, 495, is another Ohio authority supporting the claim of the university.

In this case it is distinctly *held*: "1st. A gratuitous subscription to pay certain moneys toward a particular stated fund to be raised for the endowment of certain professorships in a college becomes a fixed legal obligation as soon as the college has performed its undertaking and raised the required amount of reliable subscriptions. 2d. Such subscriptions to the college to do an act if the college will perform a prescribed duty on its part, if accepted, makes the contract complete."

In *Williams College v. Danforth*, 12 Pick., 541, it is so held more strongly than in *The Farmers' College Case*, if possible; and is the case of a college, and in substance is like the endowment subscriptions for Denison University. We will cite no more authorities, but will say in conclusion that if the claim of the university was founded upon the original subscriptions, it would be good according to the authorities. But in this case, the university's claim is well

fortified. If there was ever any doubt, that is obviated by the fact that the original subscription was settled, satisfied and paid by note of \$2,000 ten years ago. Then that note was settled by a new note given on this loan. The \$500 subscription was also settled by a note being given and entering into this \$7,500 loan. After such changes and settlements every presumption is in favor of the transaction, and the court will not go behind it. See 6 Pick., 431, opinion of Parker, C. J. Let a decree be entered for the amount of the money in favor of Denison University.

§ 384. Promise to do what the promisor is already bound to do.—C. contracted to carry the mails from New York to Philadelphia and from Philadelphia to New York. A heavy fall of snow prevented the transportation of the mail and caused a great accumulation at those points. C. was requested to use every exertion to forward the mails, and a promise was made by the agent of the department to pay him for his increased outlay. *Held*, that notwithstanding such promise there could be no recovery; that C. took the risk of such accumulation at the time of entering into the contract; that he did no more than his contract obliged him to do, and as the contract provided for no extra compensation he could recover none. The mere performance of an act which the party was by law bound to perform is not a sufficient consideration for a promise of extra pay for its performance. *Cummings v. United States*,* 21 Law Rep. (11 N. S.), 752.

§ 385. A valuable consideration, however small or nominal, is sufficient. So a consideration of \$1 is sufficient to support a contract of guaranty of an indefinite amount. *Lawrence v. McCalmont*, 2 How., 426 (§§ 267-271).

§ 386. A nominal consideration, as of \$1, is sufficient to support a contract of guaranty. *Davis v. Wells*, 14 Otto, 159 (§§ 203-218).

§ 387. Consideration for guaranty.—A trust and confidence reposed in a guarantor, which induced a person to sell the goods of which the payment is guaranteed, is a sufficient consideration for the guaranty. *Lewis v. Brewster*, 2 McL., 22.

§ 388. Assignment of mortgage by husband to wife to provide for her and her children.—A man who had separated from his wife represented to a woman that he had a divorce from his wife and induced her to marry him. They lived together for seven years as man and wife, and she had two children by him. Subsequently the woman discovered that the man had a wife living. For the purpose of providing for her and the children he assigned a mortgage to her. *Held*, that the consideration was good and meritorious, and was not illegal. *Gay v. Parpart*, 16 Otto, 686.

§ 389. Marriage—Ante-nuptial settlement.—Marriage is not only a valuable consideration to support an ante-nuptial settlement, but is a consideration of the highest value, and husband and wife, under such settlements, are in the highest sense purchasers for a valuable consideration. *Magniac v. Thompson*, 7 Pet., 393.

§ 390. A promise to forbear for a reasonable or convenient time, either in general or specific terms, or indefinitely, is a sufficient consideration for a promise to pay an existing debt, for in the latter case the court will intend the forbearance to be total and absolute, and after forbearing a reasonable time the plaintiff may bring his action upon the new promise, and is not obliged to wait all his life; but it seems that if the forbearance be for a short time only it would not be a good consideration. *Lonsdale v. Brown*, 4 Wash., 151.

§ 391. Promise to pay on extension of time.—A promise by a party to pay a debt if the creditor will give more time is a valid and binding promise, and is founded on a good consideration—a benefit to the debtor and an injury to the creditor. *Ibid*.

§ 392. Barred debt consideration for new promise.—A debt barred by the statute of limitations or by operation of law is a sufficient consideration for a new promise to pay it. *Lonsdale v. Brown*, 4 Wash., 90.

§ 393. A debt due on a bond more than twenty years old is a good consideration for a new bond, though entered into by the obligors without knowledge of their rights. *United States v. McKewan*, 4 Blatch., 393.

§ 394. Promise to pay an old debt to the creditor or bearer—Negotiability.—A corporation agreed in writing to pay to a certain person a certain sum of money at a specified rate of interest at a certain time. The money not being paid at that date, the corporation by its indorsement under seal promised to pay the same sum to the same person or bearer at an increased rate of interest. *Held*, that the indorsement created a new contract on a sufficient consideration and was negotiable under the law merchant. *Manufacturing Co. v. Bradley*, 13 Otto, 180.

§ 395. **Unexecuted agreement to pay a less sum in discharge of a larger.**—In all cases of releases by parol contract, composition with creditors, or compromises of unliquidated demands, where the consideration of the discharge of the debt is the payment of a less sum of money, the delivery of property of less value or the performance of acts, they must be exactly and literally performed. A mere unexecuted agreement to accept a less sum in discharge of a larger is not valid. *City of Memphis v. Brown*, 1 Flip., 203.

§ 396. **Agreement between indorsers to share loss — Parol.**—Two indorsers of a note at the time of making the indorsement promised each other to divide between themselves whatever loss they might be put to in consequence of such indorsement. The maker failing to pay the note, one of the indorsers paid it. In a suit by him against the other to recover half the amount thus paid, it was held that the mutual promises of the two indorsers furnished a good consideration for the contract, and that it was valid and binding. Such a contract was collateral to the note and might be proved by parol. *Phillips v. Preston*, 5 How., 291.

§ 397. **Indorsement to give credit.**—If a party indorses his name on a note for the purpose of giving the maker credit and to induce the payee to sell property to the maker, then such indorsement is founded upon a sufficient consideration. *Offutt v. Hall*, 1 Cr. C. C., 503, 574.

§ 398. **Agreement between holder and maker of notes for the drawing of bills for the amount.**—The bank of M. holding the notes of the bank of I. to a large amount, the two banks entered into an agreement by which the bank of I. was to draw bills for the amount of the notes, and to deposit a sum with C. to pay the damages if the bills were protested, and the bank of M. was to deposit the notes with C., who was to hold them as collateral security for the bills. The deposits were made and the bills drawn, but the latter were protested. An action was brought on the bills, and it was held that there was a good and sufficient consideration for them. *Stickney v. Bank of Illinois*, 3 McL., 183.

§ 399. **Cancellation of note and giving smaller ones.**—An agreement by a debtor, and at the request of a creditor, to give a number of small notes in place of a larger one, is a sufficient consideration for an agreement to cancel the existing note. *In re Dixon*, 2 McC., 557.

§ 400. **Bond to county — Note for purchase money.**—A bond to convey a city lot at a future time is a good consideration for the giving of a promissory note for the purchase money. *Lane v. Dyer*, 2 Cr. C. C., 850.

§ 401. **Agreement by purchaser to pay the price to the seller's creditor.**—It seems that if A. sells goods to B., who, at the request of A., agrees to pay the amount to C., to whom A. is indebted, C. may maintain an action in his own name for the amount if the agreement is made at the time of purchase. But the indebtedness of A. to B. is not of itself any consideration for a subsequent promise by the former to C. to pay C. the amount of the debt. *Atwood v. Lockhart*, 4 McL., 851.

§ 402. **Judgment against one partner only — Promise by the other to pay the debt to prevent the execution of a ca. sa.**—A judgment on a partnership debt was rendered against one partner only, and a *ca. sa.* issued against him. The other partner promised that if the judgment debtor was not confined on the *ca. sa.* he would pay the debt at a certain time. *Held*, that the promise was founded on a sufficient consideration. *Rice v. Barry*, 2 Cr. C. C., 448.

§ 403. **Agreement to forbear to collect of the debtor — Promise by another to pay.**—An agreement to release a levy on real estate of W., and to forbear to collect part of a judgment against him, is a sufficient consideration for a promise by H. to pay the balance of the judgment at a certain time. *Stewart v. Hinkle*, 1 Bond, 508 (§§ 1777-79).

§ 404. **Consideration between two parties to a contract supporting a promise made by a third — Parol.**—The owner of certain sugars in the hands of the defendant proposed, in the presence of the defendant, to ship them to the plaintiff, on receiving an authority from the plaintiff to draw on him for the amount. It was then agreed that the sugars should be shipped, and the authority given to draw, upon the defendant's engaging by letter to ship the sugars, then in his possession, on behalf and account of the owner. The owner thereupon wrote the letter (the form of which was assented to by the plaintiff), addressed to the defendant, requesting him to ship the sugars upon his (the owner's) account, and upon such vessel as he should direct, consigned to plaintiff. The defendant assented to it, wrote the words "agreed to" under it, and signed his name; and the authority to draw was then given. It was held that the plaintiff could recover of the defendant for breach of his undertaking, if such undertaking was an original part of the entire transaction, but not so if unconnected with and collateral and subsequent to the agreement between the owner and the plaintiff; that as between the plaintiff and the owner, the consideration, which was not mentioned in the writing, might be shown by parol; that if the undertaking of the defendant was at the same time, it required no consideration moving from the plaintiff to him, the

consideration to the owner being sufficient to uphold and support the contract of the defendant; and that, the owner having become insolvent and authorized the plaintiff to designate the vessel, a designation by the latter was sufficient under the contract. *Rabaud v. DeWolf*,* 1 Paine, 580.

§ 405. Promise by one for whom a ship is being built by a contractor, to pay the workmen.—A person contracted with a shipwright to pay him a certain sum for the building of a ship of a certain size. The shipwright becoming embarrassed the party represented to workmen employed on the ship that they need not be uneasy and that he would pay all just bills against the vessel. *Held*, that this agreement was a *nudum pactum* and void; that under the terms of the contract of building the ship belonged to the promisor, absolutely freed of all liens, and that consequently the promise was without consideration. But where, soon after the ship was commenced, the prospective owner took a secret assignment of the ship as fast as completed and of all materials as soon as furnished, and became the sole and absolute director of operations, though unknown to the workmen, the promises above mentioned were held to be for a good consideration and enforceable. *Leslie v. Glass, Taney*, 428.

§ 406. Promise to pay freight to obtain delivery of goods to another.—In order to obtain the delivery of certain hides shipped to B., A. engaged to pay the freight on them on its being adjusted between B. and the agent of the carriers, if B. did not. *Held*, that the delivery of the hides to B. was a sufficient consideration for the promise, and that it was sufficient to charge A. that the freight was adjusted and that B. had not paid it. *Trask v. Duvall*,* 4 Wash., 181.

§ 407. There is an implied agreement on the part of the assignee of a bill of lading who receives the goods to pay the freight, unless the consignor is bound by the charter-party to pay it, or unless the assignee has expressly bound himself to pay it as the surety of the assignor. *Ibid*.

§ 408. An agreement to receive certain goods in payment of a money demand is a good agreement, and if an enforcement of payment is sought in equity it will only be decreed in conformity to the agreement. Such an agreement imports a consideration which is deemed by law to be valuable. *Very v. Levy*, 18 How., 357.

§ 409. Assignment of a patent which has a market value, though the invention is useless.—In case of a contract for the sale of a patent right, it was held that though the owner of the patent and his assignees were wrong in their estimates of the value of the machine, and that it was practically useless, yet where the patent, at the time the contract was entered into, had a market value, as is shown by the contemporaneous sales of rights under it, and where it appears that when skillfully operated under favorable conditions the invention has some value, then the right to use such invention was a good consideration to support the contract. *Leavitt v. Connecticut Peat Co.*, 6 Blatch., 145.

3. Insufficiency or Failure.

§ 410. Failure of consideration — Inadequacy — Rescission.—An entire failure of consideration is sufficient to rescind a contract, but mere inadequacy, honestly occurring, furnishes no grounds for rescinding the contract. *Warner v. Daniels*, 1 Woodb. & M., 110.

§ 411. Inadequacy evidence of fraud.—It seems that an inadequacy of consideration so great as to shock the conscience is conclusive evidence of fraud. *Eyre v. Potter*, 15 How., 60.

§ 412. Action for failure of consideration.—In order to sustain an action for a failure of consideration such failure must be total. *Scudder v. Andrews*, 2 McL., 468.

§ 413. Action of covenant where the consideration is also a covenant — Failure of consideration.—Want or failure of consideration cannot be set up as a defense where an action of covenant is brought on a sealed instrument, especially where the covenant sued on is founded on another covenant made by the plaintiff to the defendant. So where a party covenants with a manufacturer to give him the exclusive right to manufacture and sell a certain patent, and the licensee covenants to pay according to the quantity sold, in a suit against the licensee on such covenant, he cannot set up the invalidity of the patent as a defense. *Wilder v. Adams*, 2 Woodb. & M., 332.

§ 414. Suit on note — Partial failure of consideration.—A partial failure of consideration is no defense to a promissory note in an action by the payee against the maker. *Varnum v. Mauro*, 2 Cr. C. C., 425. See, also, *Morrison v. Clifford*, 1 Cr. C. C., 585.

§ 415. Promise that another will do an act — Guaranty.—A mere promise that another person, *sui juris*, shall do a particular thing is void, conferring no right and producing no obligation; but a guaranty that another will do an act is valid if founded on sufficient consideration. *Coffin v. Shaw*, 8 Ware, 84.

§ 416. Cancellation by creditor of his judgment without consideration.—A judgment creditor of a railroad purchased the road on the foreclosure sale of the road on a deed of trust

which was prior to the lien of his judgments, and after such purchase marked the judgments held by him "Satisfied," so as to make the title to the road clear, but he received no consideration therefor. Afterwards the sale under which he purchased was declared void. In a suit brought by the judgment creditor to annul his cancellation of the judgments, it was held that, the satisfaction having been made without consideration, it was a *nudum pactum*, and that the court would decree them to be liens as they were at the time they were thus marked "Satisfied." *Hay v. Washington & Alexandria R'y Co.*, 4 Hughes, 829.

§ 417. **Promise by purchaser at sheriff's sale to reconvey.**—A promise made by a purchaser at a sheriff's sale, after the purchase, to reconvey the premises bought, if without consideration, is a mere *nudum pactum* and cannot be enforced. *Lenox v. Notrebe, Hemp.*, 256.

§ 418. **Promise by heir to intestate to give the property to another.**—A mere verbal promise by heirs-at-law to an intestate to give his property to the person to whom he wishes to devise it is, in the absence of fraud, a mere naked promise which a court of equity will not enforce. *Bedilian v. Seaton*, 3 Wall. Jr., 285.

§ 419. **Promise by seaman to pay master for services of physician.**—A promise of a sick seaman on shipboard to pay the master for the services of a physician is without consideration and void. *Freeman v. Baker*, Bl. & How., 384.

§ 420. **Gratuitous promise by employer to pay employee increased wages.**—Where by the terms of his contract a party was to employ all his time and exertions in his employer's service at a certain salary, a letter written to him by his employer, promising him an increased salary as a stimulus, does not constitute a new contract, but is a mere gratuitous promise not based upon a legal consideration. *Talmie v. Dean*,* 1 Wash. T'y, 53.

§ 421. **A promise to pay in Confederate notes in consideration of the receipt of such notes, and of drafts payable in them, cannot be considered a nudum pactum or an illegal contract.** *Planters' Bank v. Union Bank*, 16 Wall., 499.

§ 422. **Promise to convey to wife property acquired by marriage.**—A promise by a husband to convey to his wife property acquired by him on his marriage with her is without consideration. *Lloyd v. Fulton*, 1 Otto, 484.

§ 423. **Promise by master of vessel to pay debt of charterer.**—An agreement by the master of a ship, without any consideration moving to him from the charterer, to pay a debt of the charterer to the assignee of his vessel, is a *nudum pactum* and void. It is a parol promise to answer for the debt of another and not binding. *Shaw v. Thompson, Olc.*, 153.

§ 424. **Agreement allowing vendee of land to pay for it from the profits.**—A contract for the sale of land, which provides that the grantee shall be allowed to pay for the land from the profits thereof, is a promise without a consideration, and consequently a *nudum pactum*. It is but a gift. *Dorsey v. Parkwood*, 12 How., 138.

§ 425. **An agreement to take a part of a debt when the whole debt is due is a nudum pactum, and of no legal effect.** *Ramsdell v. United States*,* 2 Ct. Cl., 518.

4. *Moral and Equitable.*

§ 426. **The relationship of son-in-law is not such a sufficient and meritorious consideration as will make a voluntary executory conveyance valid and enforceable, though it seems that the relationship of wife or child is.** *Burton v. Le Roy*, 5 Saw., 518.

§ 427. **Illegal consideration, not expressed.**—If the consideration of a contract be contrary to the law, it is not necessary that such illegal consideration should be expressed in order to avoid the contract. It may be pleaded and shown in evidence. *Wilson v. Le Roy*, 1 Marsh., 451.

5. *Executed Consideration.*

§ 428. **Promise to pay money, upon an executed consideration.**—A promise to pay a sum of money upon a consideration executed, if it was induced by the request of the defendant, or by some previous duty, or if the debt be continuing at the time, or is barred by a rule of law or a provision of some statute, is sufficient to maintain an *assumpsit*. *Lonsdale v. Brown*, 4 Wash., 150.

§ 429. **Executed consideration will sustain a grant.**—Though an executed consideration may not be sufficient to sustain an executory contract, yet an executed consideration will sustain a grant, which is a contract executed *in presenti*—not one to be executed *in futuro*. *Bank of United States v. Lee*, 5 Cr. C. C., 327.

§ 430. **Executed contract—Statute of frauds.**—A person who takes possession of real estate and enjoys its rents and profits will not be allowed to say that the contract under

which he entered is void within the statute of frauds. The contract in such a case is executed, and to allow the party to take refuge behind the statute of frauds would be to make the statute a cloak for fraud rather than a protection against it. *Bissell v. Farmers' & Mechanics' Bank*, 5 McL., 504.

§ 431. Contract for the purchase of notes partially executory — *Bona fide* purchaser.— Where a contract for the purchase of notes is partially executory, and the purchaser has notice of fraud in the notes, he is not a *bona fide* purchaser, except as far as the contract is executed, if he goes on and completes it after such notice. *Dresser v. Missouri, etc.*, R'y Const. Co., 3 Otto, 94.

§ 432. Illegal contract executed.— A court will not enforce a contract for illegal interest, but when payments of such interest have been voluntarily made, the court will not disturb them. *Longworth v. Taylor*, 1 McL., 517.

§ 433. Though an illegal contract cannot be enforced, still where such contract has been consummated, where no court has been called upon to give aid to it, when the proceeds of it have been actually received, and received in what the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs, the case is different. The court is not then asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. *Planters' Bank v. Union Bank*, 16 Wall., 499.

6. *Compromise of Disputed Claim.*

§ 434. Compromise — Duress.— Where a party, without force or intimidation, and with full knowledge of the facts of the case, accepts on account of a controverted and unliquidated demand a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, he cannot avoid the compromise on the ground of duress, even though the condition of his private affairs was such as to urge him strongly to accept the offer. *United States v. Child*, 12 Wall., 244.

§ 435. A party to an agreement to compromise existing differences cannot be allowed to go behind the agreement while retaining its fruits. *Sargent v. Larned*, 2 Curt., 348.

§ 436. A compromise as defined by the code of Louisiana is as binding on the parties thereto as a judgment, and cannot be collaterally assailed. *Oglesby v. Attrill*, 15 Otto, 610.

§ 437. In a family settlement of disputed claims equitable circumstances should prevail, and not all the technical formalities should be expected as between strangers. *Gratz v. Cohen*, 11 How., 18.

§ 438. Code of Tennessee — Compromise — Performance — Doubtful claim.— At common law an agreement to pay a smaller sum in discharge of a larger is without consideration, and although the code of Tennessee has changed that rule in that state, still, even under such code, a person who seeks to be discharged from a just debt on the payment of a less sum than is due must show, on his part, full and complete performance; compromises will act according to the intention of the parties in that state, but such compromises must be of doubtful claims, and there must be such uncertainty as to raise a doubt as to the liability of the promisor in the mind of an ordinarily intelligent person. *City of Memphis v. Brown*, 1 Flip., 208.

IV. VALIDITY.

1. *In General. Contrary to Statute.*

SUMMARY — No action lies on illegal contract, §§ 439, 440, 443.— Contract made on Sunday, § 441.— Proceeds of illegal transaction, § 442.— Subsequent collateral contract, § 444.

§ 439. No action can be maintained in the federal courts upon a contract declared to be illegal and void by the statutes of the state in which the contract was made. *Daniels v. McCabe*, §§ 445, 446. See § 467.

§ 440. No action can be maintained on a bond of indemnity against acts to be done in New York contrary to the laws of that state, although the bond was executed elsewhere. *Hayden v. Davis*, §§ 447, 448. See § 467.

§ 441. A contract void because made on Sunday may be reaffirmed upon a week-day, and is thereby made valid. *Van Hoven v. Irish*, § 449.

§ 442. A principal cannot maintain an action of contract against his agent for the proceeds of a transaction prohibited by the laws. *Lanahan v. Pattison*, §§ 450, 451.

§ 443. Contracts made in violation of a statute, whether the prohibition be express or implied, are void unless the language of the whole statute shows a contrary intention. And a contract in violation of the statute of Mississippi of June, 1823, is not void. *Harris v. Runnels*, §§ 452-456. See § 467.

§ 444. Though a subsequent collateral contract, made in aid and furtherance of the execution of one infected with illegality, partakes of its nature and is equally illegal, yet an assignment by one of the parties to such a contract of his right and claim under it, made upon a valuable consideration, is good as against the assignor or his representatives, and they cannot compel the assignee to account for what has been voluntarily paid under it by the other party or one assuming the debt in his stead. *McBlair v. Gibbes*, §§ 457, 459.

[NOTES.—See §§ 459-515.]

DANIELS v. McCABE.

(Circuit Court for New Hampshire: 3 Clifford, 114-117. 1868.)

STATEMENT OF FACTS.—Plaintiffs sold to defendant at Boston a lot of liquors which were duly delivered to him in Boston. At the time of sale plaintiffs had a license to sell liquors from the United States, but none from the state of Massachusetts. This suit was brought for the purchase money.

Opinion by CLIFFORD, J.

The substantial finding of the case is, that the liquors were sold at the store of the plaintiffs in Boston, and were by them delivered to the defendant at the depot of the railroad named in that city, so that it clearly appears that the contract was made and the sale completed in the state where the plaintiffs reside. Actual delivery of the liquors to the defendant at that place must be understood as found by the statement of facts. Such is the clear import of the statement; but if it be considered as a delivery to a carrier for the defendant, it was equally valid, as between the parties, and the same conclusion must follow. *Orcutt v. Nelson*, 1 Gray, 542.

§ 445. *Where goods are sold and delivered in a state where the sale of such goods is prohibited by law, the contract is illegal and the purchase money cannot be collected.* See §§ 345-356, *supra*.

"Delivery to a common carrier," says Shaw, C. J., in that case, "completes the contract of sale, vests the property in the vendee, and consequently the goods, during the transit, are at the risk of the vendee." Section 28 prohibits the manufacture for sale, and the selling, of spirituous and intoxicating liquors, or any mixed liquor, part of which is spirituous or intoxicating, unless the party doing any of those acts is authorized, as provided in that chapter, p. 442. The penalty prescribed by the thirtieth section of the act is \$10, and imprisonment in the house of correction not less than twenty nor more than thirty days for the first offense, which is increased for subsequent violations. All payments or compensations for spirituous or intoxicating liquors sold in violation of law, whether in money, labor or personal property, are declared by the sixty-first section to have been received without consideration, and against equity, law and good conscience. Page 443. These several sections are, by the agreed statement, made a part of the case. The settled law in Massachusetts is, that no action can be maintained to enforce an executory contract for the price of liquors sold and delivered. Adjudged cases to that effect, in the reported decisions of the highest court of that state, are quite numerous.

Consignors of spirituous liquors, it is held, cannot maintain an action against their consignees, for the breach of an agreement to render an account of sales, pay the value of the liquors sold, and return the residue. *King v. McEvoy*, 4 Allen, 110. The express rule also, as laid down by that court, is, that no action

lies to recover the proceeds of spirituous liquors sold in violation of law, by one to whom they had been intrusted, for the purpose of being sold by the owner. Justification for such a principle, which refuses damages for a breach of trust, can only be found in some positive rule of law, denying any power in the court to grant relief. *Galligan v. Fannan*, 7 Allen, 255. Damages cannot be recovered for a breach of warranty in the sale of a horse, where it appears that the price of the horse is to be paid in liquors, which the purchaser cannot legally sell. *Howard v. Harris*, 8 Allen, 297; *Baker v. Collins*, 9 Allen, 253. Taken together, it would seem that these decisions are sufficient to show what the rule upon the subject is; but the highest court of that state has formally decided that no action will lie against a surety upon a promissory note, given in part for the price of cider sold for a beverage, within that state. *Nourse v. Pope*, 13 Allen, 87. Neither authority nor argument is necessary to show that these decisions of the state court furnish the rule of decision in this case, as the proposition is universally acknowledged. Such is the rule upon general principles, but it is expressly made so by the thirty-fourth section of the judiciary act. 1 Stat. at Large, 92.

§ 446. *Neither license from the United States nor payment of tax can validate a contract that violates the law of the state in which it is made. Cases cited.*

Payment of a license fee or tax, or both, to the United States, under the internal revenue laws passed by congress, does not authorize the sale of intoxicating liquors, in violation of the laws of a state. *Commonwealth v. Holbrook*, 10 Allen, 200. Discussion of that question, however, is now unnecessary, as it is now authoritatively settled by the decision of the supreme court. *Pervear v. Commonwealth*, 5 Wall., 475.

HAYDEN v. DAVIS.

(Circuit Court for Michigan: 3 McLean, 276-279. 1843.)

Opinion by the Court.

STATEMENT OF FACTS.—This suit is brought on a bond given by George W. Tracy, George Davis and Charles A. Hopkins, in the penal sum of \$12,000, dated July 5, 1841, conditioned that the obligors shall pay, or cause to be paid, certain drafts or bills of exchange drawn on the cashier of the Phenix Bank of Buffalo, part drawn by the plaintiff in favor of Lewis Eaton and others—part by Lewis Eaton in favor of plaintiff,—which drafts amount to the sum of \$5,898, payable at future and different periods; which drafts were given in payment of a contract made June 6, 1840, between D. Balentine, by T. Treadwell, his attorney, of the one part, and R. N. Hayden and one Lewis Eaton, of the other part, for the sale and purchase of one thousand three hundred and thirty-one shares of stock in the Bank of Constantine, in the state of Michigan, and shall fully discharge the said R. N. Hayden from all liabilities for or on account of the same, and shall fully indemnify and save harmless the said R. N. Hayden of and from all suits, etc., then the obligation to be void, etc.

The defendants pleaded that it was agreed the above drafts should be accepted by the Phenix Bank of Buffalo, before they were received in payment for said stock; that they were so accepted by A. K. Eaton, cashier, and Lewis Eaton, president, which was in violation of law, etc. Plaintiff replied that the contract of purchase was made at Constantine, in Michigan, and was transferred to plaintiff and Eaton by Balentine, at the above place; that \$5,000

were paid by plaintiff and Eaton to the said Balentine in part; and for the residue of said consideration the drafts were executed and delivered to Balentine, which remain unpaid; that the said plaintiff and Eaton, at Buffalo, at the instance of the defendants and George W. Tracy, assigned and transferred all of the stock to defendant Hopkins, and the same was thereupon accepted and received by the said Hopkins; and the plaintiff further avers that as the consideration of the said transfer and sale, it was then and there agreed that the said defendant and the said Davis should pay said drafts, and should execute their bond therefor, etc. To this the defendants demurred.

The pleadings raise the question whether the drafts, for the payment of which the bond was executed by the defendants, were legal. In the General Statutes of New York, page 63, section 4, it is provided that "no banking association, or individual banker, as such, shall issue or put in circulation any bill or note of said association or individual banker, unless the same shall be made payable on demand, and without interest. And every violation of this section by any officer or member of a banking association, or any individual banker, shall be deemed and adjudged a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court," etc. Id., 73, sec. 4. A construction was given to this statute in *Smith v. Strong*, 2 Hill, 241, in which it was held that an acceptance made in violation of it was void. The law being a general one, all are bound to take notice of it.

§ 447. *A contract expressly prohibited by law is void.*

And, on general principles, there would seem to be no doubt that any contract expressly prohibited by law is void. *Brusly v. Bignald*, 5 Barn. & Ald., 335; *Com. on Contracts*, 66; *Songter v. Hughes*, 1 Maule & Selw., 593; *Bell v. Scott*, id., 794; *Chitt. on Contracts*, 420, 422, 423; *Story's Conflict of Laws*, sec. 247.

§ 448. *Where a bond is executed in Michigan, but relates to a New York transaction which is void by the law of that state, the bond is void.*

The bond is not for the payment of money, but to indemnify the plaintiff against the above drafts. On a mere bond of indemnity, no action can be sustained until the party is damnified. The drafts are unpaid, and it does not appear from the pleadings how and to what extent the plaintiff has been injured by drawing and being connected with the drafts. But does the invalidity of these drafts avoid the bond? Of this there would seem to be no doubt, if the bond grew out of or was connected with the drafts. The rule is, that "where the contract grows immediately out of the illegal act, or is connected with it, justice will not lend its aid to enforce it." 4 Wash., 207, and authorities above cited. The bond was executed in Michigan, but it relates to a New York transaction, which is void by the laws of that state, and this vitiates the bond. The demurrer to the replication is sustained.

VAN HOVEN v. IRISH.

(Circuit Court for Minnesota: 8 McCrary, 443-445; 10 Federal Reporter, 18, 14. 1883.)

STATEMENT OF FACTS.—The parties made a contract on Sunday concerning the sale of certain cattle. Suit was brought on a contract alleged to have been made subsequently and on a week-day, which contract was substantially the same as the one made on Sunday. The jury returned a verdict for plaintiff, and defendant moved for a new trial. Other necessary facts appear in the opinion.

Opinion by NELSON, J.

Two vital questions were submitted for the determination of the jury: (1) Was the contract, for breach of which damages are claimed, entered into on Sunday? (2) If the contract was entered into on Sunday, and void by the laws of Minnesota, was it afterwards reaffirmed on a week-day?

The court stated to the jury "that by the laws of Minnesota contracts of a secular character, and which are not works of necessity and charity, if finally consummated on Sunday, are void, and no action can be maintained, either on the contract or for the recovery of whatever may have been done under the contract;" also, "that contracts entered into on Sunday could be reaffirmed afterwards." The case was fairly put to the jury, and the two controlling issues left for them to pass upon. The counsel for the defendant presented several instructions and requested the court to embrace them in its charge to the jury. They were all, with two exceptions, given in the language of counsel. The language of the other two was changed so as to permit the jury to consider and determine whether the evidence showed a reaffirmance on a week-day of the contract, in case they should find the agreement was first entered into on Sunday. The court also instructed the jury that the delivery of the cattle was evidence to be considered by them tending to show reaffirmance, as claimed by the plaintiff. Counsel in his brief states that defendant testified that the cattle were delivered under no contract. He is mistaken. The defendant testified that he delivered the cattle under a contract made Sunday, July 4th.

§ 449. *Contract made on Sunday validated by subsequent affirmance.*

The Vermont supreme court and the later authorities sustain the view taken in respect of the reaffirmance of Sunday contracts, in order, as said by Judge Redfield, to secure parties from fraud and overreaching practiced on Sunday by those who know their contracts are void and cannot be enforced. *Adams v. Gay*, 19 Vt., 358; *Harrison v. Colton*, 31 Ia., 16. In this case the evidence showed that the quality of cattle delivered by the defendant was inferior, and not up to the average of the herd he had contracted to deliver. If the jury had determined the contract was completed and final on Sunday, and there had been no subsequent legal reaffirmance, the law would leave the plaintiff to suffer from his own wrong, and would not aid him; but if the jury came to the conclusion, from the evidence, that the contract had been reaffirmed on a subsequent week-day, it became valid from the date of the reaffirmance, and plaintiff was entitled to recover damages for a breach. His success in such case does not depend on his own violation of law.

The jury sustained the latter view of the case. *Durant v. Rhener*, 26 Minn., 362, does not touch one vital point upon which this case turned, provided the jury came to the conclusion that the contract was affirmed on a week-day. In the opinion of the supreme court in that case the conclusion of the referee did not agree with his finding of facts, and the facts as he found them showed in its opinion the agreement was entered into on Sunday, and was so considered by both parties. There was no evidence in that case tending to show a reaffirmance of the contract by the parties on a subsequent day. The evidence clearly established "the agreement for the formation of a partnership then and there," on Sunday. The evidence here tended to show a reaffirmance, and justified the verdict of the jury. Motion denied.

LANAHAN v. PATTISON.

(Circuit Court for Tennessee: 1 Flippin, 410-412. 1874.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.—The plea sets up in bar of plaintiff's action that the due bill was given for the payment of the proceeds of certain lottery tickets sold by defendant for plaintiff in the state of Tennessee, which sale was, by the laws of Tennessee, prohibited, and made a misdemeanor, punishable by fine and imprisonment, wherefore the contract was unlawful and void. To this plea plaintiff interposes a demurrer, in which he says the said plea is no defense in law to the plaintiff's cause of action. The law of Tennessee provides that "if any person vend, or attempt to vend, . . . any lottery ticket in this state in any scheme to be drawn in this or in any other state or country, he is guilty of a misdemeanor, and, on conviction, shall be fined \$500 and imprisoned one month in the county jail." Code of Tennessee, sec. 4890. The effect of this statute is to prohibit the sale of lottery tickets in Tennessee, whether to be drawn in the state or in any other place. The tickets in question were issued and to be drawn in Missouri, and were sold in Memphis, Tenn., by defendant as agent of the plaintiff. The defendant did not pay over the proceeds to his principal, but gave the due bill in question by which he contracted to pay.

§ 450. *No action can be maintained upon a due bill given for the proceeds of an illegal traffic.*

It is well settled that "no action can be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law." *Armstrong v. Toler*, 11 Wheat., 257 (§§ 581-586, *infra*). The plaintiff had arranged a lottery scheme, and placed tickets in defendant's hands, to be sold in Tennessee, on an agreement by defendant, express or implied, to sell tickets at Memphis and account for the proceeds arising from such sale. Was not that an agreement by defendant to do an act for plaintiff which the law of Tennessee prohibits? And was not the consideration of defendant's promise to pay over the proceeds based upon that which the law prohibits? Plaintiff's title to the money would in such cases be clearly founded on an unlawful contract—a contract by which defendant was to sell lottery tickets in Tennessee and pay over the proceeds. You cannot separate the agreement to pay over the proceeds from the unlawful sale.

It is an indebtedness on a contract forbidden by law, and the fact that the promise to pay was changed into the form of a written due bill cannot change the fact that the consideration was illegal. The due bill was given for the very money claimed to be due from the sale of the tickets. The suit is between the original parties to the illegal transaction, and the promise, evidenced by the due bill, has its consideration in an arrangement forbidden by law. All such promises are void. This is not a case of subsequent or collateral contract, the direct or immediate consideration of which is not illegal, but is a contract based squarely on the illegal transaction—grows immediately out of, and is connected with, the illegal sale.

§ 451. — *a contract illegal in part is void.*

The rule goes so far, that if the contract be in part only connected with the illegal consideration, and growing immediately out of it, though it be a new contract, it is equally tainted, and cannot be enforced. The law leaves the parties as it finds them, and will not aid a *particeps criminis* to enforce his exactions, which originate in violations of law. The demurrer is overruled.

HARRIS v. RUNNELS.

(12 Howard, 79-87. 1851.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—It is said that the note sued upon in this case was given for an illegal consideration. The illegality alleged is, that the plaintiff brought slaves into the state of Mississippi as merchandise, in contravention of the statute regulating the importation of them, and sold them to the defendant, for which the note was given in payment. It is admitted by the plaintiff's demurrer to the defendant's special plea, that they were so brought and sold. The court overruled the demurrer and gave judgment for the defendant. The cause is before this court upon a writ of error sued out by the plaintiff. The law making contracts, in contravention of statutes, irrecoverable by suit, will be first stated and afterwards applied to this case.

§ 452. *Contracts in violation of a statute are void, whether the prohibition be express or implied, unless a contrary intention can be gathered from the language of the statute.*

There is no doubt that *assumpsit* cannot be sustained upon a contract which has not a sufficient consideration. It must not be illegal, of an immoral tendency, or contrary to sound policy. The common law maxims are *ex turpi causa, non oritur actio*—*ex dolo malo non oritur actio*. It prohibits everything which is unjust or *contra bonos mores*. The object of all law is to repress vice and to promote the general welfare of society; and it does not give its assistance to a person to enforce a demand, originating in his breach or violation of its principles and enactments. Contracts in violation of statutes are void; and they are so, whether the consideration to be performed or the act to be done be a violation of the statute. A statute may either expressly prohibit or enjoin an act, or it may impliedly prohibit or enjoin it, by affixing a penalty to the performance or omission thereof. It makes no difference whether the prohibition be expressed or implied. In either case, a contract, in violation of its provisions, is void. The rule is certain and plain. The practice under it has been otherwise. The decisions in the English courts have been fluctuating and counteracting. Those in the courts of our states have followed them without much discrimination. No one can read any one of the recent elementary treatises upon contracts without noticing the differences of opinion among judges as to the operation of the rule. Showing, however, as they do, the history of these differences, they may lead to more conformity of judicial opinion hereafter in this respect. The character of these differences will be seen by noticing one of them. Others might easily be made.

§ 453. — *examination of the rule as applied by the English courts.*

Within a few years we were told, in the English reports, and seemingly to us with a good reason, that the rule which avoids a contract made in contravention of a statute did not apply to statutes made for the protection of the revenue only. That the non-observance of excise regulations will not avoid a contract in respect of their subject-matter, if it be not accompanied with fraud, although a penalty attaches. *Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 Barn. & Cress., 98; *Hodgson v. Temple*, 5 Taunt., 181. And that it was always to be applied, when the statute was made for the protection of the public from moral evils, or from those which we know from experience that society must be guarded from by preventive legislation. Such was re-

ceived as the law by the courts in England and in our states, and cases were ruled in both accordingly; but afterwards, with only a few years intervening, Baron Parke, a distinguished judge, truly said, in *Cope v. Rowland*, 2 Mees. & W., 157: "Notwithstanding some *dicta* apparently to the contrary, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which has made it so has in view the protection of the revenue or any other object."

§ 454. — *rule stated as to contracts in violation of statutes.*

Such we believe to be now the rule in England, but with many exceptions, made upon distinctions very difficult to be understood consistently with the rule; so much so, that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only, for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way, the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.

It is not necessary, however, that the reverse of that should be expressed in terms to exempt a contract from the rule. The exemption may be inferred from those rules of interpretation, to which, from the nature of legislation, all of it is liable when subjected to judicial scrutiny. That legislators do not think the rule one of universal obligation, or that, upon grounds of public policy, it should always be applied, is very certain. For, in some statutes, it is said in terms that such contracts are void; in others, that they are not so. In one statute, there is no prohibition expressed, and only a penalty; in another, there is prohibition and penalty, in some of which, contracts in violation of them are void or not, according to the subject-matter and object of the statute; and there are other statutes in which there are penalties and prohibitions, in which contracts made in contravention of them will not be void, unless one of the parties to them practices a fraud upon the ignorance of the other. It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined, before courts should refuse to give aid to enforce contracts which are said to be in contravention of them.

§ 455. *Construction of the statute relied upon in the case at bar.*

We now turn to the case on hand, to apply to it our version of the rule and the manner of its application. The statute relied upon by the defendant, to avoid the payment of his note, is that of June, 1822 (*Hutch. Dig.*, 512). He relies upon the fourth section, substantially recited in his special pleas, and says the plaintiff cannot recover upon the note, as it was given for an illegal consideration, from the plaintiff's having failed, before he sold the negroes, to comply

with the directions in the fourth section. The sixth section declares that both the seller and the buyer of such slaves shall pay \$100 for every slave so sold or purchased. The two sections, considered conjunctively, seem to us to imply that the penalty only, without any other loss to either the seller or the buyer, was to be inflicted. The subject-matter and the sufficiency of the penalty relatively to the value of a slave, to prevent the mischief against which the legislature meant to guard, imply that the legislature did not mean that such a contract should not be enforced in a court of justice. Besides, as the act was meant to prevent convict negroes from being brought into the state for sale, and another penalty for that offense is to be inflicted, severer than that of the sixth section, without a forfeiture of the slave or any provision for his removal from the state, it cannot have been intended that the disregard of precautionary directions, for the importation of slaves for sale was to be visited with its penalty, and the indirect forfeiture by the seller of the price of them, by denying to him the aid of courts to enforce a contract of sale for negroes who were not convicts. This statute must be interpreted as all other statutes are liable to be. The state's policy was to exclude all negroes tainted with crime. For aught that appears in the pleadings, the defendant bargained for the negroes, knowing that they were brought into the state as he says they were. If, then, there was a violation of the law by his purchase, he stands *in pari delicto* with the seller, with this difference between them, that he is now seeking to add to his breach of the law the injustice of retaining the negroes without paying for them. And he might do so if the statute was such as it is represented to be in his pleas. The law will not aid either of two parties who are *in pari delicto* in the violation of a statute. Whatever may be stated in a contract for an illegal purpose, a defendant, against whom it is sought to be enforced, may, to prevent it, show both the turpitude of himself and the plaintiff. Lord Mansfield said, with a very proper sensibility of the injustice of such a plea, and of the policy which permits it to be insisted upon: "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff." Such is the law, and the defendant would have the advantage if he had not mistaken the statute under which it is claimed.

It is a rule, if effects and consequences shall result from an interpretation of a statute contrary and in opposition to the policy which it discloses, or substantially avoiding the infliction of a penalty upon the transgressor, that such an interpretation must be rejected. In this case the interpretation contended for in behalf of the defendant does both. One of them has already been stated. It is, that it would lead to the infliction of a severer penalty for the disregard of the directions for buying slaves for sale who are not convicts, than the statute imposes upon those who shall bring convict slaves into the state. Further, the penalty in the sixth section, upon such as do not comply with the directions in the fourth, is to be equally inflicted upon the buyer and the seller.

Make, then, this contract void, by the application of the rule *pari delicto potior conditio est defendantis et possidentis*, and the defendant, in the event of his conviction for transgressing the statute, would be substantially released from the penalty as to all the objects for which punishment is ever inflicted;

because, having the power to retain the negroes, he would pay the fine from their labor or would get them for only so much less than he bargained to give for them. In other words, the seller, if convicted too, would pay his own and the buyer's fine. Again, as the rule is not allowed for the benefit of either party to an illegal contract, but altogether upon grounds of public policy, we do not think that public policy calls for the application of it in this case, as the defendant might keep the slaves which he bought from the plaintiff within the state of Mississippi, contrary to the law which forbade the sale of them. Such decided advantages, to one of two who have violated a statute by a contract, could not have been meant by the legislature of Mississippi.

§ 456. *Where a statute imposing a penalty for making certain contracts is repealed, and a new one is enacted declaring such contracts void, this shows that the former statute was not intended to make such contracts void.*

It is gratifying to us that the conclusion at which we have arrived is sustained by the subsequent legislation of Mississippi. In 1837 (Hutch. Dig., 535) an act was passed repealing the act permitting slaves to be brought into the state for sale. In addition to the penalty, it is declared in terms that all contracts in contravention of it shall be void. There could not be, from statutes *in pari materia*, especially in one repealing another and substituting new conditions and penalties upon the same subject-matter of both, a stronger circumstance to show that, under the first statute in order, contracts in violation of it were not meant to be irrecoverable by suit. Our judgment in this case is, that the contract is not void, and that the defendant can take nothing by his pleas. We are aware that decisions have been made in the courts of Mississippi seemingly in conflict with this; but they are only so in appearance. None of them were made until after the constitution of Mississippi of 1817 had been superseded by that of 1832. We have said, more than once, and now say again, that the clause in the constitution of 1832, prohibiting the introduction of slaves into the state as merchandise, was inoperative to prevent it until the legislature acted upon it. We have read all that has been officially written in opposition to that conclusion without having our confidence in its correctness at all shaken. We shall direct the reversal of the judgment in this case.

JUSTICES McLEAN and CURTIS dissented.

MCBLAIR v. GIBBES.

(17 Howard, 232-239. 1854.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.— This is an appeal from a decree of the circuit court of the United States for the district of Maryland. The bill was filed by the administrator of Lyde Goodwin against the executors of Robert Oliver, to recover the proceeds of a share in an association called the Baltimore Company, which had a claim against the Mexican government, that was allowed under the convention of 1839 (8 Stats. at Large, 526), "for the adjustment of claims of citizens of the United States against the Mexican Republic." The claim of the company was founded on a contract with General Mina, in 1816, for advances and supplies in fitting out a military expedition against the dominions of the king of Spain. The bill also sought to recover a commission of five per centum, which the members of the company had agreed to give to Goodwin, for his services as agent in soliciting the claim against Mexico. The share and

commissions, as charged, amount to \$67,337.15. The executors of Oliver set up a right to retain the fund for the benefit of the estate, under and by virtue of a purchase of Goodwin's share in this company, and also of his right to the commissions, by their testator, in 1829. The purchase and transfer took place the 30th May, in that year, for a good and valuable consideration.

A question was made on the argument, whether or not the assignment of Goodwin was sufficiently comprehensive to include a right to the commissions as well as to the proceeds of the share. We are satisfied that it is. The language is very broad: "All my undivided ninth part, right, title and interest of every kind whatever, in the claim on the government of Mexico," etc. And again: "The object and intention of this agreement is to make a full and complete transfer to the said Robert Oliver of all my right, title and interest aforesaid," etc. The commissions were dependent upon the allowance of the claims of the company against Mexico, and, of course, an interest intimately connected with them; without the allowance of the one, the other would be valueless. The understanding of Goodwin himself, of the intention and effect of the assignment, accords with this view, as derived from his deposition taken in behalf of the claims of the company, and used before the board of commissioners; and also from his testimony in the proceedings before the Baltimore county court, for the distribution of the fund among the several claimants.

This share of Lyde Goodwin in the company, and his commissions, have heretofore been the subject of consideration in this court. The case is reported in 11 How., 529. George M. Gill, the permanent trustee of Goodwin, who had taken the benefit of the insolvent laws of Maryland in 1817, claimed this fund before the Baltimore county court as part of the estate of the insolvent, against the right and title of the executors of Oliver, claiming under this assignment of 1829. The Baltimore county court held that the fund passed by the insolvent assignment of 1817, to Gill, the permanent trustee. The case was taken to the court of appeals of Maryland, where the decree was reversed, and the fund distributed to Oliver's executors, the appellate court holding that the contract of the company with General Mina was made in violation of the neutrality act of the United States of 1794, and, being thus founded upon an illegal transaction, constituted no part of the property or estate of the insolvent within the meaning of the Maryland insolvent laws. Gill brought the case to this court under the twenty-fifth section of the judiciary act, for the purpose of revising that decision; but the court dismissed the case for want of jurisdiction, a majority of the judges holding that the only question involved in the decision below was the true construction of a statute of the state, and that it belonged to the Maryland court to interpret its own statutes. Whether that interpretation was right or wrong was a matter with which this court had no concern.

Gill, the permanent trustee, having thus failed to establish a title to the fund under the Maryland insolvent laws, the litigation is again revived respecting the fund, in behalf and for the benefit of the personal representatives of Goodwin, on the ground that the moneys realized upon the contract with General Mina, from the Mexican government, is to be regarded as a subsequent acquisition of property by the insolvent, belonging to his estate, and to be dealt with accordingly. Hence this bill filed against the executors of Oliver to recover possession of the fund. The defense set up to this demand of the administrator of Goodwin, and which it is insisted is conclusive against him, is the assignment of the contract of General Mina, by Goodwin himself, to Robert

Oliver, in 1829, which has been already referred to; that having thus parted with all his right or claim to that contract, for a full and valuable consideration, the proceeds thereof derived from the recognition and fulfillment by the Mexican government belonged to the estate of Oliver, and not to that of Goodwin; and vested his executors with the equitable right to receive the moneys, and which have been paid accordingly under the decree of the court of appeals of Maryland, in making a distribution of the fund.

It is urged, however, in answer to this view, that the contract with General Mina, being illegal, the sale and assignment of it from Goodwin to Oliver must also be illegal, and consequently that no interest therein, equitable or legal, passed to Oliver's executors. But this position is not maintainable. The transaction out of which the assignment to Oliver arose was uninfected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him. The assignment was subsequent, collateral to, and wholly independent of, the illegal transactions upon which the principal contract was founded. Oliver was not a party to these transactions, nor in any way connected with them.

§ 457. *Validity of a contract made in aid of an illegal one.*

It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law; but that is not this case. Oliver, by the assignment, became simply owner in the place of Goodwin, and as to any public policy or concern supposed to be involved in the making or in the fulfillment of such contracts, it was a matter of entire indifference to which it belonged. The assignee took it, liable to any defense, legal or equitable, to which it was subject in the hands of Goodwin. In consequence of the illegality the contract was invalid, and incapable of being enforced in a court of justice. The fulfillment depended altogether upon the voluntary act of Mina, or of those representing him. No obligation existed, except what arose from a sense of honor on the part of those deriving a benefit from the transaction out of which it arose. Its value rested upon this ground, and this alone. The demand was simply a debt of honor. But if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And if even the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself. In *Faikney v. Reynous*, 4 Burr., 2069, where two persons were jointly concerned in an illegal stock-jobbing business with a third, and a loss having arisen, one of them paid the whole, and took a security from the other for his share, the security was held to be valid as a new contract, uninfected by the original transaction. And in *Petrie v. Hannay*, 3 Term R., 418, where one of the partners, under similar circumstances, paid the whole at the instance of the other, he was allowed to recover for the proportionate share. These cases are examined and approved in *Armstrong v. Toler*, 11 Wheat., 258 (§§ 581-586, *infra*).

In *Tenant v. Elliot*, 1 Bos. & Pull., 3, the defendant, a broker, effected an insurance for the plaintiff which was illegal, being in violation of the navigation laws; but on a loss happening, the underwriters paid the money to the broker, who refused to pay it over to the insured, setting up the illegality, upon which an action for money had and received was brought. The plaintiff recovered, on the ground that the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected

by the illegality of the original transaction. The same principle was applied and enforced in the case of *Farmer v. Russell*, 1 Bos. & Pull., 296. In *Thompson v. Thomson*, 7 Ves. Jr., 470, there had been a sale of the command of an East India ship to the defendant, and as a consideration he stipulated to pay an annuity of £200 to the previous commander so long as he should continue in command of the ship.

This contract of sale was illegal. Subsequently, the defendant relinquished the command, and another person was appointed in his place. But under the regulation adopted by the East India Company to prevent the sale of the commands of their ships, an allowance was made to the defendant, on his retiring, of £3,540. The bill in this case was filed for the purpose of procuring a decree for the investment of a portion of this fund to satisfy the annuity of £200, praying that the value of it might be ascertained and paid out of the money allowed by the company. The objection made was, that the contract providing for the annuity was illegal, and a court of equity, therefore, would not interfere.

The master of the rolls, Sir William Grant, agreed that the contract was illegal; he admitted there was an equity against the fund, if it could be reached by a legal agreement; but observed, "you have no claim to this money, except through the medium of an illegal agreement, which, according to the determinations, you cannot support." "If the case," he further observed, "could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing the trust;" "but in this instance the money is paid to the party." "There is nothing collateral in respect to which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences."

So in *Sharp v. Taylor*, 2 Phill. Ch., 801, the bill was filed, among other things, to recover a moiety of the freight money, the whole of which had come into the hands of one of the joint owners. The defense set up was, that the trade in which the vessel had been engaged, and in which the freight had been earned, was in violation of the navigation laws, and illegal. But Lord Chancellor Cottenham answered, that the plaintiff was not asking for the enforcement of an agreement adverse to the provision of the act of parliament, nor seeking compensation and payment for an illegal voyage; that, he observed, was disposed of when *Taylor*, the defendant, received the money; the plaintiff was seeking only his share of the realized profit. Again he observed, can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some act of parliament has been violated? The answer is, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do as between the parties. The difference, he observes, between enforcing illegal contracts, and asserting title to the money which has arisen from them, is distinctly taken in *Tenant v. Elliot*, and *Farmer v. Russell*, and recognized by Sir William Grant, in *Thompson v. Thompson*.

§ 458. *Though a subsequent collateral contract made in aid of one that is illegal cannot be enforced, yet the bona fide assignment for value of an illegal claim is valid and binding on assignor's representatives, and, should the claim be legalized before realizing on it, the assignee is protected.*

These cases show that the assignment of Lyde Goodwin to Robert Oliver, in 1829, being collateral to and disconnected from the illegal transaction out of

which the Mina contract arose, was valid and binding upon Goodwin, and vested in Oliver all the benefits and advantages, whatever they might be, derived from that contract. The assignment from Goodwin to Oliver, though the assignment of an illegal contract — which contract, therefore, imposed no legal obligation, and rested simply upon the honor of the parties, — was not within the condemnation of the Maryland insolvent laws, as expounded by her courts, as the right was not derived under but entirely independent of them. Those laws have no application to this assignment. And further, that the money having been realized by his executors, according to the purpose and object of the assignment, becomes a part of the assets of the estate, which belong to the personal representatives. Another ground may be briefly stated, which, in our judgment, is equally conclusive against the complainant. The assignment of 1829, of the Mina contract, not being tainted with illegality, and therefore obligatory upon Goodwin, if he were alive and claiming the fund against the representatives of Oliver, having parted with all his right in the subject to their testator for a valuable consideration, would be estopped from setting up any such claim, and, of course, his personal representatives can be in no better situation.

We have not deemed it necessary to look into the case for the purpose of ascertaining whether Goodwin, at the time of the proceedings in the Baltimore county court, had such notice of them as required that he should have appeared there and asserted his right; and hence, that the decree of that court, in the distribution of the fund, was conclusive upon such right. That question is unimportant, inasmuch as, in our opinion, the executors of Oliver have, independently of that ground, established a complete title to the fund in controversy. We think the decree of the court below was right, and should be affirmed.

§ 459. Contracts within the penalty or prohibition of a statute, void — Usury.— A contract in contravention of a statute which contains a penalty and a prohibition is absolutely void unless a contrary intent appears from the statute. So where an act regulating interest contains a prohibition against taking a greater rate than that prescribed, and in certain contingencies also provides for a forfeiture of the whole usurious debt, the reasonable inference is that the intention of the act was to make such contracts usurious and void. *In re Pittock*, 2 Saw., 424.

§ 460. Contrary to statute or common law.— There is no solid distinction between written instruments containing covenants, conditions or grants illegal at common law, but not *malum in se*, and those containing conditions, covenants and grants illegal by express prohibition of statute. In each case the instruments are void as to such conditions, covenants or grants which are illegal, and are good as to all others which are legal and unexceptionable in their character. The only exception is when the statute has not confined its prohibitions to the illegal conditions, covenants or grants, but has expressly, or by necessary implication, avoided the whole instrument to all intents and purposes. *United States v. Bradley*, 10 Pet., 368.

§ 461. Statute prohibiting an agreement must be clear.— Unless it is clear from the words of a prohibitory statute that an agreement in violation of it is void, courts will not so declare it, but will give effect to the agreement. The intention of the legislature is to be made out by referring to the whole statute, and such intention will control the courts in giving it construction. *National Exchange Bank v. Moore*, 2 Bond, 177.

§ 462. In violation of statute or public policy.— A contract made in violation of a statute or of the policy of the law is void. *M'Lean v. Lafayette Bank*, 8 McL., 613.

§ 463. Repeal of law prohibiting contract.— Though a contract is made in express violation of law, a repeal of the prohibitory act does not give validity to the contract; yet the legislature may remove the prohibition and authorize a recovery where there has been a good consideration. They cannot, however, impose an obligation which does not equitably arise out of the transaction. *Milne v. Huber*, 8 McL., 216.

§ 464. Validity as affected by subsequent events.— Contracts valid when made continue so as long at least as the governments of the contracting parties are not at war, and are valid

and enforceable notwithstanding a change in the conditions of business which originally led to their creation. The occurrence of subsequent events rendering them of more or less value to either of the parties cannot affect their validity or justify any violation of their provisions. *Railroad Co. v. Richmond*, 19 Wall., 588.

§ 465. **Illegality as a defense by purchaser in possession.**—Though a public sale to perfect a previous private agreement for the sale of property is void as against public policy and the law of Georgia, yet *quære*, whether a purchaser under such an agreement, who has entered into possession and used the property, can set up such violation of law and public policy to defeat an action for the purchase money. *Porter v. Graves*, 14 Otto, 173.

§ 466. **Illegality cannot be waived.**—Where a contract is illegal there can be no waiver of the illegality by the parties. The defense is allowed for the sake of the law, and not on account of the defendant. The law will not enforce what it has forbidden and denounced. The maxim *ex dolo malo non oritur actio* is limited by no such qualification. Whenever illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reason. Wherever the contamination reaches it destroys. *Coppell v. Hall*, 7 Wall., 558.

§ 467. **No remedy for that which is illegal.**—There can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is itself illegal. *Dill v. Elliott, Taney*, 237. See §§ 489, 440, 443.

§ 468. **In violation of the laws of a foreign country.**—If a foreigner makes a firm and final contract, complete in his own or a foreign country, it is nothing to him whether a use may or may not be made of the contract in violation of the revenue laws of a foreign country. But the case is different with a citizen. If he makes a contract, knowing it to be in violation of the laws of his country, he cannot have the aid of the laws he has offended to enforce it. If the contract of a foreigner is to be completed or has a view to its execution in a foreign country, he is bound to take notice of the laws. Doing business under the faith and sanction of these laws, he will be bound by them. *Cambioso v. Maffet*, 2 Wash., 104.

§ 469. **Unjust and immoral contract authorized by positive law.**—Where a contract is against sound morals, natural justice and right, a remedy thereon may exist by virtue of the positive law under which the contract was made; but such remedy can only be enforced so long as the statute is in existence. Such remedy derives its full effect from the statute, and cannot, for any purpose, survive its repeal. *Osborn v. Nicholson*, 1 Dill., 221.

§ 470. **Contract to do an act prohibited by statute.**—Where the statute makes a certain act unlawful no contract to do such act is lawful or can be enforced. So, where a statute makes it unlawful for any person to employ an unlicensed engineer, and imposes a penalty for so doing, no action lies by an unlicensed engineer to recover wages. It would make prohibitory statutes nugatory and of no effect if parties could act and contract in violation of them, and then require the courts to enforce and uphold such contracts. *The Pioneer*, Deady, 79.

§ 471. **A contract to do an illegal act is void whether it is *malum in se* or *malum prohibitum*.** *Bank of United States v. Owens*, 2 Pet., 589.

§ 472. **It seems that every contract made for or about a matter or thing which is prohibited and made unlawful by statute is a void contract, although the statute does not mention that it shall be so, but only inflicts a penalty on the offender. The fixing of a penalty imports a prohibition and makes the prohibited act illegal.** *Clark v. Protection Ins. Co.*, 1 Story, 123.

§ 473. **A contract to do an act forbidden by law is void and cannot be enforced in a court of justice.** *Tiffany v. Boatman's Institution*, 18 Wall., 384.

§ 474. **Contract growing out of illegal transaction.**—Where a contract either as a whole, or in part only, grows immediately out of, or is connected with, an illegal transaction, notwithstanding it may be a new contract, it is equally contaminated. *Scudder v. Thomas*,* 85 Ga., 365.

§ 475. **Contract connected with illegal transaction.**—It seems that a contract may be valid notwithstanding it is remotely connected with an independent illegal transaction which, however, it is not designed to aid or promote. *Ocean Ins. Co. v. Polleys*, 18 Pet., 164.

§ 476. **Transaction with unlawful bank-bills.**—If a contract arises out of an illegal act, or is connected therewith, there can be no recovery upon it. So where the issuing of bank-bills by unauthorized corporations was prohibited by law, it was held that no action growing out of a transaction with such bills could be maintained. *Milne v. Huber*, 3 McL., 214.

§ 477. **Promise in consideration of unlawful act—Bills of credit—Note.**—A promise made in consideration of an act which is forbidden by law is void. So a promissory note given to a state in return for bills of credit issued by it is void. *Craig v. Missouri*, 4 Pet., 436; *Byrne v. Missouri*, 8 Pet., 40.

§ 478. **Illegal contract — Assignment.**—An agreement made in violation of an express statute is illegal and void, and no interest in, or right of property arising out of it, either legal or equitable, can be conveyed by assignment. *William v. Olliver*, 12 How., 131.

§ 479. **Subsequent ratification of invalid contract.**—Parties cannot render valid their own invalid contract by a subsequent ratification of it. So where directors in a railroad company sought to ratify a contract with a construction company, which contract was invalid because certain of the parties ratifying were directors in both companies, it was held that the attempted ratification did not render the contract valid. *Thomas v. Brownsville, etc.*, R. Co., 1 McC., 392 (§§ 575-577).

§ 480. **Recovery of money paid on unexecuted illegal contract.**—Money paid by one party in part performance of an illegal contract can be recovered back, the other party not having performed any part of the contract, and both parties having abandoned it before completion. *Spring Co. v. Knowlton*, 13 Otto, 49 (§§ 1589-94).

§ 481. **Recovery of money paid on wager — Law of Michigan.**—At common law money paid on a fair wager could not be recovered back, but the laws of Michigan alter the common law, and allow a recovery in such cases. *Grant v. Hamilton*, 8 McL., 103.

§ 482. **Void contract, executed — Property accumulated under.**—Even though a contract is void the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and a court will not refuse to deal with it on the ground that it was acquired under an illegal contract. Where an illegal contract has been consummated and the proceeds of the sale have been actually received, and received in something which the law recognizes as having value, courts may enforce the equities between the parties. Though an illegal contract will not be executed, yet when it has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin. *Western Union Tel. Co. v. Union Pac. R'y Co.*, 1 McC., 563.

§ 483. **Illegal contract — Partially executed.**—Though a contract is illegal, yet where it has been partially executed, the parties are thus far bound, and neither can of his own motion, without process or settlement, seize and exclude the other party from property acquired by both under such agreement. *Western Union Tel. Co. v. St. Joseph & Western R'y Co.*, 1 McC., 568. See § 495.

§ 484. — **executed.**—In case of an illegal contract, though executed, equity will not aid one party and deny redress to the other. *Tiffany v. Boatman's Institution*, 18 Wall., 3-5.

§ 485. **Executed and executory — Connected with illegal transaction.**—While in the case of an executed illegal contract a court will not interfere to set it aside, yet where it is executory, courts will not lend themselves to aid in its enforcement; and it seems that if a contract be connected with the illegal transaction, in part only, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it. *Baily v. Milner*,* 30 G.L., 335.

§ 486. **Contract by corporation before filing articles — Subsequent ratification.**—A corporation, before its articles of association had been filed as required by law, entered into a contract for certain machinery. After its organization was perfected the corporation recognized the validity of the contract. *Held*, that it was binding on the corporation notwithstanding the fact that by statute all corporations were forbidden to do business till after the filing of their articles of incorporation. *Whitney v. Wyman*, 11 Otto, 336.

§ 487. **Prohibited contract by foreign corporation — Estoppel.**—A state law provided that no foreign corporation should do business in the state before the appointment of a state agent on whom process might be served. *Held*, that a contract made before such appointment was illegal and void, and that the party entering into the contract with the company was not estopped to deny its validity. *In re Comstock*, 3 Saw., 227.

§ 488. **Law prohibiting corporation from making a mortgage — Mortgage by its agent and indemnity by the corporation.**—The law organizing a corporation provided that it could hold lands but that it should have no power to mortgage them. Not having money enough to pay in full for certain lands, its agents took the title to lands purchased for it in their own name and gave a mortgage back in their own name, and then conveyed the lands to the corporation, and the corporation agreed to indemnify the agents for any sums they might be obliged to expend in consequence of their obligation. The agents being obliged to pay the mortgages, and the corporation becoming insolvent, the agents sued a stockholder. *Held*, that the transaction was in violation of the provisions of the law forbidding the corporation to mortgage its lands, and that the contract of indemnity was in fraud of the statute and void, at least as against an innocent stockholder. *Cox v. Gould*, 4 Blatch., 345.

§ 489. **Unauthorized contract by corporation — Notes by bank.**—A contract entered into by a corporation that has no powers except those given by statute is void if made in violation of law. Notes made by a bank which are not payable on demand, when the bank is for-

bidden to make notes not so payable, are void, even in the hands of *bona fide* holders. *Root v. Godard*, 3 McL., 103; *Root v. Wallace*, 4 McL., 8. See § 492.

§ 490. **Formation of banking corporation in violation of law.**—Where a banking corporation is established in violation of a law to prevent illegal banking, no action can be maintained by its creditors against its stockholders and directors. The rule of law is that as between *particeps criminis* the law can give no aid, and it is not perceived how an individual can become indebted to the bank, or have a claim on it, without being involved in its illegality. *Nessmith v. Shelden*, 4 McL., 377.

§ 491. **Provision in respect to payment ultra vires.**—A contract by a city for the improvement of its streets is not so inoperative that no payment at all need be made for the work, because it provides for payment in bonds which it has no authority to issue. *Hitchcock v. Galveston*, 6 Otto, 341 (CORP., §§ 2854-53).

§ 492. **Bank-notes made in violation of law.**—Notes issued by a bank in violation of the law which prohibited the issuing of such notes otherwise than payable on demand without interest are void. *Weed v. Snow*, 8 McL., 266. See § 499.

§ 493. **Bills drawn to carry on illegal banking.**—The statute of a state prohibited, under penalties, the erection, establishment, institution or putting in operation of any banking company, or the issue of any bills or notes with intent or purpose so to do. *Held*, that the statute covered with its prohibition the whole range of devices by which illegitimate currency is imposed on the community, and applies completely to the first step in its operations. So, when a bill of exchange is drawn in one state on a party in another, and the known purpose of both is to carry on such illegal banking, such bill is void. *Davidson v. Lanier*, 4 Wall., 454 (BILLS AND NOTES, §§ 1319-24).

§ 494. **Loan of prohibited amount by national bank.**—Although the national banking law prohibits the loan by a national bank of a greater amount than equals one-tenth of its capital to any individual, yet if such loan is made it is valid as between the parties, and cannot be collaterally attacked. Its only effect is to render the directors personally liable, and to expose the bank to a forfeiture of its charter. *Shoemaker v. National Mechanics' Bank*, 2 Abb., 421.

§ 495. — **executed contract.**—Though a contract is such that a court would not enforce it, yet if it is executed a court will leave the parties where it finds them, giving aid to neither. So where a national bank has loaned money to a party in excess of the limit prescribed by law, and has received collateral securities therefor, such securities cannot be reached by a creditors' bill brought by a creditor of the borrower. *Stewart v. National Union Bank*, 2 Abb., 431.

§ 496. **Contract by insurance company — Requirements of charter — Varying or cancelling of policy.**—Where the charter of an insurance company provided, in effect, that an instrument, in order to bind the company, should be signed by the president or some other officer according to the ordinances, by-laws and regulations of the board of directors, it was held that a contract varying a policy of insurance was as much an instrument as the original policy, and could therefore only be executed as prescribed by law, and that the same rule applied to canceling the policy. To enable the company to contract it must follow the mode of contracting prescribed, or its act will no more create a contract than if the company had never been incorporated. *Head v. Providence Ins. Co.*, 2 Cr., 167.

§ 497. **Usury — Substituted contract.**—Though a contract was usurious, and a subsequent contract was entered into in substitution of the former, such subsequent contract is not void for illegality unless the former contract was rendered void by the law of the place where it was executed, especially where the second contract was entered into between the parties in view of the fact that one of the parties proposed to take advantage of the illegality of the former contract. *De Wolf v. Johnson*, 10 Wheat., 392.

§ 498. **Discount of note — Usury.**—When a bank, the payee of a note, discounts it to the credit of the maker, and takes the interest in advance, the transaction is usurious. *Union Bank of Georgetown v. Corcoran*, * 5 Cr. C. C., 513.

§ 499. **Usury.**—A contract to do an act forbidden by law is void, and cannot be enforced in a court of justice, and this is true though the statute forbidding the contract does not in express terms make such contracts void. So where a state constitution forbids the taking or demanding of more than six per cent. interest, no contract made in such state can be sustained where a higher rate of interest is taken or demanded by the contract. *Dill v. Ellicott*, Taney, 286.

§ 500. **A sale of cotton during the existence of the non-intercourse act between citizens in the belligerent sections of the country was illegal, and an action to recover the proceeds of the cotton cannot be maintained by the vendee against the government.** *Cutner v. United States*, 17 Wall., 520.

§ 501. Note given for price of slave—Suit thereon after the abolition of slavery.—A note given for a slave at a time when slavery was lawful in the state in which it was given is valid, and may be enforced by the courts of the United States even after the abolition of slavery, though the new constitution of the state prohibits all actions for the recovery of money where the consideration was a slave or the hire thereof. *White v. Hart*, 18 Wall., 658.

§ 502. Constitution of Mississippi forbidding the importation of slaves—Note given for slaves imported.—The constitution of Mississippi, adopted in 1882, provided that after May 1, 1883, the introduction of slaves into the state should be prohibited, and provided further that actual settlers should be allowed to purchase slaves outside the state for their own use till 1845. *Held*, that this was merely directory on the legislature, and that it did not render void a note given for slaves imported into the state in 1835 and 1836, before there was any legislative provision on the subject. *Groves v. Slaughter*, 15 Pet., 497.

§ 503. —breach of warranty.—At the time of a sale of a slave in Arkansas before the war of the rebellion, and while slavery was lawful, the purchaser gave his note therefor, and warranted the slave sold to be sound in mind and body and a slave for life, and that his title was perfect. After the adoption of the thirteenth amendment prohibiting slavery, a suit was brought on the note, and it was held that being a valid contract at the time and place where made, it was valid everywhere, and that the right under it being vested, it was not affected by the thirteenth amendment. *Held*, also, that there was no question of implied warranty, and as the express warranty was not broken at the time of the sale, no breach could be wrought by any after event. *Osborn v. Nicholson*, 13 Wall., 658.

§ 504. Contract in violation of sections 4 and 5 of act of congress of March 31, 1830, relating to public lands.—An agreement on the part of settlers upon unsurveyed public lands of the United States to purchase the lands as soon as they should be surveyed and offered for sale, and then to mortgage them to secure the payment of a debt, is not a contract in violation of sections 4 and 5 of the act of congress of March 31, 1830, for the relief of purchasers of public lands, and for the suppression of fraudulent practices at the public sales of lands of the United States. *Wright v. Shumway*, 1 Biss., 23.

§ 505. Indiana statute—Contract for convict labor.—A statute of Indiana provided that convicts might be hired "in any number not exceeding one hundred, in any one contract," etc. Four different contracts were made with the same parties, each contract calling for the labor of one hundred men, and all four were made at the same time. *Held*, that the execution of these contracts was not a violation of the statute. *In re Southwestern Car Co.*, *9 Biss., 76.

§ 506. Conducting suit for share of profits—Assignment to enable one to sue.—Although, under a state law, an agreement to carry on a suit on condition of receiving a share of the proceeds is void, yet this rule does not apply to the transfer of the legal title of land to a stockholder of a corporation in trust for the corporation, and to enable him to bring suit for the benefit of the corporation. *Roberts v. Cooper*, 20 How., 438.

§ 507. Insurance on unlawful voyage.—A contract of insurance made on a voyage which is opposed to the common, statute or maritime laws of the country where it is effected is void. The plaintiff, whether he is insurer or insured, is turned out of court, not because he is more in fault than the defendant, for they are *in pari delicto*, and, in such a case, *potior est conditio possidentis*. *Craig v. United States Ins. Co.*, Pet. C. C., 417.

§ 508. Insurance policy—Contemplated illegal act.—The validity of a contract of maritime insurance cannot be affected by a mere contingent, future contemplated illegal act in the progress of voyages covered by the policy, if the voyage is otherwise, in its origin, concoction and accomplishment, perfectly legal. A mere intention to do an illegal or other act which would avoid the policy if done, but which has never been consummated by any act, will not *per se* vitiate the policy. There is, in all cases of this sort, a *locus poenitentiae*; the act and intent must be coupled together. In order to make the voyage utterly void in its origin, it is necessary that the place of the voyage itself and the main object of the enterprise should be absolutely illegal. The voyage should be originally and absolutely, in whole or in part, illegal as to trade and objects, and not a mere contingent intention to do some collateral act in the course of a legal voyage or trade, which, if done, might be illegal. The illegality should not only be contingently contemplated, but there should be some overt act in progress. *Clark v. Protection Ins. Co.*, 1 Story, 123.

§ 509. Bill of exchange drawn in fraud of law.—A bill of exchange drawn in one state on a party in another state, in furtherance of a plan entered into by both in fraud of the laws of the first state, is void in the hands of a party with notice. *Davidson v. Lanier*, 4 Wall., 455 (BILLS AND NOTES, §§ 1519-24).

§ 510. The by-laws of the National Home for Disabled Volunteer Soldiers provided that no officer should receive any fees or compensation other than his regular salary. The building

commissioners of the national asylum agreed with the deputy governor of a particular branch that he should have a certain percentage of the value of materials used in the completion of a new building. *Held*, that such contract was in violation of the by-laws and was void. *Yates v. National Home*, 13 Otto, 674.

§ 511. Judgment on contract declared void by law — Note by judgment debtor to bail. — Judgment having been rendered against a person on a gambling debt, and the liability of a special bail to pay the same having become fixed, the judgment debtor gave the bail a promissory note for the payment of such sum. *Held*, that such note was not void under the statute of the state declaring void all contracts of which the consideration was money won at a game. *Welford v. Gilham*, 2 Cr. C. C., 558.

§ 512. Partnership formed to make illegal contracts — Account between the partners. — A partnership was formed for the purpose of buying soldiers' land claims and then locating and selling them, notwithstanding the fact that such transfers of claims were prohibited by law and illegal. After certain claims had been purchased, located and sold, one of the partners, who had had no share in the management of the business, sold out to the managing partner. Claiming to have been defrauded in the sale, the seller brought his bill for an accounting and a division of the funds. *Held*, that although the purposes of the contract were illegal, still the plaintiff was entitled to the relief sought. *Brooks v. Martin*, 2 Wall., 79.

§ 513. Agreement to locate land scrip for the benefit of half-breed Indians — Indian treaty — Act of congress making such scrip non-assignable. — A certain Indian treaty provided that certain lands should be reserved for half-breeds and that they should hold as other Indian titles were held. Afterwards the president was authorized to give the half-breeds certain land scrip in return for their relinquishment of the lands reserved by the treaty, but the act authorizing such transfer expressly provided that such scrip should not be assignable. A. agreed to locate certain scrip held by B. for the benefit of certain half-breeds, and B. promised, for a valuable consideration, to procure title, to be vested in A. after such location was made. *Held*, that this contract was not in violation of the treaty or of the subsequent act of congress, and that the transaction was not an assignment of the scrip within the prohibition of the act. *Myrick v. Thompson*, 9 Otto, 291.

§ 514. Contract to furnish means for an expedition in violation of neutrality laws — Assumption of debt by foreign country — Bankruptcy. — The Maryland courts having decided that the contract between General Mina and the Baltimore Company, under which the latter furnished the former with means to fit out an expedition against the province of Mexico, was illegal and void, as made in violation of our neutrality laws, and that no interest under the contract passed to the assignees in insolvency of a shareholder in the company, the supreme court followed this decision. But Mexico, after achieving her independence, having assumed the debt, and the United States, through its minister to that country, having made it a subject of negotiation on behalf of the parties in interest, it was held that the claim, as thus assumed, passed to the assignees of the shareholder under a subsequent insolvency. *Mayer v. White*,* 24 How., 817.

§ 515. The court will not add penalties to those prescribed by law. — Though courts of law will not lend their aid to enforce illegal or unconscionable contracts, yet they will not favor defenses to such contracts which in effect add penalties not prescribed by law. *De Wolf v. Johnson*, 10 Wheat., 392.

2. As to Public Policy or Morality.

SUMMARY — Agreement to have a vessel condemned as a prize, § 516. — Compensation for procuring a government contract, § 517. — Judicial notice of illegality, § 518. — Agreement for personal influence with a government agent, §§ 519, 523. — Action to adjust losses, § 520. — Lobby service, §§ 521, 522. — Procuring appointment as special government counsel, § 523. — Guaranty that certain shares should be at par, § 524. — Promise of indemnity for illegal act, §§ 525, 526. — Agreement to bid at execution sale, § 527. — Conducting business with a bank known to be illegally organized, § 528. — Exempting employer from liability for negligence, § 529. — Agreement to avoid testifying as a witness, § 530. — Agreement in a bond to pay an attorney's fee, § 531. — Same persons directors in two contracting companies, § 532. — Attorney and client, § 533. — Agreement in reference to imported goods which had been seized, § 534. — Note given by thief for stolen goods, § 535.

§ 516. An act of congress declared that all of an enemy's ships which should be seized by the crews thereof should be lawful prize to the captors. To avoid capture by United States cruisers, defendant, who commanded a British ship, agreed with his crew that they should seize the vessel, take her into a United States port, have her condemned, and divide the proceeds according to a plan agreed upon, the defendant to have a certain share as trustee for the

owners. This agreement was carried out. A bill in equity was subsequently filed by the owner's assignee to compel defendant to account for the proceeds of the share received by him as trustee; to which bill defendant demurred, and it was held that the demurrer must be sustained. *Hannay v. Eve*, § 536.

§ 517. An agreement for compensation in procuring a contract with the government to furnish it with supplies is an agreement against public policy. So where N. agreed to procure for defendant a contract between it and the government to furnish the latter with muskets, which he did, and afterwards brought suit for compensation, it was held that his agreement with defendant was against public policy and void. *Tool Co. v. Norris*, §§ 537-539.

§ 518. When a contract sued on is forbidden by law, the court is bound to take judicial notice of the fact, whatever the state of the pleadings. *Oscanyan v. Arms Co.*, §§ 540-547.

§ 519. An agreement to use personal influence with a government agent in order to procure a government contract is void. So where plaintiff, being consul-general of the Turkish government, agreed with defendant to use his personal influence with a special agent of the Turkish government to procure contracts between that government and defendant, and did use such influence with success, it was held that plaintiff could maintain no action for his services in procuring such contracts. *Ibid.*

§ 520. Where parties enter into a contract to make another contract with the government, in the execution of which an unsuccessful attempt is made to defraud the government, neither party to the first contract can maintain an action upon it to adjust losses sustained by the failure of the attempted frauds. *Bartle v. Coleman*, § 548.

§ 521. A contract by which a lawyer agrees to procure by lobby service the passage of a bill through congress is a void contract. *Trist v. Child*, §§ 549-554. See §§ 600, 605.

§ 522. All contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, are void by the policy of the law. And where an agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a court to recover compensation. So, where plaintiff agreed for a certain sum of money to induce the legislature of Virginia to grant to defendants a certain right of way which they desired, and the evidence showed that the parties knew that he intended to accomplish this result by secret influence with individual members of the legislature, it was held that the contract was against public policy, and was void. *Marshall v. Baltimore & Ohio R. Co.*, §§ 555-562. See §§ 600, 605.

§ 523. Plaintiff agreed to secure for defendant an appointment as special counsel for the United States in certain causes pending, if defendant would divide with him the fees received in such causes. In an action to recover one-half the fees, *held*, that the contract was void as against public policy. *Meguire v. Corwine*, § 563. See § 601.

§ 524. Plaintiff agreed to receive shares of stock in a certain railroad company in exchange for lands, and defendants guaranteed that the shares should be worth par three years from the date of the conveyance. *Held*, that the contract was binding. *Hill v. Smith*, § 564.

§ 525. A promise of indemnity for doing an illegal act is void. So where a firm promised to indemnify F. if he would become surety on the bond of one partner as administrator, the intention of all the parties being to make the administration a partnership business, it was held that the promise of indemnity was void. *Forsyth v. Woods*, §§ 565, 566.

§ 526. A promise of indemnity for publishing a libel is void. *Arnold v. Clifford*, § 567.

§ 527. C. was lessee of a building in which he placed some personal property, and afterwards assigned his lease to W. Rent was payable to H., which C. failed to pay. H. applied to W., and it was agreed between them that H. should levy on C.'s personal property above mentioned and obtain judgment, and that at the execution sale W. should bid the amount of the judgment with costs. In an action for breach of this agreement it was held that the validity of the agreement depended upon the good faith of the parties and the object sought to be accomplished, and that in this case the agreement was valid. *Wickor v. Hoppock*, §§ 568, 569. See § 632.

§ 528. A party who assists in transacting business with a bank which he knows has been illegally organized cannot maintain an action against the bank for balances due him by it in settlement of business transactions thus illegally conducted. Nor can he recover upon notes given for the sums due, for the notes are founded upon the same illegal consideration. *Brown v. Tarkington*, §§ 570, 571.

§ 529. A contract between employee and employer, that the latter shall not be liable for the consequences of his own negligence in supplying defective machinery for his employee's use, is a contract against public policy and void. *Roesner v. Hermann*, § 572.

§ 530. Plaintiff was a book-keeper for defendants. To avoid testifying as a witness in a suit brought against them by the government, plaintiff agreed to absent himself from the jurisdiction of the court, and defendants agreed to pay his salary and expenses while thus absent. In pursuance of the agreement plaintiff did absent himself for about eighteen months, and

now sues on the above contract for his salary and expenses. *Held*, that plaintiff could recover nothing. *Bierbauer v. Wirth*, § 578.

§ 581. Defendant gave two bonds, with sureties, to pay for merchandise furnished him by plaintiff, and each bond contained an agreement that if suit were brought upon the same the obligors would pay \$100 as an attorney's fee, in addition to the penalty. *Held*, that such an agreement was a valid contract. *Wilson Sewing Machine Co. v. Moreno*, § 574.

§ 582. A contract between a construction company and a railroad company is invalid if any directors in the former are also directors in the latter. A construction company made a contract with a railroad company in which it was agreed that the former company should relieve the directors of the latter company from any further assessments upon the stock for which they had subscribed. *Held*, that the contract was against public policy and void. *Thomas v. Brownsville, etc., R. Co.*, §§ 575-577.

§ 583. After judgment an attorney may lawfully purchase of his client real estate which he has been employed to recover. *McMicken v. Perin*, §§ 578-580.

§ 584. Certain goods of A. and others consigned to T. were seized as imported contrary to law. The goods were delivered by the captors to T., upon his agreement to become liable for their appraised value, and T. delivered to A. his portion of the goods upon his promise to repay T. his proportion of any sum T. should be obliged to pay if the goods were ultimately condemned. The goods were condemned, and T. paid their appraised value. In an action by T. against A., upon the latter's promise of repayment, the jury found that T. had no interest in the goods of A., and was not concerned in any scheme to introduce the goods into the United States, and rendered a verdict for T. Upon appeal to this court it was held that the contract sued on was lawful, and that the action could be maintained. *Armstrong v. Toler*, §§ 581-583.

§ 585. A note given by the thief in payment for stolen goods is not invalid as for compounding a felony, provided the payee makes no agreement to abstain from his legal duty to prosecute the wrong-doer. *Hoover v. Wood*, § 587. See § 640.

[NOTES.—See §§ 538-630.]

HANNAY v. EVE.

(3 Cranch, 242-249. 1803.)

APPEAL from U. S. Circuit Court, District of Georgia.

STATEMENT OF FACTS.—Bill in equity for a discovery, an accounting, etc. Complainant, assignee of Cruden & Co., who were British subjects, alleged in his bill that a vessel belonging to them, and commanded by defendant Eve, sailed from Kingston, Jamaica, to New York, on December 24, 1782. By reason of stormy weather, she was rendered incapable of reaching the latter port, and it was determined, in order to save the lives of the crew and passengers, to put into the nearest port of the United States. An act of congress of December 9, 1781, declared "that all ships and vessels, with their cargoes, which should be seized by the respective crews thereof, should be deemed and adjudged as lawful prize to the captors." Defendant accordingly proposed that the crew should seize the ship and cargo, make prisoners of the passengers, sail for the nearest port, and there obtain a condemnation of ship and cargo for the benefit of the crew, the balance above their wages to remain in the hands of defendant as trustee for the owners. This plan was carried out, and distribution made according to the agreement previously entered into. Defendant purchased some of the shares of the crew for the benefit of the owners, and also a part of the cargo, which he afterwards sold at great profit. Defendant demurred to the bill.

Opinion by MARSHALL, C. J.

The essential difficulty in this cause arises from the consideration, that, under the resolution of congress by which the vessel and cargo mentioned in the proceedings were condemned, a sanction is claimed to a breach of trust, and a violation of moral principle. In such a case, the mind submits reluctantly to the rule of law, and laboriously searches for something which shall reconcile

that rule with what would seem to be the dictate of abstract justice. It has been correctly argued by the plaintiff in error, that the captain was under obligations to the owners, from which, in a moral point of view, he could not be completely absolved. He was bound to save for them the ship and cargo by all fair means within his power; but he was not bound to employ fraud in order to effect the object. The situation of the vessel unquestionably justified her being carried into the port of an enemy, and perhaps, in the courts of England, the libeling of the vessel by the captain and crew might be construed to be an act which would inure solely to the benefit of the owners; but war certainly gives the right to annoy an enemy by means such as those which were employed by congress, and courts are bound to consider them as legitimate, and to leave to them their full operation.

§ 536. *Contract in fraud of a war regulation of the United States invalid.*

The agreement to save the ship and cargo, under the semblance of a condemnation, was not, in itself, an immoral act; it was, as has been truly said, a stratagem which the laws of war would authorize, but it was certainly a fraud upon the resolution of congress, and no principle can be more clear than that the courts of the United States can furnish no aid in giving efficacy to it. Congress having a perfect right, in a state of open war, to tempt the navigators of enemy vessels to bring them into the American ports, by making the vessel and cargo prize to the captors, the condemnation of a vessel so brought in amounted necessarily to an absolute transfer of the property, and to a complete annihilation, in a legal point of view, of the title of the owners, and of their claim upon the captain. Had no communication taken place between the captain and his crew, whereby a portion of the prize money was allotted to him in trust for the owners, which would not have been allotted to him as a captor, in virtue of his station in the vessel, it would have been a plain case of prize under the resolution of congress, and any intention under which the capture was made, whether declared or not, would have been, like other acts of the will, controllable and alterable by the persons who had entertained it. But if, by a contract with the crew, stipulating certain advantages for the owners of the ship and cargo, the vessel has been carried in, when she would not otherwise have been carried in, or a larger proportion of the prize has been allowed to the captain than would have been allowed to him for his own use, a plain fraud has been committed by him, and the question, whether the trust which he assumed upon himself, and under which he obtained possession of the property, can be enforced in this court, is one of more difficulty, upon which a difference of opinion has prevailed. It has been thought by some of the judges, that the contract being in itself compatible with the strictest rules of morality, and being opposed by only a temporary and war regulation, which exists no longer, may now be enforced. But upon more mature consideration, the majority of the judges accede to the opinion that the contract being clearly in fraud of the law, as existing at the time, a law to which, under the circumstances attending it, no just exceptions can be taken, its execution cannot be compelled by the courts of that country to evade whose laws it was made. The person in possession must be left in possession of that which the decree of a competent tribunal has given him.

This opinion seems completely to decide the point made under the treaty of peace. According to it, a debt never existed to which the treaty could apply. No debt was due from the captain to his owners, but in virtue of the confiscation of the ship and cargo; and it has never been alleged that the treaty ex-

tended to captures, made during the war, of property in the actual possession of the enemy, whatever might be the means employed in making them. If the allegations of the bill had stated any contract subsequent to the condemnation, by which Captain Eve had made himself a trustee, the previous moral obligation might have furnished a sufficient consideration for that contract. But the allegations of the bill are not sufficiently explicit on this point. They do not make out such a case. His declarations appear to have been contemporaneous with the transaction, and only to have manifested the intention under which he acted, an intention which he was at liberty to change.

Judgment affirmed.

TOOL COMPANY v. NORRIS.

(2 Wallace, 45-56. 1864.)

ERROR to U. S. Circuit Court, District of Rhode Island.

STATEMENT OF FACTS.—In July, 1851, the Providence Tool Company, a corporation created under the laws of Rhode Island, entered into a contract with the government, through the secretary of war, to deliver to officers of the United States, within certain stated periods, twenty-five thousand muskets of a specified pattern, at the rate of \$20 a musket. This contract was procured through the exertions of Norris, upon a previous agreement with the corporation through its managing agent, that, in case he obtained a contract of this kind, he should receive compensation for his services proportionate to the extent of the contract. A dispute afterwards arose as to the amount of compensation to be paid. Norris insisted that by the agreement he was to receive the difference between the contract price and \$17. The Tool Company contended that it had promised only a liberal compensation. The parties were unable to agree, and Norris brought an action of contract in the court below, and obtained judgment in his favor, from which judgment the Tool Company appealed.

Opinion by MR. JUSTICE FIELD.

Several grounds were taken, in the court below, in defense of this action; and, among others, the corporation relied upon the proposition of law that an agreement of the character stated — that is, an agreement for compensation to procure a contract from the government to furnish its supplies — is against public policy, and void. This proposition is the question for the consideration of the court. It arises upon the refusal of the court below to give one of the instructions asked.

§ 537. *Instructions will be reviewed, when.*

A suggestion was made on the argument, though not much pressed, that the instruction involving the proposition cannot properly be regarded, inasmuch as it was directed in terms to the agreement set forth in the special counts of the declaration, upon which the jury found for the defendants. There would be much force in this suggestion if the general counts, upon which the verdict passed for the plaintiff, did not also aver that his services were rendered in procuring the same contract for the government. The instruction was directed especially to the legality of a contract of that kind, which, having been once refused with reference to some of the counts, it was not necessary for counsel to renew with reference to the other counts to which it was equally applicable. The subsequent instructions were, therefore, directed to other matters. It was not claimed, on the trial, that the plaintiff had rendered any other services than those which resulted in the procurement of the contract for the muskets. We

are of opinion, therefore, that the proposition of law is fairly presented by the record, and is before us for consideration.

§ 538. *A contract for compensation for procuring a government contract is void.*

The question, then, is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction is against public policy. That agreements, like the one under consideration, have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service and to unnecessary expenditures of the public funds.

§ 539. — *analogous cases.*

The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception. There is no real difference in principle between agreements to procure favors from legislative bodies and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both is the direct and inevitable result of all such arrangements. *Marshall v. Baltimore & Ohio R. Co.*, 16 How., 314 (§§ 553-562, *infra*); *Harris v. Roof*, 10 Barb., 489; *Fuller v. Daine*, 18 Pick., 472.

The same principle has also been applied, in numerous instances, to agreements for compensation to procure appointments to public offices. These offices are trusts held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation to procure these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy. *Gray v. Hook*, 4 Comst., 449.

Other agreements of an analogous character might be mentioned, which the courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly; it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country. It follows that the judgment of the court below must be reversed and the cause remanded for a new trial; and it is so ordered.

OSCANYAN v. ARMS COMPANY.

(13 Otto, 261-278. 1890.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This is an action to recover the sum of \$136,000, alleged to be due to the plaintiff upon a contract with the defendant, as commissions on the sales of fire-arms to the Turkish government, effected through his influence. The defendant pleads the general issue. At the time the transactions occurred, out of which this action has arisen, the plaintiff was consul-general of the Ottoman government at the port of New York. The defendant is a corporation created under the laws of Connecticut. The action was originally commenced in the supreme court of New York, and on motion of the defendant was removed to the circuit court of the United States. When it was called for trial, and the jury was impaneled, one of the plaintiff's counsel, as preliminary to the introduction of testimony, stated to the court and jury the issues in the case and the facts which they proposed to prove. From such statement it appeared that the sales for which commissions were claimed by the plaintiff were made whilst he was an officer of the Turkish government, and through the influence which he exerted upon its agent sent to this country to examine and report in regard to the purchase of arms. The particulars of the services rendered will be more fully mentioned hereafter. It is sufficient now to say that the defendant, considering that the facts which the plaintiff proposed to prove showed that the contract was void as being corrupt in itself, and prohibited by morality and public policy, upon which no recovery could be had, moved the court to direct the jury to render a verdict in its favor. The court thereupon inquired of the plaintiff's counsel if they claimed or admitted that the statements which had been made were true, to which they replied in the affirmative. Argument was then had upon the motion, after which the court directed the jury to find a verdict for the defendant, which was accordingly done. Judgment being entered upon it, the case was brought to this court for review. The reversal of the judgment is sought for alleged errors of the court below in three particulars:

1st, in directing a verdict for the defendant upon the opening statement of the plaintiff's counsel; 2d, in holding that the question of the illegality of the contract could be considered in the case, the same not having been specially pleaded; and 3d, in adjudging that the contract set forth in the statement was illegal and void.

§ 540. *The court may direct a verdict for defendant upon plaintiff's opening statement, when it clearly appears from such statement that the contract sued on is one forbidden by law.*

Each of these grounds will be carefully examined. 1. Several reasons are presented against the power of the court to direct a verdict upon the statement of the facts which the plaintiff proposed to prove that might be more properly urged against its exercise in particular cases. The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. The question in either case must be whether the facts upon which it is called to instruct the jury be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury.

In the trial of a cause, the admissions of counsel as to matters to be proved are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof. And if, in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case. If, on a trial for a homicide, to take an illustration suggested by counsel, it should appear from the opening statement that the accused had been pardoned for the offense charged, it would be a waste of time to listen to the evidence of his original criminality; for, if established, he would still be entitled to his discharge by force of the pardon. So, in a civil action, if it should appear from the opening statement that it is brought to obtain compensation for acts which the law denounces as corrupt and immoral, or declares to be criminal, such as attempts to bribe a public officer, or to evade the revenue laws, or to embezzle the public funds, the court would not hesitate to close the case without delay. Of course, in all such proceedings, nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain, and qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action.

Here there were no unguarded expressions used, nor any ambiguous statements made. The opening counsel was fully apprised of all the facts out of which his client's claim originated, and seldom was a case opened with greater fullness of detail. He dwelt upon and reiterated the statement of the fact which constituted the ground of the court's action in directing a verdict for the defendant, namely, that it was Oscanyan's influence alone which controlled the agent of the Turkish government; and, for the use of that influence, the defendant had agreed to give the compensation demanded,—that is to say, that, whilst an officer of the Turkish government, the plaintiff had stipulated for a commission on contracts obtained from it through his personal influence over its agent. Had the case been pending in a court of some of the states, or in an English court, a non-suit would have been ordered, if the facts stated had been deemed fatal to the action. Involuntary non-suits not being allowed in the federal courts, the course adopted was the proper proceeding. The differ-

ence in the two modes is rather a matter of form than of substance, except in the case of a non-suit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted either upon motion or upon appeal.

§ 541. — *cases cited.*

The language of this court in numerous cases is in accordance with these views, though used with reference to directing a verdict after evidence is received. But, as already stated, it cannot make any difference as to the power of the court whether the facts be developed by the evidence or be admitted by counsel. In *Merchants' Bank v. State Bank* it appeared that upon the evidence on behalf of the plaintiff being closed the defendant's counsel moved the court below to instruct the jury that it was not sufficient to enable them to find a verdict for the plaintiff. The instruction was given, and the jury found for the defendant. The case being brought here on writ of error, this court said, speaking through Mr. Justice Swayne: "According to the settled practice in the courts of the United States it was proper to give the instruction if it were clear the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one; it saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and jury, and fixes where it belongs the responsibility which should be assumed by the court." 10 Wall., 604, 637 (*BANKS*, §§ 101-118).

In *Pleasants v. Fant* this court, speaking of a case where the evidence was insufficient to justify a verdict, and where it would be the duty of the court below to set it aside and grant a new trial, said, speaking through Mr. Justice Miller: "Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." 22 Wall., 116, 122.

In *Railroad Co. v. Fraloff* it was claimed by the company that the court below erred in not giving a peremptory instruction for a verdict in its favor. But this court, whilst holding the position untenable, said, speaking through Mr. Justice Harlan: "Had there been no serious controversy about the facts, and had the law, upon the undisputed evidence, precluded any recovery whatever against the company, such an instruction would have been proper." 100 U. S., 24, 26. Indeed, there can be at this day no serious doubt that the court may at any time direct a verdict when the facts are undisputed, and that the jury should follow such direction. The maxim that questions of fact are to be submitted to the jury, and not to be determined by the court, is not violated by this proceeding any more than by a non-suit in a state court where the plaintiff fails to make out his case. The intervention of the jury is required only where some question of fact is controverted. Our conclusion, therefore, is that the first position of the plaintiff is not well taken.

The suggestion in the argument that the counsel who made the opening had been called into the case only two days before the trial, and was not, therefore, fully prepared to open it, does not merit consideration. In the first place, the record does not show that any application was made to the court for a post-

ponement of the trial on that ground; in the second place, two days ought to have been ample time for the counsel to acquaint himself with the essential facts of the case; and in the third place, no new fact is even now mentioned that would have materially changed his statement.

§ 542. *The court is bound to take judicial notice that a contract sued on is forbidden by law, if such is the fact, whatever be the state of the pleadings.*

2. The position of the plaintiff that the illegality of the contract in suit cannot be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration had it not been earnestly pressed upon our attention by learned counsel. The theory upon which the action proceeds is that the plaintiff has a contract, valid in law, for certain services. Whatever shows the invalidity of the contract shows that in fact no such contract as alleged ever existed. The general denial under the Code of Procedure of New York, or the general issue at common law, is, therefore, sustained by proof of the invalidity of the transaction which is designated in the complaint or declaration as a contract. Whilst, however, at the common law, under the general issue in *assumpsit*, it was always admissible to give in evidence any matter which showed that the plaintiff never had a valid cause of action, in practice many other matters were allowed under that plea, such as went to the discharge of the original cause of action, and showed that none subsisted at the commencement of the suit,—such as payment, release, accord and satisfaction, and a former recovery, and excuses for non-performance of the contract; and also that it had become impossible or illegal to perform it. 1 Chitty, Pleading, 493; *Craig v. State of Missouri*, 4 Pet., 410 (Const., §§ 521–538); *Edson v. Weston*, 7 Cow. (N. Y.), 278; *Young v. Rummell*, 2 Hill (N. Y.), 478. It followed that there were many surprises at the trial by defenses which the plaintiff was not prepared to meet. The English courts, under the authority of an act of parliament passed in the reign of William IV., adopted rules which, to some extent, corrected the evils arising from this practice of allowing defenses under the general issue which did not go directly to the validity of the original cause of action. And the Code of Procedure of New York did away entirely with the practice in that state, and required parties relying upon anything which, admitting the original existence of the cause of action, went to show its discharge—such as a release or payment, or other matter—to plead it specially, in order that the plaintiff might be apprised of the grounds of defense to the action. We do not understand that the code makes any other change in the matters admissible under the general denial.

§ 543. *An objection to a contract, that it is immoral or corrupt, cannot be obviated by pleading or even by consent.*

But if we are mistaken in this view of the system of procedure adopted in New York, and of the defenses admissible according to it under a general denial in an action upon a contract, our conclusion would not be changed in the present case. Here the action is upon a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common

decency, public morality or the law. History furnishes instances of robbery, arson and other crimes committed for hire. If, after receiving a pardon, or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward,—if we may suppose that audacity could go so far,—the court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defense. It would not be restrained by defects of pleading, nor, indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed is equally true in all cases where the services for which compensation is claimed are forbidden by law, or condemned by public decency or morality.

This doctrine was applied in *Coppell v. Hall*, reported in 7 Wall., 542. In that case Coppell was the acting British consul in New Orleans, and during the late civil war entered into a contract with one Hall, by which the latter agreed to furnish him with sundry bales of cotton, which he was to cause to be protected from seizure by our forces and transported to New Orleans, and there disposed of to the best advantage, he to receive one-third of the profits for his compensation. For breach of this contract he sued Hall, who set up that the contract was against public policy and void, and also a reconventional demand or counterclaim for damages for a breach of the contract by Coppell. On the trial, the court below, among other things, instructed the jury that if the contract was illegal, the illegality had been waived by the reconventional demand of the defendant; but this court said, speaking through Mr. Justice Swayne, that the instruction "was founded upon a misconception of the law. In such cases," he added, "there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." See, also, *Holman v. Johnson*, 1 Cowp., 341. Approving of the doctrine so well expressed in this citation, our conclusion is, that the second position of the plaintiff is not well taken.

FURTHER STATEMENT OF FACTS.—3. We are brought, then, to the consideration of the contract upon which the action is founded. This is given in the opening statement of the plaintiff, with full particulars of the services rendered. We need only repeat its essential portions. As already mentioned, he was, at the time, consul-general of the Ottoman government at the port of New York. For many years previously to 1869 he had resided in the United States, and was familiar with our language. In that year the Turkish government sent Rustem Bey, an officer of high rank in its service, to the United States to examine and report in regard to the purchase of arms and machinery for its use. He was a friend of the plaintiff; had known him many years, and their relations were intimate. On his arrival in this country he made the

plaintiff's office his headquarters, and there all his interviews and negotiations with the manufacturers of arms were had, and, as he did not speak English, these interviews and negotiations were conducted through the plaintiff. The manufacturers soon became aware of the relation of the men to each other, and accordingly opened a correspondence with the plaintiff, or waited upon him, to secure his influence with the Bey in presenting their arms. Among others, Winchester, the president of the Winchester Repeating Arms Company, of Connecticut, the defendant here, sought an introduction to him, and the scene is thus narrated: "Said Mr. Winchester to Oscanyan, 'Will you be kind enough to call the attention of Rustem Bey to my repeating rifle?' 'Well,' said Oscanyan, 'Mr. Winchester, I am receiving commissions from all parties for that favor, and I expect commissions for my services, and that is one of the ways by which I make my livelihood; if you can compensate me, if you can remunerate me by giving me commissions, I will use my influence for you, and do all I can for you.' 'Very well,' said Mr. Winchester, 'that is all right. You shall have whatever commissions we deem proper, and we will talk the matter over and agree upon that.' Accordingly Oscanyan showed the Winchester repeating rifle to Rustem Bey," who was not pleased with it, but through Oscanyan's influence was induced to send samples of it to Constantinople.

In January, 1870, the Bey received instructions from the Turkish minister of ordnance to examine and report upon the Spencer gun. These instructions were given because the Turkish government had heard that the United States had a large number of these guns on hand which they desired to dispose of. They immediately became known to Oscanyan, and as he had agreed with Winchester to press the claims of the Winchester gun, he at once proceeded to use his influence with the Bey to condemn the Spencer gun. The opening statement says that "he raised all manner of objections that he could, and he finally did succeed in inducing" the Bey to put it aside. Then he brought out a Winchester gun, a sample of which he always kept in his office for the very purpose, whenever opportunity offered, of presenting its claims. It appears, however, that the Bey did not, from the first, like that gun, and for that reason, continues the opening statement, "Oscanyan had to use all his ingenuity and skill and perseverance and patience" to get him to look at it at all; but finally he succeeded in getting him to recommend the purchase of a thousand of them for the use of the imperial body-guard. This, said the plaintiff's counsel, was done by the Bey "in order to please Oscanyan," knowing the fact that he had an arrangement with the defendant for a commission on the sale. Accordingly the Bey reported to the Turkish government, condemning the Spencer gun and recommending the purchase of the Winchester repeating arms. Soon afterwards Oscanyan informed Winchester of what he had done, when the latter remarked that he would have allowed Oscanyan the same commissions on the Spencer guns as on the others. Oscanyan replied that the United States had a large number of them on hand, and if the Bey had reported favorably on that gun, the Turkish government would have ordered them directly from the United States government. It was that reason, said Oscanyan, which "weighed on my mind" to persuade the Bey to condemn the gun.

In February, 1870, the Bey received fresh instructions to inquire into and report upon the price of twenty thousand repeating arms, and to send fresh samples. Oscanyan soon learned of this and immediately telegraphed for Winchester, who arrived at his office on the following day, when Oscanyan informed him that he had got an order for twenty thousand guns, or an in-

quiry for the price of twenty thousand, and thought he could get an order for one hundred thousand. He then called Winchester's attention to an objection raised by the Bey relating to the spring of the magazine of the rifle, and advised him to meet it; and this advice was acted upon. Soon afterwards Winchester, as president of the company, put in writing his agreement with Oscanyan, to give ten per cent. upon all sales of arms of the company made to or by the latter to the Ottoman government, provided that such sales were made at prices and upon terms having his approval. This was dated on the 4th of March, 1870. On the following day a box of fresh samples was forwarded to the Turkish minister of ordnance at Constantinople, and, after a delay of some months for the receipt of the cartridges, a trial of them was had with a favorable result. Written contracts between the defendant and the Turkish government followed; one made November 9, 1870, for arms to the amount of \$520,000, and another made August 19, 1871, for arms to the amount of \$840,000.

The plaintiff claims that these contracts were procured through the recommendations which by his influence were made by Rustem Bey. His counsel stated this in his opening, and declared that no other person had possessed any influence in effecting the sales.* It is for the use of this influence that the contract in suit was made and compensation is now demanded. The question then arises, Is this contract one which the court will enforce? We have no hesitation in answering it in the negative. The contract was a corrupt one — corrupt in its origin and corrupting in its tendencies. The services stipulated and rendered were prohibited by considerations of morality and policy which should prevail at all times and in all countries, and without which fidelity to public trusts would be a matter of bargain and sale, and not of duty. In the first place, the plaintiff was, at the time, an officer of the Turkish government. As its consul-general at the port of New York, he was invested with important functions and entitled to many privileges by the law of nations. It is not necessary here to state with any particularity the functions and privileges attached to the consular office. These will be found in any of the approved treatises on international law.

It is enough to observe that a consul is an officer commissioned by his government for the protection of its interests and those of its citizens or subjects; and whilst he is sometimes allowed, in Christian countries, to engage in commercial pursuits, he is so far its public agent and commercial representative that he is precluded from undertaking any affairs or assuming any position in conflict with its interests or its policy. By some governments he is invested — in the absence of a minister or ambassador to represent them — with diplomatic powers, and, as between their citizens or subjects, may also exercise judicial functions. By all governments his representative character is recognized, and for that reason certain exemptions and privileges are granted to him. In the constitution of the United States, consuls are classed with ministers and ambassadors in the enumeration of parties whose cases are subject to the original jurisdiction of the supreme court, and in the treaty with the Ottoman Empire authority is given to it to appoint consuls in the United States.

It was stated in the argument that the office held by the plaintiff was an honorary one, created especially as an evidence of the high regard entertained for him by the government of his country, as if the objection to his claim of a right to exact a commission on contracts with it, made through his influence, was obviated by the fact that he received no salary for the discharge of his of-

ficial duties. Assuming the office to have been purely an honorary one, we do not perceive how this circumstance could in any respect alter his relations to that government. If conferred as a mark of honor, the fact would seem to impose upon him increased obligation to avoid any departure from the line of duty. The members of parliament in England receive no pay for their services, and the expenses of many official positions, in this and other countries, exceed the compensation allowed to the incumbents; but this circumstance would not excuse, much less justify, them in sacrificing the public interests for individual gains or profits. All such positions are trusts to be exercised from considerations of duty and for the public good. Whenever other considerations are allowed to intervene and control their exercise, the trust is perverted and the community suffers. The plaintiff, it is true, was not the purchasing agent of the Turkish government, but he was its honored officer, upon whose fidelity to its interests it had a right to rely in any advice which he might give to its agent. But so far from justifying this confidence, the only motive upon which he appears to have acted was the hope of gain to himself by high commissions on the sales effected. As justly remarked by the judge who tried the case, the benefits which would inure to the government of which he was the commercial representative do not seem to have entered into the considerations which influenced his mind.

§ 544. *Sale of personal influence to be exercised over an officer, void; cases cited.*

But, independently of the official relation of the plaintiff to his government, the personal influence which he stipulated to exert upon another officer of that government was not the subject of bargain and sale. Personal influence to be exercised over an officer of government in the procurement of contracts, as justly observed by counsel, is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article. Numerous adjudications to this effect are found in the state and federal courts. This is true when the vendor holds no official relations with the government, though the turpitude of the transaction becomes more glaring when he is also its officer.

In *Tool Co. v. Norris*, reported in 2 Wall., 45 (§§ 537-539, *supra*), this court held that an agreement for compensation to procure a contract with the government to furnish it with supplies was against public policy and could not be enforced. That was a case where the compensation was made contingent upon success in procuring the contract, and, as we shall hereafter show, should be distinguished from agreements for services in presenting information on the subject for the consideration of the government. It was a case where nothing was to be paid if no contract was obtained, and if obtained the compensation was to be proportionate to its extent. In deciding the case the court said: "Considerations as to the most efficient and economical mode of meeting the public wants should alone control in this respect the action of every department of government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy, and whatever tends to introduce any other elements into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service and to unnecessary expenditures of the public funds. . . . All agreements for pecuniary considerations to con-

trol the business operations of the government or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country."

In this case the doctrine of the court in *Marshall v. Baltimore & Ohio R. Co.*, reported in 16 How., 314 (§§ 555-562, *infra*), was emphasized. There compensation was claimed by the plaintiff for services rendered in procuring the passage of a law by the legislature of Virginia, upon a contract that if the law was not passed, or, if passed, was not accepted and adopted or used by the stockholders, no compensation should be allowed. It was held that the contract was void as against public policy. The court, speaking through Mr. Justice Grier, said: "Bribes in the shape of high contingent compensation must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means;' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill." See, also, *Wood v. McCann*, 6 Dana (Ky.), 366; *Mills v. Mills*, 40 N. Y., 543.

§ 545. *Agreements for compensation for bringing matters to the consideration of government officials are valid, when.*

In *Trist v. Child*, reported in 21 Wall., 441 (§§ 549-554, *infra*), the distinction is drawn between the use of personal influence to secure legislation, and legitimate professional services in making the legislature acquainted with the merits of the measure desired. Whilst the former is condemned, the latter are, within certain limits, regarded as appropriate subjects for compensation. There the defendant had employed the plaintiff to get a bill passed by congress for an appropriation to pay a claim against the United States. It was considered by the court to have been a contract for lobby services, and adjudged void as against public policy. Other similar cases were mentioned by the court, and, after observing that in all of them the contract was held to be against public policy and void, it added, speaking through Mr. Justice Swayne: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case."

So, too, with reference to furnishing the government with arms or supplies of any kind. It is legitimate to lay before the officers authorized to contract, all such information as may apprise them of the character and value of the articles offered, and enable them to act for the best interests of the country. And for such services compensation may be had as for similar services with private parties, either upon a *quantum meruit*, or, where a sale is effected, by

the ordinary brokerage commission. And here it may be observed, in answer to some authorities cited, that the percentage allowed by established custom of commission merchants and brokers, though dependent upon sales made, is not regarded as contingent compensation in the obnoxious sense of that term, which has been so often the subject of animadversion by this court, as suggesting the use of sinister or corrupt means for accomplishing a desired end. They are the rates established by merchants for legitimate services in the regular course of business. But where, instead of placing before the officers of the government the information which should properly guide their judgments, personal influence is the means used to secure the sales, and is allowed to prevail, the public good is lost sight of, unnecessary expenditures are incurred, and, generally, defective supplies are obtained, producing inefficiency in the public service. In *Meguire v. Corwine*, decided at the last term, the doctrine of the above cases was approved. There an agreement to pay the plaintiff — in consideration of his appointment as government counsel — one-half the fees he might recover, was adjudged invalid. Transactions of the kind were declared to be “an unmixed evil;” and the court said that, whether forbidden by statute or condemned by public policy, “no legal right can spring from such a source.” 101 U. S., 108, 111 (§ 563, *infra*).

§ 546. *An agreement by an officer of a foreign government for compensation for using his influence in effecting a sale to his government is void.*

In the present case there is no feature that relieves the contract which the plaintiff seeks to enforce from the condemnation pronounced in the several cases cited. It is the naked case of one officer of a government, to secure its purchase of arms, selling his influence with another officer in consideration of a commission on the amount of the purchase. The courts of the United States will not lend their aid to collect compensation for services of this nature; nor does it make any difference that the Turkish government did not object to the plaintiff's taking commission on such contracts, which counsel contended we must consider as admitted together with the rest of the opening statement. We may doubt whether we are compelled to take as correct, with the facts mentioned touching the contract in court, his statement of the law or customs of other countries. But admitting this to be otherwise, and that the Turkish government was willing that its officers should be allowed to take commissions on contracts obtained for it by their influence, that is no reason why the courts of the United States should enforce them. Contracts permissible by other countries are not enforceable in our courts, if they contravene our laws, or morality, or our policy. The contract in suit was made in this country, and its validity must be determined by our laws. But had it been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement.

§ 547. *Validity of contracts, by what law governed. Exceptions.*

The general rule undoubtedly is that the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; but to this, as to all general rules, there are exceptions, and among these Story mentions contracts made in a foreign country to promote or reward the commission of crime, to corrupt or evade the due administration of justice, to cheat public agents or to affect the public rights, and other contracts which in their nature are founded in moral turpitude, and are inconsistent with the good order and solid interest of society. “All such contracts,” he adds, “even although they might be held valid in a country where they are

made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or even of natural justice, are allowed to have their due force and influence in the administration of international jurisprudence." Story, *Conflict of Laws*, sec. 258.

Among such obnoxious contracts must be included all such as have for their object the control of public agents by considerations conflicting with their duty and fidelity to their principals. A contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country,—not from any consideration of the interests of that government or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people. *Hope v. Hope*, 8 De G., M. & G., 731; *Watson v. Murray*, 23 N. J. Eq., 257. In any view of the contract here, whether it would be valid or invalid according to Turkish law and customs, it is intrinsically so vicious in its character and tendency, and so repugnant to all our notions of right and morality, that it can have no countenance in the courts of the United States.

Our conclusion, therefore, is that the third position of the plaintiff is not well taken. It follows that the judgment of the court below must be affirmed and it is so ordered. (a)

BARTLE v. NUTT.

(4 Peters, 184-189. 1830.)

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.—This suit was brought on the chancery side of the circuit court of the District of Columbia for the county of Alexandria, by the appellant (complainant) against the appellee (respondent). The object professed is to obtain a settlement of accounts arising out of a partnership charged to have existed between the complainant and respondent and one Ferdinand Marsteller.

The bill charges that, in 1814, a contract was entered into between the complainant and the government of the United States, for rebuilding Fort Washington. That when the contract was made, it was agreed between the respondent, Ferdinand Marsteller, and the complainant, that they should share the profits of the contract; that is, that each of them should receive one-third part of the profits. That the respondent was to furnish the concern with such merchandise as might be necessary, disburse the funds of the concern, and keep the accounts relative to such disbursements; that the complainant was to superintend the work, and Marsteller to drawing and furnishing the money for carrying it on. The bill charges that, under this arrangement, the work was commenced and finished, and that, on its measurement, it was supposed a profit had been made of about \$4,500; and that, accordingly, \$1,500 were advanced to the respondent as his share of the profits. That about the close of the business, it was discovered that Marsteller had committed great frauds on the government, and that the complainant gave information of these frauds to the department of war, in consequence of which Marsteller was disgraced, and soon after died insolvent. That soon after this development, the respondent instituted suit against the complainant for a balance claimed on his store account, and for money disbursed by him for complainant; that the complainant insti-

(a) *Affirming Oscanyan v. Winchester Repeating Arms Co.*,* 15 Blatch., 79.

tuted a cross-action against the respondent, and both suits were, by mutual consent, referred to arbitrators. That when the reference was made, the complainant expected that the arbitrators would go into a full examination of the partnership accounts in relation to the government contract, as well as in relation to the individual accounts of the parties. But that, when the arbitrators proceeded to act, they declined looking on the transaction as a partnership one, and thought themselves bound to consider the accounts as unconnected with that concern; and finally awarded against the complainant \$4,497.42, in which was included an allowance of \$1,500, for Coleman's share of the profits of the contract, and \$1,534, for commissions in disbursing the money received from the government. That the copartnership has been always indebted to the complainant on account of the contract with government. The bill then proceeds to some details respecting the accounts, at this time not important, and prays for an account and general relief.

The answer admits that the complainant, in 1814, entered into a contract with Ferdinand Marsteller, agent for the United States, for the rebuilding of Fort Washington, with the terms and conditions of which contract the respondent had no concern. That, it being necessary to have an agent in Alexandria to procure supplies for carrying the contract into effect, and as Marsteller had expressed a wish that the money should be disbursed through the agency of the respondent, and that the respondent should keep the accounts between Marsteller and the complainant, the latter agreed that the respondent should act as agent; and, in the first instance, offered him as a compensation a share of the profits, and the complainant afterwards offered him a commission of five per cent. on the disbursements. That the respondent accepted of the latter offer, and under it entered on the agency, after having refused the first.

The respondent denies that he was in any shape interested as a copartner with the complainant and Marsteller, or with either of them, in relation to the said contract, or that he ever received any share of the profits; but admits the charge of a commission of five per cent. on the money disbursed by him. He admits that the complainant having refused to pay the balance due from him to the respondent on private account, he did institute suit against him; that a cross-suit was brought by the complainant against the respondent; that both suits were referred to arbitrators, who awarded in the respondent's favor the sum of \$4,497.42; that, on the investigation before the arbitrators, the complainant set up as an offset the same claim which he prosecutes in this suit, and that it was rejected, as unsupported by evidence. The respondent relies on that award, and the judgment on it, as a bar to further proceedings.

The cause came on to be heard on the bill and answer, and after various proceedings not necessary to notice, the bill was dismissed without costs; the court being of opinion that the partnership charged was contrary to public policy and sound morals, and that a court of equity ought not to lend its aid to either of the parties against the other. Among the exhibits in the cause was the contract between the complainant and the government, dated 17th September, 1814, signed and sealed by complainant, and witnessed by Thomas Lowe:

"Accepted for the United States, by order of Colonel Monroe, secretary of war.

F. MARSTELLER,

"September 30, 1814.

Deputy Quartermaster-General."

The proposition for this contract was addressed by Bartle to Marsteller in writing, and the contract was signed on the same day. From the evidence taken in the case it clearly appears that Marsteller acted as the agent of the

United States in making the contract; that the materials furnished and the labor performed were under the direction of Bartle; that the money was principally received from the government by Marsteller, paid over by him to Coleman, who disbursed it on the orders of Bartle. There can be no doubt that Bartle and Marsteller were partners in the profits of the contract; but the capacity in which Coleman acted does not seem to be so certain. There is very strong evidence of his being a partner; but it is not very material whether he was an agent or a party in a contract made and carried into effect under the circumstances which attended this. The shades of difference which would, in either event, distinguish the moral or legal aspect of the cause, are too slight to engage the attention of the court. By the account of the complainant against the firm of Marsteller, Coleman & Bartle, it appears that his charges amount to \$58,374; and that there is a loss to the concern of \$10,538, one-half of which he charges to Coleman; and he seeks to recover this by deducting the amount from a judgment obtained against him by Coleman in the circuit court, affirmed here on a writ of error.

Of the alleged loss on this contract, the sum of \$8,860 is thus accounted for in the complainant's account against the firm: "To deductions made by the government (which are against the operative mechanic) from the work and materials. *Vide Abstracts B, F, \$8,860 of this sum.*" Of this sum it appears, by Abstract B, that \$3,198 were for an overcharge of fifty cents per perch of stone, and fifty cents per thousand of bricks, beyond the contract price; and, by Abstract F, that \$5,661 were for over-measurement of stone, brick and carpenter work; so that, deducting these two items from the amount of the loss on the contract, it is reduced to \$1,678.

§ 548. *Where two persons attempt to negotiate a fraudulent contract through a government agent, equity will not entertain a bill by one against the other to compel an account.*

The case then presented for the consideration of the circuit court, and now before us for revision, is this: a contract made by the complainant with a public agent, a deputy quartermaster-general, to an amount exceeding \$50,000, in the profits of which he was to participate; false measures attempted to be imposed on the government; the fraud discovered by the vigilance of its accounting officers; and a bill in equity filed to compel an alleged partner to account for and pay to one of the parties in such a transaction the one-half of a loss sustained by an unsuccessful attempt to impose spurious vouchers on the government. To state such a case is to decide it. Public morals, public justice, and the well-established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which began with the corruption of a public officer, and progressed in the practice of known and wilful deception in its execution, can never be consummated or sanctioned by any court. The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws.

This court is unanimously of opinion that the circuit court were right in dismissing the complainant's bill, and affirms their decree with costs.

TRIST v. CHILD.

(21 Wallace, 441-453. 1874.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.— Appellee had a claim for services against the United States, which claim he proposed to submit to congress. Accordingly he agreed with L. Child that the latter should prosecute the claim before congress, and as compensation for his services it was agreed that he should receive twenty-five per cent. of whatever sum congress might allow. If nothing was allowed he was to receive nothing. Before action was taken by congress on the claim Child died, but his son and personal representative, L. M. Child, who was also his partner at the time when the above agreement was made, continued to prosecute the claim. On April 20, 1870, congress appropriated \$14,559 to pay the claim. L. M. Child thereupon applied to Trist for payment of the twenty-five per cent. as agreed upon. Trist declined to pay, and Child applied to the treasury department to suspend payment of the money to Trist, and at the time of suit the money was still in the treasury. Child then filed his bill, asking that Trist might be enjoined from withdrawing the \$14,559 from the treasury until he complied with his agreement with Child, Sr., and that he might be ordered also to pay Child, Jr., \$5,000. The case was heard in the court below upon the bill and answer, and it was decreed that Trist should pay complainant \$3,639, with interest from April 20, 1871, and that until he did so he should be enjoined from receiving from the treasury any of the money appropriated to him by the act of congress of that date. Trist appealed.

Opinion by MR. JUSTICE SWAYNE.

The court below decreed to the appellee the amount of his claim, and enjoined Trist from receiving from the treasury "any of the money appropriated to him" by congress, until he should have paid the demand of the appellee. This decree, as regards that portion of the fund not claimed by the appellee, is an anomaly. Why the claim should affect that part of the fund to which it had no relation is not easy to be imagined. This feature of the decree was doubtless the result of oversight and inadvertence. The bill proceeds upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant upon the fund appropriated. We shall examine the latter ground first. Was there in any view of the case a lien?

§ 549. *An agreement to pay for services out of a fund when received will not operate to create a lien thereon.*

It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. *Yeates v. Groves*, 1 Ves. Jr., 280; *Lett v. Morris*, 4 Sim., 607; *Bradley v. Root*, 5 Paige, 632; 2 Story's Equity, § 1047. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. *Field v. The Mayor*, 2 Seld., 179. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor. *Wright v. Ellison*, 1 Wall., 16; *Hoyt v. Story*, 3 Barb. (S. C.), 264; *Malcolm v. Scott*, 3 Hare, 39; *Rogers v. Hosack*, 18 Wend., 319. Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon

the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in nowise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. *Wright v. Ellison*, 1 Wall., 16. If there was no lien there was no jurisdiction in equity.

§ 550. *By act of congress a transfer of any part of a claim against the United States, or an interest therein, must be executed in the presence of at least two witnesses.*

There is another consideration fatally adverse to the claim of a lien. The first section of the act of congress of February 26, 1853, declares that all transfers of any part of any claim against the United States, "or of any interest therein, whether absolute or conditional, shall be absolutely null and void, unless executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due and the issuing of a warrant therefor." That the claim set up in the bill to a specific part of the money appropriated is within this statute is too clear to admit of doubt. It would be a waste of time to discuss the subject.

§ 551. *A contract to pay an attorney a part of claim to be recovered by lobby service, held void.*

But there is an objection of still greater gravity to the appellee's case. Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of congress, from whom he had received favorable assurances, he proceeds: "Please write to your friends to write to any member of congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." Institutes of Justinian, lib. 3, tit. 19, par. 24. In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said (*Jones v. Randall*, 1 Cowp., 39): "Many contracts which are not against morality are still void as being against the maxims of sound policy." It is a rule of the common law of universal application, that where a contract, express or implied, is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

§ 552. — *authorities examined.*

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied. Within the condemned category are: An agreement to pay for supporting for election a candidate for sheriff (*Swayze v. Hull*, 3 Halst., 54); to pay for resigning a public position to make room for another (*Eddy v. Capron*, 4 R. I., 395; *Parsons v. Thompson*, 1 H. Black., 22); to pay for not bidding at a sheriff's sale of real property (*Jones v. Caswell*, 3 Johns. Cas., 29); to pay for not bidding for articles to be sold by the government at auction (*Doolin v. Ward*, 6 Johns., 194); to pay for not bidding for a contract to carry the mail on a specified

route (*Gulick v. Bailey*, 5 Halst., 87); to pay a person for his aid and influence in procuring an office, and for not being a candidate himself (*Gray v. Hook*, 4 Comst., 449); to pay for procuring a contract from the government (*Tool Co. v. Norris*, 2 Wall., 45; §§ 537-539, *supra*); to pay for procuring signatures to a petition to the governor for a pardon (*Hatzfield v. Gulden*, 7 Watts, 152); to sell land to a particular person when the surrogate's order to sell should have been obtained (*Overseers of Bridgewater v. Overseers of Brookfield*, 3 Cow., 299); to pay for suppressing evidence and compounding a felony (*Collins v. Blantern*, 2 Wils., 347); to convey and assign a part of what should come from an ancestor by descent, devise, or distribution (*Boynton v. Hubbard*, 7 Mass., 112); to pay for promoting a marriage (*Scribblehill v. Brett*, 4 Brown, P. C., 144; *Arundel v. Trevillian*, 1 Ch. Rep., 47); to influence the disposition of property by will in a particular way. *Debenham v. Ox*, 1 Ves., 276. See, also, *Addison on Contracts*, 91; 1 *Story's Equity*, ch. 7; *Collins v. Blantern*, 1 *Smith's Lead. Cas.*, 676, American note.

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy and void. *Clippinger v. Hepbaugh*, 5 Watts & Serg., 315; *Harris v. Roof*, 10 Barb. (S. C.), 489; *Rose v. Truax*, 21 id., 361; *Marshall v. Baltimore & Ohio R. Co.*, 16 How., 314 (§§ 555-562, *infra*).

§ 553. — *in cases like that at bar an agreement for purely professional services is valid.*

We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of universal history. 1 *Montesquieu*, *Spirit of Laws*, 17. The theory of our government is that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness and integrity. Any departure from the line of rectitude in such cases is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and ex-

ertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and, considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking. If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority. We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

§ 554. *When purely professional services are blended with services which are forbidden, no compensation can be recovered.*

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of mo-

tive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defendentis*. Where there is turpitude, the law will help neither party. The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons. Decree reversed, and the case remanded, with directions to dismiss the bill.

MARSHALL v. BALTIMORE & OHIO RAILROAD COMPANY.

(16 Howard, 314-354. 1853.)

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—A question necessarily preliminary to our consideration of the merits of this case has been brought to the notice of the court, though not argued or urged by the counsel. The plaintiff in error, who was also plaintiff below, avers in his declaration that he is a citizen of Virginia, and that "The Baltimore & Ohio Railroad Company, the defendant, is a body corporate by an act of the general assembly of Maryland." It has been objected that this averment is insufficient to show jurisdiction in the courts of the United States over the "suit" or "controversy." The decision of this court in the case of *Louisville R. Co. v. Letson*, 2 How., 497, it is said, does not sanction it, or, if some of the doctrines advanced should seem so to do, they are extrajudicial, and therefore not authoritative.

The published report of that case (whatever the fact may have been) exhibits no dissent to the opinion of the court by any member of it. It has, for the space of ten years, been received by the bar as a final settlement of the questions which have so frequently arisen under this clause of the constitution; and the practice and forms of pleading in the courts of the United States have been conformed to it. Confiding in its stability, numerous controversies, involving property and interests to a large amount, have been heard and decided by the circuit courts, and by this court; and many are still pending here, where the jurisdiction has been assumed on the faith of the sufficiency of such an averment. If we should now declare these judgments to have been entered without jurisdiction or authority, we should inflict a great and irreparable evil on the community. There are no cases, where an adherence to the maxim of *stare decisis* is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts. For this reason alone, even if the court were now of opinion that the principles affirmed in the case just mentioned, and that of *Bank of United States v. Deveaux*, 5 Cranch, 61, were not founded on right reason, we should not be justified in overruling them. The practice founded on these decisions, to say the least, injures or wrongs no man; while their reversal could not fail to work wrong and injury to many. Besides the numerous cases with similar averments, over which the court have exercised jurisdiction without objection, we may mention that of *Rundle v. Delaware & Raritan Canal Co.*, 14 How., 80, as one precisely in point with the present. The report of that case shows that the question of jurisdiction, though not noticed in the opinion of the court, was not overlooked, three of the judges having severally expressed their opinion upon it. Its value as a precedent is therefore not

merely negative. But as we do not rely only on precedent to justify our conclusion in this case, it may not be improper, once again, to notice the argument used to impugn the correctness of our former decisions, and also to make a brief statement of the reasons which, in our opinion, fully vindicate their propriety.

§ 555. *The circuit courts of the United States have jurisdiction in all cases in which the allegations of the record show that a citizen of one state sues a corporation chartered by another state.*

By the constitution, the jurisdiction of the courts of the United States is declared to extend, *inter alia*, to "controversies between citizens of different states." The judiciary act (1 Stats. at Large, 73) confers on the circuit courts jurisdiction "in suits between a citizen of the state where the suit is brought and a citizen of another state." The reasons for conferring this jurisdiction on the courts of the United States are thus correctly stated by a contemporary writer (Federalist, No. 80): "It may be esteemed as a basis of the Union, 'that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.' And if it be a just principle, that every government ought to possess the means of executing its own provisions by its own authority, it will follow that, in order to the inviolable maintenance of that equality of privileges and immunities, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens."

Now, if this be a right or privilege guaranteed by the constitution to citizens of one state in their controversies with citizens of another, it is plain that it cannot be taken away from the plaintiff by any legislation of the state in which the defendant resides. If A., B. and C., with other dormant or secret partners, be empowered to act by their representatives, to sue or to be sued in a collective or corporate name, their enjoyment of these privileges, granted by state authority, cannot nullify this important right conferred on those who contract with them. It was well remarked by Mr. Justice Catron, in his opinion delivered in the case of *Rundle*, already referred to, that "if the United States courts could be ousted of jurisdiction, and citizens of other states be forced into the state courts, without the power of election, they would often be deprived, in great cases, of all benefit contemplated by the constitution; and in many cases be compelled to submit their rights to judges and juries who are inhabitants of the cities where the suit must be tried, and to contend with powerful corporations, where the chances of impartial justice would be greatly against them; and where no prudent man would engage with such an antagonist, if he could help it. State laws, by combining large masses of men under a corporate name, cannot repeal the constitution. All corporations must have trustees and representatives, who are usually citizens of the state where the corporation is created; and these citizens can be sued and the corporate property charged by the suit. Nor can the courts allow the constitutional security to be evaded by unnecessary refinements, without inflicting a deep injury on the institutions of the country."

Let us now examine the reasons which are considered so conclusive and imperative that they should compel the court to give a construction to this clause of the constitution practically destructive of the privilege so clearly intended to be conferred by it. "A corporation, it is said, is an artificial person, a mere legal entity, invisible and intangible." This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity "cannot be a citizen" is a logical conclusion from the premises which cannot be denied.

But a citizen who has made a contract, and has a "controversy" with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing and being sued in a factitious or collective name. But these important faculties, conferred on them by state legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent.

Nor is it reasonable that representatives of numerous unknown and ever-changing associates should be permitted to allege the different citizenship of one or more of these stockholders, in order to defeat the plaintiff's privilege. It is true that these stockholders are incorporators, and represented by this "juridical person," and come under the shadow of its name. But for all the purposes of acting, contracting and judicial remedy, they can speak, act and plead only through their representatives or curators. For the purposes of a suit or controversy, the persons represented by a corporate name can appear only by attorney, appointed by its constitutional organs. The individual or personal appearance of each and every incorporator would not be a compliance with the exigency of the writ of summons or *distringas*. Though, nominally, they are not really parties to the suit or controversy. In courts of equity, where there are very numerous associates having all the same interest, they may plead and be impleaded through persons representing their joint interests, and, as in the case between the northern and southern branches of the Methodist Church, lately decided by this court, the fact that individuals adhering to each division, were known to reside within both states of which the parties to the suit were citizens was not considered as a valid objection to the jurisdiction.

In courts of law, an act of incorporation and a corporate name are necessary to enable the representatives of a numerous association to sue and be sued. "And this corporation can have no legal existence out of the bounds of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation." *Bank of Augusta v. Earle*, 13 Pet., 519 (Corp., §§ 1123-35). The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the state which is the necessary *habitat* of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicile as against those who are compelled to seek them there, and can find them there and nowhere else. If it were otherwise, it would be in the power of every corporation, by electing a single director residing in a different state, to deprive citizens of other states with whom they have controversies, of this constitutional privilege, and compel them to resort to state tribunals in cases in which, of all others, such privilege may be considered most valuable.

But it is contended that, notwithstanding the court, in deciding the ques-

tion of jurisdiction, will look behind the corporate or collective name given to the party to find the persons who act as the representatives, curators or trustees of the association, stockholders, or *cestui que trusts*, and in such capacity are the real parties to the controversy, yet that the declaration contains no sufficient averment of their citizenship. Whether the averment of this fact be sufficient in law is merely a question of pleading. If the declaration sets forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the *habitat* of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name, and exercise the faculties conferred by it, the allegation that the "defendants are a body corporate by the act of the general assembly of Maryland" is a sufficient averment that the real defendants are citizens of that state. This form of averment has been used for many years. Any established form of words used for the expression of a particular fact is a sufficient averment of it in law. In the case of *Gassies v. Ballou*, 6 Pet., 761, the petition alleged that "the defendant had caused himself to be naturalized an American citizen, and that he was at the time of filing the petition residing in the parish of West Baton Rouge." This was held to be a sufficient averment that he was a citizen of the state of Louisiana. And the court say: "A citizen of the United States, residing in any state of the Union, is a citizen of that state." They also express their regret that previous decisions of this court had gone so far in narrowing and limiting the rights conferred by this article of the constitution. And we may add, that instead of viewing it as a clause conferring a privilege on the citizens of the different states, it has been construed too often as if it were a penal statute, and as if a construction which did not adhere to its very letter, without regard to its obvious meaning and intention, would be a tyrannical invasion of some power supposed to be secured to the states or not surrendered by them.

The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every state. It is of importance also to corporations themselves that they should enjoy the same privileges in other states, where local prejudices or jealousy might injuriously affect them.

With these remarks on the subject of jurisdiction we will now proceed to notice the various exceptions to the rulings of the court on the trial. The declaration, besides a count for work and labor done and services rendered in procuring certain legislation in Virginia, demands the sum of \$50,000 on a special contract made with the defendants, through a committee of the board of directors, dated 12th of December, 1846, as follows:

"On motion, it was resolved that the president be and is hereby authorized, in addition to the agent heretofore employed by the committee for the same purpose, to employ and make arrangements with other responsible persons to attend at Richmond during the present session of the legislature, in order to superintend and further any application or other proceeding to obtain the right of way through the state of Virginia on behalf of this company, and to take all proper measures for that purpose; that he also be authorized to agree with such agent or agents, in case a law shall be obtained from the said legislature, during its present session, authorizing the company to extend their road through that state to a point on the Ohio river as low down the river as Fishing Creek; and the stockholders of this company shall afterwards accept such law as may be

obtained, and determine to act under it; or, in case a law should be passed authorizing the construction of a railroad from any point on the Ohio river above the mouth of the Little Kanawha and below the city of Wheeling, with authority to intersect with the present Baltimore & Ohio Railroad; and the stockholders of the Baltimore & Ohio Railroad Company shall determine to accept and adopt said law, or shall become the proprietors thereof, and prosecute their road according to its provisions, then in either of the said cases the president shall be and is authorized to pay to the agent or agents whom he may employ in pursuance of this resolution, the sum of \$50,000 in the six per cent. bonds of this company at their par value, and to be made payable at any time within the period of five years. Resolved, that it shall be expressly stipulated in the agreement with the said agent or agents employed pursuant to this resolution, and as a condition thereof, that if no such law as aforesaid shall pass, or if any law that may be passed shall not be accepted, or adopted or used by the stockholders, the said agents shall not be entitled to receive any compensation whatever for the service they may render in the premises, or for any expense they may incur in obtaining such law or otherwise."

And also the following resolution of January 18, 1847: "On motion, it was unanimously resolved, that the right of Mr. Marshall to the compensation under the existing contract shall attach upon the passage of a law at the present session of the legislature giving the right of way to Parkersburg or to Fishing Creek either to the Baltimore & Ohio Railroad Company, or to an independent company: Provided this company accept the one and adopt and act under the other, as contemplated by the contract."

And also a letter from the president of the company, of February 11, 1847, containing a further modification of the terms as exhibited in the following extract: "In this crisis, if after the utmost exertion nothing better can be done, if it were practicable to pass Mr. Hunter's substitute with Fish Creek instead of Fishing Creek, we would not undertake to prevent the passage of such a law. We would then refer the whole question to the stockholders; and I am authorized to say that, everything else failing, if such a law as is indicated pass, and the stockholders adopt it and act under it in the manner contemplated by the contract, your compensation shall apply to that as to any other aspect of the case."

The defendants gave notice of the following grounds of defense, as those upon which they intended to rely: "1. That the agreement sought to be enforced by the plaintiff, admitting his ability to make it out by legal proof to the extent of his pretensions, was an agreement contrary to the policy of the law, and which cannot be sustained. 2. That, admitting the said agreement to be a valid one, which the courts would enforce, yet the plaintiff is not entitled to recover because he failed to accomplish the object for which it was entered into. 3. That the law of Virginia, which was accepted by the defendants after it had been modified by the waiver of the city of Wheeling, as mentioned in the plaintiff's notice, was not obtained through the efforts of the plaintiff, but against his strenuous opposition, and furnishes him no ground for his present claim. 4. That there was a final settlement between the plaintiff and defendants, after the passage of the Virginia law aforesaid, which concludes him on this behalf."

On the trial the plaintiff, after giving in evidence the contract as above stated, produced various letters and documents tending to show the measures pursued and their result—a particular recapitulation of these facts is not necessary,

and would incur the case. A very brief outline will suffice to an understanding of the points to be considered.

It appears that the defendants were desirous to obtain, from the legislature of Virginia, the grant of a right of way, so as to strike the Ohio river as low down as possible, in view of a connection from thence towards Cincinnati. It was the interest of the people of Wheeling to prevent, if possible, the terminus of the road on the Ohio from being anywhere else but at their city. In the winter of 1846-7, the antagonist parties came into collision again before the legislature of Virginia, at Richmond. In this contest, the plaintiff acted as general agent of the defendants, under the contract in question. The bills granting the desired franchise to the defendants were defeated in every form proposed by them, and a substitute, altered and amended to suit the interests of Wheeling, was finally passed in face of the strenuous opposition of the defendants. The plaintiff afterwards admitted his defeat and want of success in fulfilling the conditions of his contract. He at the same time demanded and received the sum of \$600 for expenses of agents, etc. But as Wheeling and defendants both desired the extension of the road to the Ohio, they finally agreed to a compromise, modifying the operation of the act under which the road has since been completed.

The defendants then offered in evidence, in support of their defense, on the ground of illegality of the contract, a letter from the plaintiff to the president of the board, dated 17th November, 1846, with an accompanying document, in which plaintiff proposes himself as agent, and states his terms; and the course he advises to be pursued, and the means to be used to insure success; and also a letter from the president in answer thereto, stating his inability to act on his individual responsibility, and inviting an interview; together, also, with a letter from the same, dated 12th of December, in which he says: "I am now prepared to close an arrangement with you on the basis of your communication of the 17th of November."

The plaintiff's objection to the admission of these documents in evidence, and the reception of them, form the subject of the first bill of exceptions. In order to judge of the competency and relevancy of these documents to the issue in the case, it will be necessary to give a brief statement of some portion of their contents. The letter of November 17th commences by referring to a former interview and a promise to submit a plan, in writing, by which it was supposed the much desired right of way through Virginia might be procured from the legislature. It proposes that the writer should be appointed, as agent of the company, to manage "the delicate and important trust." It states that, as the business required "absolute secrecy," he could not safely get testimonials as to his qualifications; but that he had "considerable experience as a lobby member" before the legislature of Virginia, and could allege "an ostensible reason" for his presence in Richmond, and his active interference, without disclosing his real character and object.

The accompanying document explains the cause of previous failures, and shows what remedy or counteracting influence should be employed. It announces that "log-rolling" was the principal measure used to defeat them before. That it has grown into a system; that, however "skilful and unsorupulous" the friends of defendants may have been in this respect, still their opponents had got the advantage, being present on the ground, and "using outdoor influence." That it was necessary to meet their opponents with their own weapons. That the mass of the members of the legislature were "careless and

good natured," and "engaged in idle pleasures," capable of being "moulded like wax" by the "most pressing influences." That, to get the vote of this careless mass, "efficient means" must be adopted. That, through their "kind and social dispositions," they may be approached and influenced to do anything not positively wrong, "where they can act without fear of their constituents." That, to the accomplishment of success, it was necessary to have "an active, interested and well organized influence about the house." That these agents "must be inspired with an earnest, nay, anxious, wish for success," "and have their whole reward depending on it." "Give them nothing if they fail, endow them richly if they succeed." "Stimulate them to active partisanship by the strong lure of high profit."

That, in order to the "requisite secrecy," the company should know but one agent, and he select the others; that the cost of all this will "necessarily be great," as the result can be obtained "only by offers of high contingent compensation;" that "high services cannot be had at a low bid," and that he would not be willing to undertake the business unless "provided with a fund of at least \$50,000." As the contract was made "on the basis of this communication," there can be no doubt as to its legal competence as evidence to show the nature and object of the agreement. As parts of one and the same transaction, they may be considered as incorporated in the contract declared on. The testimony is therefore competent. Is it relevant?

As the first three propositions contained in the charge of the court have reference to the question of the relevancy of this matter to the issues, they may well be considered together. They are as follows:

"1. If, at the time the special contract was made upon which this suit is brought, it was understood between the parties that the services of the plaintiff were to be of the character and description set forth in his letter to the president of the railroad company, dated November 17, 1846, and the paper therein inclosed, and that, in consideration of the contingent compensation mentioned in the contract, he was to use the means and influences proposed in his letter and the accompanying paper, for the purpose of obtaining the passage of the law mentioned in the agreement, the contract is against the policy of the law, and no action can be maintained.

"2. If there was no agreement between the parties that the services of the plaintiff should be of the character and description mentioned in his letter and communication referred to in the preceding instruction, yet the contract is against the policy of the law, and void, if, at the time it was made, the parties agreed to conceal from the members of the legislature of Virginia the fact that the plaintiff was employed by the defendant, as its agent, to advocate the passage of the law it desired to obtain, and was to receive a compensation in money for his services, in case the law was passed by the legislature at the session referred to in the agreement.

"3. And if there was no actual agreement to practice such concealment, yet he is not entitled to recover if he did conceal from the members of the legislature, when advocating the passage of the law, that he was acting as agent for the defendant, and was to receive a compensation in money in case the law passed."

§ 556. *All contracts are void by which it is agreed that, for a contingent remuneration, personal, secret and sinister influences are to be used to procure desired legislation. Such contracts are against public policy.*

It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with

sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. Hence all contracts to evade the revenue laws are void. Persons entering into the marriage relation should be free from extraneous or deceptive influences; hence the law avoids all contracts to pay money for procuring a marriage. It is the interest of the state that all places of public trust should be filled by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection; hence the law annuls every contract for procuring the appointment or election of any person to an office. The pardoning power, committed to the executive, should be exercised as free from any improper bias or influence as the trial of the convict before the court; consequently the law will not enforce a contract to pay money for soliciting petitions or using influence to obtain a pardon. Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.

All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent "stimulated to active partisanship by the strong lure of high profit." Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.

Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors. Influences secretly urged under false and covert pretenses must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are "proper means;" and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or "careless" members in favor of his bill. The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations,

and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome—*omne Romæ venale*.

That the consequences we deprecate are not merely visionary, the act of congress of 1853 (10 Stats. at Large, 170), c. 81, "to prevent frauds upon the treasury of the United States," may be cited as legitimate evidence. This act annuls all champertous contracts with agents of private claims. 2. It forbids all officers of the United States to be engaged as agents or attorneys for prosecuting claims, or from receiving any gratuity or interest in them in consideration of having aided or assisted in the prosecution of them, under penalty of fine and imprisonment in the penitentiary. 3. It forbids members of congress, under a like penalty, from acting as agents for any claim in consideration of pay or compensation, or from accepting any gratuity for the same. 4. It subjects any person who shall attempt to bribe a member of congress to punishment in the penitentiary, and the party accepting the bribe to the forfeiture of his office.

If severity of legislation be any evidence of the practice of the offenses prohibited, it must be the duty of courts to take a firm stand, and discountenance, as against the policy of the law, any and every contract which may tend to introduce the offenses prohibited. Nor are these principles now advanced for the first time. Whenever similar cases have been brought to the notice of courts they have received the same decision. Without examining them particularly, we would refer to the cases of *Fuller v. Dame*, 18 Pick., 472; *Hatzfield v. Gulden*, 7 Watts, 152; *Clippinger v. Hepbaugh*, 5 Watts & Serg., 315; *Wood v. M'Cann*, 6 Dana, 366; and *Hunt v. Test*, 8 Ala., 719; *Commonwealth v. Callaghan*, 2 Virginia Cas., 460.

§ 557. *Secrecy usually a badge of fraud.*

The sum of these cases is: 1. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, is void by the policy of the law. 2. Secrecy, as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a court to recover compensation.

§ 558. *"Log-rolling" fraudulent and criminal.*

3. That what, in the technical vocabulary of politicians is termed "log-rolling," is a misdemeanor at common law, punishable by indictment. It follows, as a consequence, that the documents given in evidence under the first bill of exceptions were relevant to the issue; and that the court below very properly gave the instructions under consideration.

We now come to the last three exceptions to the instructions of the court, which were as follows: "4. But if the contract was made upon a valid and legal consideration, the contingency has not happened upon which the sum of \$50,000 was to be paid to the plaintiff—the law passed by the legislature of Virginia being different in material respects from the one proposed to be obtained by the defendant by the agreement of February 11, 1847, and the passage of which, by the terms of that contract, was made a condition precedent to the payment of the money. 5. The subsequent acceptance of the law as

passed, under the agreement with the city of Wheeling, stated in the evidence, was not a waiver of the condition, and does not entitle the plaintiff to recover in an action on the special contract. 6. There is no evidence that the plaintiff rendered any services, or was employed to render any, under any contract, express or implied, except the special contract stated in his declaration; and as no money is due to him, under that contract, he cannot recover upon the count of *quantum meruit*."

We do not think it necessary, in order to justify these instructions of the court below, or to vindicate our affirmance of them, to enter into a long and perplexed history of the various schemes of legislative action and their results, as exhibited by the testimony in the case. It would require a map of the country, and tedious and prolix explanations. Suffice it to say, that after a careful examination of the admitted facts of the case, we are fully satisfied of the correctness of the instructions: 1. Because the plaintiff, by his own showing, had not performed the conditions which entitled him to demand this stipulated compensation. 2. The act of assembly which was passed, and afterwards used by defendant for want of better, was obtained by the opponents of defendants, and in spite of the opposition of plaintiff; and the fact that the company were compelled to accept the act under modifications, by compromise with their opponents, would not entitle plaintiff to his stipulated reward. 3. By the stipulations of his contract he is estopped from claiming under a *quantum meruit*, as his whole compensation depended on success in obtaining certain specified legislation, which he acknowledged he had failed to achieve.

The judgment of the circuit court is, therefore, affirmed with costs. (a)

JUSTICES CATRON, DANIEL AND CAMPBELL dissented on the question of jurisdiction.

Dissenting opinion by MR. JUSTICE DANIEL.

From the opinion just delivered, I must declare my dissent. In the settlement of the discreditable controversy between the parties to this cause, I take no part. If I did, I should probably say that it is a case without merits, either in the plaintiff or in the defendants, and that in such a case they should be dismissed by courts of justice to settle their dispute by some standard which is cognate to the transaction in which they have been engaged. My participation in this case has reference to a far different and more important ingredient involved in the opinion just announced, namely, the power of this court to adjudicate this cause consistently with a just obedience to that authority from which, and from which alone, their being and their every power are derived.

Having in former instances, and particularly in the case of *Rundle v. Delaware & Raritan Canal Co.*, endeavored to expose the utter want of jurisdiction in the courts of the United States over causes in which corporations shall be parties either as plaintiffs or defendants, I hold it to be unnecessary in this place to repeat or to enlarge upon the positions maintained in the case above mentioned, as they are presented in 14 How., 95. Indeed, from any real necessity for enforcing the general fundamental proposition contended for by me in the case of *Rundle* and the *Delaware & Raritan Canal Company*, namely, that under the second section of the third article of the constitution, citizens only, that is to say, men, material, social, moral, sentient beings, must be parties, in order to give jurisdiction to the federal courts, I am wholly relieved by the virtual, obvious and inevitable concessions, comprised in the attempt

(a) Affirming *Marshall v. Baltimore, etc., R. Co.*, * *Taney*, 201

now essayed, to carry the provision of the constitution beyond either its philological, technical, political or vulgar acceptation. For in no one step in the progress of this attempt is it denied that a corporation is not and cannot be a citizen, nor that a citizen does not mean a corporation, nor that the assertion of a power by an individual outside of the corporation, and interfering with and controlling its organization and functions (whatever might be the degree of interest owned by that individual in the corporation), would be incompatible with the existence of the corporate body itself. Nothing of this kind is attempted. But an effort is made to escape from the effect of these concessions by assumptions which leave them in all their force, and show that such concessions and assumptions cannot exist in harmony with each other. Thus it has been insisted that a corporation, created by a state, can have no being or faculties beyond the limits of that state; and if its president and officers reside within that state, such a conjuncture will meet and satisfy the predicament laid down by the constitution.

The want of integrity in this argument is exposed by the following questions: 1. Does the restriction of the corporate body within particular geographical limits, or the residence of its officers within those limits, render it less a corporation, or alter its nature and legal character in any degree? 2. Does the restriction of the corporate faculties within given bounds necessarily, or by any reasonable presumption, imply that the interest of its stockholders, either in its property or its acts, is confined to the same limits? If it does, then a change of residence by officers, agents or stockholders, or a transfer of a portion of the interests of the latter, would destroy the qualification of citizenship depending upon locality. If it would not have this effect, then this anomalous citizen may possess the rights of both plaintiff and defendant, nay, by a sort of plural being or ubiquity, may be a citizen of every state in the Union, may even be a state and a citizen of the same state at the same time.

Again, it has been said that the constitution has reference merely to the interests of those who may have access to the federal courts; and that provided those interests can be traced, or presumed to have existence in persons residing in different states, it cannot be required that those by whom such interests are legally held and controlled, or represented, should be alleged or proved to be citizens, or should appear in that character as parties upon the record. In reply to this proposition, it may be asked, upon what principle any one can be admitted into a court of justice apart from the interest he may possess in the matter in controversy; and whether it is not that interest alone, and the position he holds in relation thereto, which can give him access to any court? But, again, the language of the constitution refers expressly and conclusively to the civil or political character of the party litigant, and constitutes that character the test of his capacity to sue or be sued in the courts of the United States. In strict accordance with this doctrine has been the interpretation of the constitution from the early, and what may in some sense be called the contemporaneous, interpretation of that instrument, an interpretation handed down in an unbroken series of decisions, until crossed and disturbed by the anomalous ruling in the case of *Letson v. The Louisville Railroad Company*.

§ 559. *To maintain an action in the federal courts the parties must be citizens of different states, and that fact must appear in the record by positive averment, and the cause of action between the parties must have existed ab origine.*

Beginning with the case of *Bingham v. Cabot*, in 3 Dal., 382, and running through the cases of *Turner v. Bank of North America*, 4 Dal., 8; *Turner*

v. Enrille, id., 7; *Mossman v. Higginson*, id., 12; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Wood v. Wagnon*, 2 id., 1; *Capron v. Van Noorden*, 2 id., 126; *Strawbridge v. Curtiss*, 3 id., 267; *Bank of United States v. Deveaux*, 5 id., 61; *Hodgson v. Bowerbank*, 5 id., 303; *New Orleans v. Winter*, 1 Wheat., 91; *Sullivan v. Fulton Steamboat Co.*, 6 Wheat., 450,—the doctrine is ruled and reiterated, that, in order to maintain an action in the courts of the United States, under the clause in question, not only must the parties be citizens of different states, but that this character must be averred explicitly, and must appear upon the record, and cannot be inferred from residence or locality, however expressly stated, and that the failure to make the required averment will be fatal to the jurisdiction of a federal court, either original or appellate; and is not cured by the want of a plea or of a formal exception in any other form. But the decisions have not stopped at this point; they have ruled that, to come within the meaning of the constitution, the cause of action must have existed *ab origine* between citizens of different states, and that the article in question cannot be evaded by a transfer of rights, which, by their primitive and intrinsic character, were not cognizable in the courts of the United States as between citizens of different states. See *Turner v. Bank of North America*, already cited, and the cases of *Montalet v. Murray*, 4 Cranch, 46; and *Gibson v. Chew*, 16 Pet., 315. It is remarkable to perceive how perfectly the case of *Turner v. The Bank of North America* covers that now under consideration, and how strongly and emphatically it rebukes the effort to claim, by indirect and violent construction, powers for the federal courts which not only have never been delegated to them, nor implied by the silence of the constitution, but still more, powers assumed in defiance of its express inhibition. In the case last mentioned, the plaintiffs were well described as citizens of Pennsylvania, suing Turner and others, who were properly described as citizens of North Carolina, upon a promissory note made by the defendants, and payable to Biddle & Co., and which, by assignment, became the property of the plaintiffs. Biddle & Co. were not otherwise described than as “using trade and partnership” at Philadelphia or North Carolina. Upon an exception upon argument, taken for the first time in this court, Ellsworth, chief justice, pronounced its decision in these words: “A circuit court is one of limited jurisdiction, and has cognizance not of causes generally, but only of a few, specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears.

“This renders it necessary, inasmuch as the proceedings of no court can be valid further than its jurisdiction appears or can be presumed, to set forth upon the record of a circuit court the facts or circumstances which give it jurisdiction, either expressly or in such manner as to render them certain by legal intendment. Amongst those circumstances, it is necessary, where the defendant appears to be a citizen of one state, to show that the plaintiff is a citizen of some other state, or an alien; or if, as in the present case, the suit be upon a promissory note by an assignee, to show that the original promisee is so, for by a special provision of the statute it is his description as well as that of the assignee which effectuates the jurisdiction; but here the description given of the promisee only is, that he used trade at Philadelphia or North Carolina; which, taking either place for that where he used trade, contains no averment that

he was a citizen of a state other than that of North Carolina, or an alien, nor anything which by legal intendment can amount to such an averment." Let it be remembered that the statute alluded to by Chief Justice Ellsworth is nothing more nor less than an assertion in terms of the second section of the third article of the constitution; and it may then be asked, what becomes of this awkward attempt to force upon both the constitution and statute a construction which the just meaning of both absolutely repels? Every one must be sensible that the seat of a man's business, of his daily pursuits and occupations, must probably, if not necessarily, be the place of his residence; yet here we find it expressly ruled that such a commorancy by no just legal intendment, any more than by express language, constitutes him a citizen of that community or state in which he may happen to be then residing or transacting his business; moreover, it is familiar to every lawyer or other person conversant with history, that during the periods of greatest jealousy and strictness of the English polity, aliens were permitted, for the convenience and advancement of commerce, to reside within the realm, and to rent and occupy real property; but it never was pretended that such permission or residence clothed them with the character or with a single right pertaining to a British subject.

Nor has the doctrine ruled by the cases just cited been applied to proceedings at law alone, in which a peculiar strictness or an adherence to what may seem to partake of form is adhered to. The overruling authority of the constitution has been regarded by this court as equally extending itself to equitable as to legal rights and proceedings in the courts of the United States. Thus, in the case of *Course v. Stead*, in 4 Dal., 22. That was a suit in equity in the circuit court of the United States for the district of Georgia, in which it was deemed necessary to make a new party by a supplemental bill. This last bill recited the original bill, and all the orders which had been made in the cause, but omitted to allege the citizenship of the newly made defendant. In this case, when brought here by appeal from the court below, this court say, in reference to the omission to aver the citizenship of the new party: "It is unnecessary to form or to deliver any opinion upon the merits of this cause; let the decree of the circuit court be reversed." The case of *Jackson v. Ashton*, in 8 Pet., 148, is still more in point. This also was a suit in equity. The caption of the bill was in these words: "Thomas Jackson and others, citizens of the state of Virginia, v. The Rev. William E. Ashton, a citizen of Pennsylvania." What said this court by its organ, Marshall, chief justice, upon this state of the case? "The title or caption of the bill is no part of the bill, and does not remove the objection of the defects in the pleadings. The bill and proceedings should state the citizenship of the parties to give the court jurisdiction." In these last decisions must be perceived the most emphatic refutation of this newly assumed version of the constitution, which affirms that, although by the language of that instrument citizenship, and neither residence nor property, but citizenship, the civil and political relation or *status*, independently of either, is explicitly demanded, yet this requisition is fully satisfied by the presumption of a beneficiary interest in property apart either from possession or right of possession or from any legal estate or title, makes the interest thus inferred equivalent with citizenship of the person to whom interest is thus strangely imputed. Perhaps the most singular circumstance attending the interpolation of this new doctrine is the effort made to sustain it upon the rule *stare decisis*. After the numerous and direct authorities before cited, showing the inapplicability to this case of this rule, it would have been thought *a priori*

that the very last aid to be invoked in its support would be the maxim *stare decisis*. For this new class of citizen corporations, incongruous as it must appear to every legal definition or conception, is not less incongruous nor less novel to the relation claimed for it, or rather for its total want of relation to the settled adjudications of this court. It is strictly a new creation, an alien and an intruder, and is at war with almost all that has gone before it, and can trace its being no further back than the case of *Letson v. Louisville R. Co.*

§ 560. *Stare decisis; value of the principle when rightly applied. Dangers from its perversion.*

The principle *stare decisis*, adopted by the courts in order to give stability to private rights, and to prevent the mischiefs incident to mutations for light and insufficient causes, is doubtless a wholesome rule of decision when derived from legitimate and competent authority and when limited to the necessity which shall have demanded its application; but like every other rule, must be fruitful of ill when it shall be wrested to the suppression of reason or duty or to the arbitrary maintenance of injustice, of palpable error or of absurdity. Such an application of this rule must be necessarily to rivet upon justice, upon social improvement and happiness, the fetters of ignorance, of wrong and usurpation. It is a rule which, whenever applied, should be derived from a sound discretion—a discretion having its origin in the regular and legitimate powers of those who assert it. It can never be appealed to in derogation or for the destruction of the supreme authority—of that authority which created and which holds in subordination the agents whose functions it has defined, and bounded by clear and plainly-marked limits. Wherever the constitution commands, discretion terminates. Considerations of policy or convenience, if ever appealed to, I had almost said if ever imagined, in derogation of its mandate, become an offense. Beyond the constitution or the powers it invests, every act must be a violation of duty, an usurpation.

There cannot be a more striking example than is instanced by the case before us of the mischiefs that must follow from disregarding the language, the plain words, or what may be termed the body, the *corpus*, of the constitution, to ramble in pursuit of some *ignis fatuus* of construction or implication, called its spirit or its intention—a spirit not unfrequently about as veracious and as closely connected with the constitution as are the spirits of the dead with the revolving tables and chairs, which, by a fashionable metempsychosis of the day, they are said to animate.

The second section of the third article of the constitution prescribes citizenship as an indispensable requisite for obtaining admission to the courts of the United States—prescribes it in language too plain for misapprehension. This court, in the case of *Dèveaux* and the Bank of the United States, yielded obedience, professedly at any rate, to the constitutional mandate, for they asserted the indispensable requisite of citizenship; but in an unhappy attempt to reconcile that obedience with an unwarranted claim to power, they utterly demolished the legal rights, nay, the very existence, of one of the parties to the controversy, thereby taking from that party all standing or capacity to appear in any court. This was *ignis fatuus* No. 1. This was succeeded by the case of *Letson v. Cincinnati & Louisville R. Co.*, in which by a species of judicial resurrection, this party, the corporation, was *deterré*, raised up again, but was not restored to the full possession of life and vigor or to the use of all his members and faculties, nor even allowed the privilege of his original name; but semi-animate, and in virtue of some rite of judicial baptism, though “curtailed

of his natural dimensions," he is rendered equal to a release from the thralldom of constitutional restriction, and made competent at any rate to the power of commanding the action of the federal courts. This is *ignis fatuus* No. 2. Next in order is the case of *Marshall v. Baltimore & Ohio R. Co.* This is indeed the *chef-d'œuvre* amongst the experiments to command the action of the spirit in defiance of the body of the constitution.

It is compelled, from the negation of that instrument, by some necromantic influence, potent as that by which, as we read, the resisting Pythia was constrained to yield her vaticinations of an occult futurity. For in this case is manifested the most entire disregard of any and every qualification, political, civil, or local. This company is not described as a citizen or resident of any state; nor as having for its members the citizens of any state; nor as a *quasi* citizen; nor as having any of the rights of a citizen; nor as residing or being located in any state, or in any other place. No intimation of its "whereabout" is alluded to. It is said to have been incorporated by the state of Maryland; but whether the state of Maryland had authority to fix its locality, or ever directed that locality, and whether that be in the moon or *in terra incognita*, is nowhere disclosed. It is said that because this company was incorporated by the legislature of Maryland, we may conjecture, and are bound to conjecture, that it is situated in Maryland, and must possess all the qualifications appertaining to a citizen of Maryland to sue or be sued in the courts of the United States; and this inference we are called upon to deduce in opposition to the pleadings, the proofs, and the arguments, all of which demonstrate that this corporation claims to extend its property, its powers, and operations, and of course its locality, over a portion of the state of Virginia, and that it was in reference to its rights and operations within the latter state that the present controversy had its origin.

Thus does it appear to me that this court has been led on from dark to darker, until at present it is environed and is beacons on by varying and deceptive gleams, calculated to end in a deeper and more dense obscurity. In dread of the precipices to which they would conduct me, I am unwilling to trust myself to these rambling lights; and if I cannot have reflected upon my steps the bright and cheering day-spring of the constitution, I feel bound nevertheless to remit no effect to halt in what, to my apprehension, is the path that terminates in ruin. And in considering the tendencies and the results of this progress, there is nothing which seems to me more calculated to hasten them, than is the too evidently prevailing disposition to trench upon the barrier, which, in the creation by the several states of the federal government, they designed to draw around and protect their sovereign authority and their social and private rights; and to regard and treat with affected derision every effort to arrest any hostile approach, either indirectly or openly, to the consecrated precincts of that barrier. It is indeed a sad symptom of the downward progress of political morals, when any appeal to the constitution shall fail to "give us pause," and to suggest the necessity for solemn reflection. Still more fearful is the prevalence of the disposition, either in or out of office, to meet the honest or scrupulous devotion to its commands with a sneer, as folly unsuited to the times, and condemned by that new-born wisdom which measures the constitution only by its own superior and infallible standard of policy and convenience. By the disciples of this new morality, it seems to be thought that the mandates or axioms of the constitution, when found obstructing the way to power, and when they cannot be overstepped by truth or logic, may be con-

veniently turned and shunned under the denomination of abstractions or refinements; and the loyal supporters of those mandates may be borne down under the reproach of a narrow prejudice of fanaticism incapable of perceiving through the letter, and in contradiction of the language of the charter, its true spirit and intent; and as being wholly behind the sagacity and requirements of the age.

We cannot, however, resist the disposition to ask of those whose expanded and more pervading view can penetrate beyond the palpable form of the charter, what it is they mean to convey by the term abstraction, which is found so well adapted to their purposes? We would, with becoming modesty, inquire whether every axiom or precept, either in politics or ethics, or in any other science, is not an abstraction? Whether truth itself, whether justice or common honesty, is not an abstraction? And we would further ask those who so deal with what they call abstractions, whether they design to assail all general precepts and definitions as incapable of becoming the fixed and fundamental basis of rights or of duties. The philosophy of these expositions may easily embrace the rejection of the decalogue itself, and might be particularly effectual in reference to that injunction which forbids the coveting of all that appertains to our neighbor. The constitution itself is nothing more than an enumeration of general abstract rules, promulged by the several states, for the guidance and control of their creature or agent, the federal government, which for their exclusive benefit they were about to call into being. Apart from these abstract rules the federal government can have no functions and no existence. All its attributes are strictly derivative, and any and every attempt to transcend the foundations (those proscribed abstractions) on which its existence depends is an attempt at anarchy, violence and usurpation. Amongst the most dangerous means, perhaps, of accomplishing this usurpation, because its application is noiseless whilst it is persevering, is the habitual interference, for reasons entirely insufficient, by the federal authorities with the governments of the several states; and this too most commonly under the strange (I had almost called it the preposterous) pretext of guarding the people of the states against their own governments, constituted of, and administered by, their own fellow-citizens, bound to them by the sympathies arising from a community or identity of interests, from intimate intercourse, and selected by and responsible to themselves. Or it may be said, under the excuse of protecting the people of the states against themselves, converting the federal government in reference to the states into one grand commission, *De lunatico inquirendo*. The effect of this practice is to reduce the people of the states and their governments under an habitual subserviency to federal power; and gives to the latter whatever has been, and ever must be, the result of intervention by a foreign, a powerful, and interested mediator, the lion's share in every division. For myself, I would never hunt with the lion. I would anxiously avoid his path; and as far as possible keep him from my own; always bearing in mind the pregnant reply told in the Apologue as having been made to his gracious invitation to visit him in his lair; that although in the path that conducted to its entrance innumerable footprints were to be seen, yet in the same path there could be discerned *Nulla vestigia retrorsum*. The vortex of federal encroachment is of a capacity ample enough for the ingulphing and retention of every power; and inevitably must a catastrophe like this ensue, so long as a justification of power, however obtained, and the end of every hope of escape or redemption, can, to the sickening and desponding sense, in the iron rule of *stare decisis*, be proclaimed. A

rule which says to us: "The abuse has been already put in practice; it has by practice, merely, become sanctified; and may therefore be repeated at pleasure." The promulgation of a doctrine like this does indeed cut off all hope of redress, of escape, or of redemption, unless one may be looked for, however remote, in a single remedy—that sharp remedy to be applied by the true original sovereignty abiding with the states of this Union, namely, a reorganization of existing institutions, such as shall give assurance that if in their definition and announcement their rights can, by their appointed agents, be esteemed as abstractions merely, yet in the concrete, that is, in the exercise and enjoyment, those rights are real and substantive, and may neither be impaired nor denied.

My opinion is that this cause should have been dismissed by the circuit court for want of jurisdiction, and should now be remanded to that court with instruction for its dismissal.

Dissenting opinion by MR. JUSTICE CAMPBELL.

I dissent from that portion of the opinion of the court which affirms the jurisdiction of the circuit court in this case. The question involves a construction of a clause in the constitution, and arises under circumstances which make it proper that I should record the reasons for the dissent.

The conditions under which corporations might be parties to suits in the courts of the United States engaged the attention of this court not long after its organization. At the session of the court in 1809, three cases exhibited questions of jurisdiction in regard to them, under three distinct aspects. The *Bank of the United States v. Deveaux* was the case of a corporation plaintiff, whose corporators were described as citizens of Pennsylvania suing a citizen of Georgia in the federal court of that state. The case of *Wood v. Maryland Insurance Company* was that of a corporation defendant, whose corporators were properly described, sued in the state of its charter. And the case of *Hope Insurance Company v. Boardman* was that of a "legally incorporated body," sued in the state from which it derived its charter, and was "legally established," but of whose corporators there was no description. 5 Cranch, 57, 61, 78.

§ 561. *To make a corporation a proper party in a cause in the federal courts, it must be averred that its corporators are citizens of a state other than the state of the opposite party.*

The cases were argued together by counsel of eminent ability, with preparation and care, and were decided by the court with much deliberation and solemnity. Chief Justice Marshall declared the opinion of the court to be, "that the invisible, intangible and artificial being, the mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently cannot sue or be sued in the courts of the United States unless the rights of the members in this respect can be exercised in the corporate name." As it appeared in the two cases first mentioned, that the corporators might sue and be sued in the courts of the United States under the circumstances of the cases, the court on those cases treated them "as a company of individuals who, in transacting their joint concerns, had used a legal name," and for the reason "that the right of a corporation to litigate depended upon the character (as to citizenship) of the members which compose it, and that a body corporate cannot be a citizen within the meaning of the constitution. The judgment in the last case was reversed for want of jurisdiction."

In *Sullivan v. Fulton Steamboat Co.*, 6 Wheat., 450, the defendant was described as a body corporate, incorporated by the legislature of the state of New York, for the purpose of navigating, by steamboats, the waters of East river or Long Island Sound, in that state. This corporation was sued in New York. Upon appeal, this court determined that the circuit court had no jurisdiction of the defendant. In *Breithaupt v. Bank of Georgia*, 1 Pet., 238, that corporation was sued in that state, but this court certified "that as the bill did not aver that the corporators of the Bank of Georgia are citizens of the state of Georgia, the circuit court had no jurisdiction of the case." In *Vicksburg Bank v. Slocomb*, 14 Pet., 60, a corporation was sued by a citizen of a different state, in the state of its charter, but it appearing by plea that two of its corporators were citizens of the same state as the plaintiff, this court declined jurisdiction for the federal tribunals. This was in accordance with the circuit decisions, 4 Wash., 597; 3 Sumn., 472; 1 Paine; and their doctrine was repeated in *Irvine v. Lowry*, 14 Pet., 293. Such was the condition of the precedents in this court when, in 1844, the case of *Louisville R. Co. v. Letson*, 2 How., 497, arose. The case was one of a New York plaintiff suing a South Carolina corporation in that state, and describing its corporators as citizens. It appeared by plea, among other things, not material to the present discussion, "that two of the corporators were citizens of North Carolina."

In similar pleas before this it had appeared that the corporators belonged to the state of the adverse party, and consequently were within the exclusion of the eleventh section (1 Stats. at Large, 78) of the judiciary act of 1789. In the present case, the plaintiff was a citizen from a different state from these corporators. The court notices this fact as a peculiarity. "The point," they say, "has never before been under the consideration of this court. We are not aware that it ever occurred in either of the circuits until it was made in this case. It has not, then, been directly ruled in any case." The court proceeded then to decide that there was jurisdiction under the constitution, for the parties were citizens of different states, and that the judiciary act did not exclude it. Thus was this point in the plea disposed of, upon grounds which unsettled none of the cases before cited. The court avows this, and says: "That the case might be safely put upon these reasonings," conducted "in deference to the doctrines of former cases." It then proceeds: "But there is a broader ground upon which we desire to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular state is to be deemed, to all intents and purposes, as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person."

Since the decision of Letson's case, there have been cases of corporations, suing in the federal courts beyond the state of their location, and suing and being sued in the state of their location, in which this question might have been considered in this court. But there was no argument at the bar, and no notice of it in the opinion of the court. In one of these, one of the six judges who assisted in the decision of Letson's case expressed strongly a disapprobation of its doctrine, while another limited the conclusions of the court to the decision of the case then before it. *Rundle v. Delaware Canal Co.*, 14 How., 80.

The case of *Indiana R. Co. v. Michigan R. Co.*, 15 How., 233, presented the question now before us, and at that time I was favorable to its re-examination;

but this was expressly waived by the court, and the case decided upon another question of jurisdiction. In the case of the Methodist Church, there was but one corporation before the court as a party. The two corporators who composed that were defendants in their corporate as well as individual capacity. The citizenship of all the parties to the record was legally declared; and the parties to the record legally represented all the interests of the voluntary association at issue. In reference to jurisdiction, Justice Washington says: "The cases of a voluntary association trustees, executors, partners, legatees, distributees, parishioners, and the like, are totally dissimilar to a corporation, and this dissimilarity arises from the peculiar character of a corporation (4 Wash., 595); and this is clear by the decisions of this court. 4 Cranch, 306; 8 Wheat., 642.

I have been thus specific in the statement of the precedents in the court, that it may appear that this dissent involves no attempt to innovate upon the doctrines of the court, but the contrary, to maintain those sustained by time and authority in all their integrity. The declaration before us describes the defendant "as a body corporate by act of the general assembly of Maryland," and corresponds, therefore, with the cases cited from 5 Cranch, 57; 6 Wheat., 450; 1 Pet., 238; and in those cases jurisdiction was first questioned and disclaimed in this court. These cases were not cited in Letson's case, and are decisive of this. If we search the record for facts to sustain the jurisdiction, we can collect that the defendant has been recognized as a body corporate by the legislature of Virginia, is commorant, and transacts business there by its authority, has for its corporators citizens and a city of that state, and that the plaintiff is also a citizen of Virginia. If these facts are considered with reference to the question of jurisdiction, all the cases decided by this court on this subject have principles which would exclude it. Even Letson's case prescribes that the corporation should carry on its business in the state of its charter, and that case hardly contemplated an estoppel such as is described in the opinion of the court.

I am compelled to consider this case as uncontrolled by the declaration of doctrine in Letson's case; nor do I consider the cases in which the decision of the question has been waived as obligatory. I cannot look for the conclusions of this court or any of its members, except from the public, authorized and responsible opinions delivered here in cases legitimately calling for them. For this conclusion I have the sanction of the highest authority. Chief Justice Marshall, replying to the argument that corporations under no circumstances, and by no averment, could be a party to a suit in the courts of the United States, says: "Repeatedly has this court decided cases between a corporation and an individual, without feeling a doubt of its jurisdiction," and adds: "Those decisions are not cited as authority, for they were made without a consideration of the particular point."

The inquiry now presented is, shall I concur in a judgment which removes the ancient landmarks of the court, in reference to its jurisdiction, and which it established with care and solemnity, and maintained for so long a period with consistency and circumspection? I am compelled to reply in the negative. A corporation is not a citizen. It may be an artificial person, a moral person, a juridical person, a legal entity, a faculty, an intangible, invisible being; but Chief Justice Marshall employed no metaphysical refinement, nor subtlety, nor sophism, but spoke the common sense, "the universal understanding," as he calls it, of the people, when he declared the unanimous judgment of this court, "that it certainly is not a citizen."

Nor were corporations within the contemplation of the framers of the constitution when they delegated a jurisdiction over controversies between the citizens of different states. The citation by the court from *The Federalist* proves this. It is said by the writers of that work, "that it may be esteemed as the basis of union that the citizens of each state shall be entitled to all the immunities and privileges of citizens of the several states." And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow that, in order to the inviolable maintenance of that equality of immunities and privileges to which citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. Thus to administer the rights and privileges of citizens of the different states, held under a constitutional guaranty, when brought into collision or controversy — rights and immunities derived from the constitutional compact, and forming one of its fundamental conditions, was the object of this jurisdiction. The commonplace that it resulted as a concession to the possible fears and apprehensions of suitors, that justice might not be impartially administered in state jurisdiction, soothing as it is to the official sensibilities of the federal courts, furnishes no satisfactory explanation of it.

Hence the interpretation of that instrument which transferred to the artificial persons created by state legislation the rights or privileges of the corporators, derived from the constitution of the United States, as citizens of the Union, and held independently and without any relation to their rights as corporators — was, to say no more, a broad and liberal interpretation. Nor did the court in *Deveaux's case* affect the least self-denial or diffidence in making the bounds of its power. It declared that "the duties of the court, to exercise a jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation," and in this spirit rejected a jurisdiction over a case exactly like the present.

§ 562. *Corporations have no extraterritorial rights. Their powers are exercised out of their state only by virtue of comity.*

The doctrine of the court in *Bank of Augusta v. Earle*, 13 Pet., 519, and *Runyan v. Coster*, 14 Pet., 129, to the result that corporations have no extraterritorial rights, but that the legal exercise of their faculties, extraterritorially, was the effect of a rule of comity among the states, dependent upon their policy and convenience, and revocable at their pleasure, was in harmony with these judgments of the court, and the constitutional principles I have stated. The administration of the rules of domestic policy adopted by the several states, in reference to these artificial creatures of a domestic legislation, belonged to state jurisdictions, and were ascertainable from its laws and judicial interpretations. But when, from the later case of *Letson*, it was supposed that these legal entities had a *status* which admitted them to the federal tribunals by a constitutional recognition, the inquiry at once arose, for what purpose was this privilege held? The interdependence between the sections of the constitution which defined the privileges and immunities of citizens of the Union, and the jurisdiction of the federal courts in controversies between citizens of the states, was known and felt. It was argued that the capacity to sue was only a consequent of the right to contract, to hold property, and to perform civil acts. They commenced, therefore, an agitation of the state courts for their rights as "citizens of the Union." The supreme court of Kentucky, 12 B. Mon., 212, repelling these pretensions and exposing their perilous character, thus refers to *Letson's*

case, which had been relied on for their support: "There are some expressions in that opinion which indicate that corporations may be regarded as citizens to all intents and purposes." But in saying this, the court went far beyond the question before them, and to which it may be assumed that their attention was particularly directed. So, too, in *New Jersey*, 3 Zab., 429, it was argued that the existence of the extraterritorial rights of corporations "is not now a question of comity in the United States, but a constitutional principle incapable of being altered by state legislation."

And opinions from jurists of pre-eminence in Massachusetts and New York were laid before the court to sustain the argument founded upon the relaxing doctrines of this court. Thus the introduction of new subjects of doubt, contest and contradiction is the fruit of abandoning the constitutional landmarks. Nor can we tell when the mischief will end. It may be safely assumed that no offering could be made to the wealthy, powerful and ambitious corporations of the populous and commercial states of the Union so valuable, and none which would so serve to enlarge the influence of those states, as the adoption, to its full import, of the conclusion, "that to all intents and purposes, for the objects of their incorporation, these artificial persons are capable of being treated as a citizen as much as a natural person."

The supreme court of Kentucky says, truly: "The apparent reciprocity of the power would prove to be a delusion. The competition for extraterritorial advantages would but aggrandize the stronger to the disparagement of the weaker states. Resistance and retaliation would lead to conflict and confusion, and the weaker states must either submit to have their policy controlled, their business monopolized, their domestic institutions reduced to insignificance, or the peace and harmony of the states broken up and destroyed." To this consummation, this judgment of the court is deemed to be a progress. The word "citizen," in American constitutions, state and federal, had a clear, distinct and recognized meaning, understood by the common sense, and interpreted accordingly by this court through a series of adjudications. The court has contradicted that interpretation and applied to it rules of construction which will undermine every limitation in the constitution, if universally adopted. A single instance of the kind awakens apprehension, for it is regarded as a link in a chain of repetitions.

The litigation before this court, during this term, suffices to disclose the complication, difficulty and danger of the controversies that must arise before these anomalous institutions shall have attained their legitimate place in the body politic. Their revenues and establishments mock at the frugal and stinted conditions of state administration; their pretensions and demands are sovereign, admitting impatiently interference by state legislative authority. And from the present case, we learn that, disdainful of "the careless arbiters" of state interests, they are ready "to hover about them" in "efficient and vigilant activity," to make of them a prey; and, to accomplish this, to employ corrupting and polluting appliances. I am not willing to strengthen or to enlarge the connections between the courts of the United States and these litigants. I can consent to overturn none of the precedents or principles of this court to bring them within their control or influence. I consider that the maintenance of the constitution, unimpaired and unaltered, is a greater good than could possibly be effected by the extension of the jurisdiction of this court, to embrace any class either of cases or of persons.

Mr. Justice Catron authorizes me to say that he concurs in the conclusions of this opinion. Our opinion is, that the judgment of the circuit court should be affirmed for the want of jurisdiction.

MEGUIRE v. CORWINE.

(11 Otto, 108-112. 1879.)

ERROR to the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The plaintiff in the court below is the plaintiff in error here. The first count of the declaration avers that in consideration of the assistance to be rendered by him to the defendants' testator in procuring him to be appointed special counsel of the United States in certain litigated cases known as the "Farragut prize cases," and also in consideration of the assistance to be rendered by the plaintiff in managing and carrying on the defense in those cases,—which assistance was accordingly rendered,—the testator promised the plaintiff to pay him one-half of all fees which the testator should receive as such special counsel, and that the testator did receive as such special counsel in those cases \$29,950, of which sum the plaintiff was entitled to be paid one-half, etc.

The second count is substantially the same with the first, except that it avers the consideration of the contract to have been the assistance to be rendered by the plaintiff in the defense of the cases named, and is silent as to the stipulation that he was to assist in procuring the appointment of the testator as special counsel for the government. The third is a common count alleging the indebtedness of the testator to the defendant for work and labor to the amount of \$12,975.

It appears by the bill of exceptions that the plaintiff called three witnesses to establish the contract upon which he sought to recover. Lovel testified that "the testator also stated that he had agreed to pay the plaintiff one-half of all the fees he should receive in said cases, for his aid in getting the appointment of special counsel and for the assistance which the plaintiff was to render in procuring testimony and giving information for the management of the defense in said cases."

"On cross-examination, the witness said he knew, before his said conversation with R. M. Corwine, and before Corwine was employed, that Mr. Meguire, the plaintiff, had the selection of counsel in said cases, the treasury department only restricting him to the selection of a man who was familiar with admiralty practice, and Mr. Meguire was to utilize the information he professed to have at that time. The bargain, as witness understood it, was that in consideration of Meguire's procuring Corwine to be employed as special counsel in those cases, and of assisting him in getting evidence and information, Corwine agreed to pay to the plaintiff (Meguire) one-half of the fees which he (Corwine) might receive from the United States for services in said cases.

"The plaintiff then called Lewis S. Wells, another witness in his behalf, who, being duly sworn, stated that since the commencement of this suit—he thought some time last year—he met the testator (R. M. Corwine, deceased) in the treasury department, and had a conversation with him about the plaintiff and the Farragut cases. Mr. Corwine was very angry, and said that he had agreed to pay Mr. Meguire one-half of his fees in the Farragut cases, and had paid him one-half the retainer received in 1869, and \$1,000 in July, 1873, and had

taken his receipt in full. That he had found out that plaintiff had not been the means of his appointment as special counsel, and he thought he had paid the plaintiff enough."

Wells testified further that upon two occasions the testator told him the plaintiff was assisting him in the preparation of the defense in the Farragut cases, and that he had agreed to pay to the plaintiff one-half of his fees for the plaintiff's services. This is all that is found in the record touching the terms and consideration of the contract. It was in proof by a late solicitor of the treasury that the plaintiff strongly urged on him the employment of the testator as special counsel, and that at the instance of the plaintiff he called the attention of the secretary of the treasury to the subject, and that the appointment of the testator was thus brought about. The plaintiff had been a clerk in New Orleans, in the office of Colonel Holabird, chief quartermaster of the Department of the Gulf during the war, and had possession of Holabird's papers, from which he derived the facts communicated to the testator for the defense of government in the prize suits in question. It was not controverted that the amount of fees received by the testator was \$25,950, and that he paid over to the plaintiff \$4,475 before the breach occurred between them. The further sum of \$8,500 was claimed by the plaintiff, and this suit was brought to recover it. The learned counsel for plaintiff in error complains in his brief that "in the charge of the court, page 10, the jury were instructed that 'the contract set out in the first count of the declaration was illegal and void, and that the plaintiff could not recover on the second count unless the jury should find that the parties made another and a distinct contract;' 'and in the first instruction asked by the defendants and given by the court the jury were told that such an arrangement is void, because it is contrary to public policy, and the plaintiff cannot recover in any form of action for any services rendered or labor performed in pursuance thereof.' . . . 'There can be no doubt that this charge was fatal to the plaintiff's whole case. The jury were not allowed to infer, as they well might have done from the testimony of more than one of the witnesses, that the testator, after his appointment as special counsel, recognized an implied agreement to pay the plaintiff half of his fees for the services of the latter rendered during the progress of the business.'"

In our view of the record this is the turning point of the case. The objection taken to the instructions referred to is not so much to them in the abstract as the concrete. The complaint is that they closed the door against the inference of another contract which the jury might have drawn from the testimony in the case. To this there are several answers. If there were such testimony, it should have been set forth in the record. After a careful examination, we have been unable to find any. The instructions expressly saved the right of the jury to find another and a different contract, and their attention was called to the subject. They found none. The contract objected to by the court as fatally tainted was proved by witnesses called by the plaintiff himself. He neither proved nor attempted to prove any other. It was, then, neither claimed nor intimated that any other had been made. After the views of the court were announced, it was too late for the plaintiff to change his position and claim for the jury the right to wander at large in the field of conjecture and find as a fact what the evidence wholly failed to establish, and which, if found, would have thrown on the court the necessity to set aside the verdict and award a new trial.

A judge has no right to submit a question where the state of the evidence

forbids it. *Michigan Bank v. Eldred*, 9 Wall., 544. On the contrary, where there is an entire absence of testimony, or it is all one way, and its conclusiveness is free from doubt, it is competent for the court to direct the jury to find accordingly. *Merchants' Bank v. State Bank*, 10 id., 604 (BANKS, §§ 101-118). The practice condemned in *Michigan Bank v. Eldred* is fraught with evil. It tends to create doubts which otherwise might not, and ought not, to exist, and may confuse the minds of the jury and lead them to wrong conclusions. If the instructions here under consideration are liable to any criticism, it is that they were more favorable to the plaintiff in error than he had a right to claim.

§ 563. *A contract to procure employment of a public character for another, and receive therefor one-half the emoluments, is against public policy and void.*

The law touching contracts like the one here in question has been often considered by this court, and is well settled by our adjudications. *Marshall v. Baltimore & Ohio R. Co.*, 16 How., 314 (§§ 555-562, *supra*); *Tool Co. v. Norris*, 2 Wall., 45 (§§ 537-539, *supra*); *Trist v. Child*, 21 id., 441 (§§ 549-554, *supra*); *Coppell v. Hall*, 7 id., 542. It cannot be necessary to go over the same ground again. To do so would be a waste of time. The object of this opinion is rather to vindicate the application of our former rulings to this record than to give them new support. They do not need it. Frauds of the class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare, and of free government as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists, and of those by whom it is administered. Corruption is always the forerunner of despotism.

In *Trist v. Child*, *supra*, while recognizing the validity of an honest claim for services honestly rendered, this court said: "But they are blended and confused with those which are forbidden; the whole is a unit, and indivisible. That which is bad destroys that which is good, and they perish together. . . . Where the taint exists it affects fatally, in all its parts, the entire body of the contract. In all such cases *potior conditio defendentis*. Where there is turpitude, the law will help neither party." These remarks apply here. The contract is clearly illegal, and this action was brought to enforce it. This conclusion renders it unnecessary to consider the plaintiff's other assignments of error. The case being fundamentally and fatally defective, he could not recover. Conceding all his exceptions, other than those we have considered, to be well taken, the errors committed could have done him no harm, and opposite rulings would have done him no good. In either view, these alleged errors are an immaterial element in the case. *Barth v. Clise*, 12 Wall., 400.

Judgment affirmed.

HILL v. SMITH.

(21 Howard, 283-287. 1853.)

ERROR to U. S. Circuit Court, District of Indiana.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—The plaintiff's demand is founded on the following contract, dated August 17, 1853, signed by defendants, and set forth at length in the declaration:

"Whereas Henry Hill, of Delaware county, has proposed to convey to the Cincinnati, Newcastle & Michigan Railroad Company a certain tract of land

in Delaware county, containing three hundred and nine acres, for the consideration of \$6,100, to be paid in the capital stock of said company, at par, on the condition that Caleb Smith and other responsible persons will guaranty that the said stock shall be worth par in three years from the present date, and in default thereof that the company shall make it up to par; and whereas the said Cincinnati, Newcastle & Michigan Railroad Company have agreed by a resolution of their board of directors to accept said proposition: Now, we, the undersigned, in consideration of the premises, hereby guaranty to the said Henry Hill that the said stock shall be worth par in three years from the date of this instrument; and if at the expiration of that date said stock shall not be worth par, we guaranty the said Henry Hill that the said Cincinnati, Newcastle & Michigan Railroad Company shall make up to him or pay him whatever sum the said stock shall be worth less than par, so as to make the said stock worth par to said Henry Hill at that date."

The declaration is in proper form, and contains all the averments necessary to show a breach of this contract and the consequent liability of defendants. There was a general demurrer to the declaration and judgment for the defendants.

§ 564. *A contract guarantying that certain railroad stock shall be worth par at a certain date is valid.*

As we have not been furnished with an argument on behalf of defendants, we are at a loss to discover on what grounds it is supposed that this judgment can be supported. As the contract is in writing, signed by the parties to be charged, it cannot be affected by the statute of frauds; and, although the term "guaranty" is usually applied to a collateral undertaking to pay the debt of another, yet, when taken in connection with the other terms of the instrument, this is clearly an original, independent contract. If it had been under seal, the term "*covenant*" would have been the technical synonym for the word "guaranty," as here used. It states that the plaintiff would not agree to sell his land in exchange for stock, except on condition that defendants should guaranty that the stock in three years would be worth par, or should be made so by the corporation. For this consideration defendants agree to make it so, or, in other words, to pay the difference between the cash value of the stock on that day and its nominal value.

On this condition, and for this consideration, the plaintiff agreed to convey his land to the railroad company; and, on the faith of defendants' undertaking, he has conveyed it, and accepted, not money, but certain stock which defendants have agreed to make equal to money by a certain day. The declaration avers that at the time specified the stock was wholly worthless, and of no value, and the railroad company utterly insolvent, and unable to pay the difference; and that defendants, having full notice of these facts, refuse to comply with their contract. There is no reason why this contract should be treated as void because of an illegal or immoral consideration. Its conditions require no previous suit to be instituted against any one as principal debtor. The declaration contains every necessary averment: a valid contract, a large consideration paid, and a breach of the contract by defendants; all set forth in proper and technical language. The plaintiff is therefore entitled to judgment on the demurrer, unless the court below, in their discretion, shall permit the defendants, on payment of costs, to withdraw their demurrer, and plead some good defense in bar. The judgment of the court below is reversed, and record remitted for further proceedings.

FORSYTH v. WOODS.

(11 Wallace, 484-488. 1870.)

ERROR to U. S. Circuit Court, District of Missouri.

STATEMENT OF FACTS.— Woods, being assignee of a certain bankrupt firm, sued Forsyth to recover a balance alleged to be due the firm. Forsyth had been jointly requested by the individuals who composed the above firm to become a surety for one of them upon an administration bond; he had been told by them that they intended to make the administration a partnership business, and to share as partners all gains and losses resulting from it, so that, in signing the bond, he would become the surety of the firm, and not merely of one partner. The partnership took possession of the assets of the deceased intestate, afterwards became bankrupt, and Forsyth, as surety on the administration bond, was compelled to pay a large sum. In like manner he was compelled to pay upon another bond given by the other partner of the firm as administrator upon another estate. If the partnership was liable to repay Forsyth the sums paid by him as surety, then he had a set-off against the demand of the assignee Woods. Plaintiff in the court below demurred, his demurrer was sustained, and Forsyth brought the case to this court.

§ 565. *An undertaking by all the members of a firm is not necessarily the contract of the firm.*

Opinion by MR. JUSTICE STRONG.

If it be conceded that such a joint request as is pleaded, followed by an assumption of obligation and a consequent payment of money in pursuance of it, raised an implied promise on the part of those who joined in the request to reimburse the defendant, it is, perhaps, still not clear that it was a partnership promise, creating a debt of the partnership, and therefore entitled to priority in bankruptcy over private debts of the partners. It is not pleaded that the firm of E. P. Tesson & Co. requested the defendant to assume the obligation he took, though it is averred that the persons who constituted the firm made that request, and it is not certain that a promise by a partnership and a promise by the individual partners collectively have the same effect. If a firm be composed of two persons, associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of the two partners, made in their individual names, respecting a matter that has no connection with the firm business, creates a liability of the firm as such. The partnership is a distinct thing from the partners themselves, and it would seem that debts of the firm are different in character from other joint debts of the partners. If it is not so, the rule that sets apart the property of a partnership exclusively, in the first instance, for the payment of its debts may be of little value. That rule presumes that a partnership debt was incurred for the benefit of the partnership, and that its property consists, in whole or in part, of what has been obtained from its creditors. The reason of the rule fails when a debt or liability has not been incurred for the firm as such, even though all the persons who compose the firm may be parties to the contract.

§ 566. *A promise of indemnity for doing an illegal act is void.*

But the substantial fault of the plea in this case is that, at best, it sets up an illegal contract, which the law will not enforce. The promise, if any, of the firm was to indemnify the defendant for doing an act planned and intended to enable his principal in the administration bond to commit a gross breach of trust. The arrangement was entered into in order that the partnership might

obtain the possession of all the effects, goods, chattels, rights and credits which had belonged to the intestate decedent, and which were assets that the administrator only had the right to hold. It was also a part of it that the administration should be conducted by the firm and not by the person to whom the probate court committed it. To this arrangement the defendant became a party, and he signed the bond in view of it, and in order that it might be carried out. This appears from the plea. It needs no argument to show that the transaction was against the policy of the law and plainly illegal.

Letters of administration are a trust. They are granted by the probate court or ordinary because of confidence reposed in the grantee. They require him to take exclusive charge of the personal property of his intestate and to bring to its administration his own personal attention and judgment. He has no right to allow others to control it or to share in its administration. If he does, he exposes it to unnecessary hazards, and subjects it to the disposition of persons in whom the officer of the law has reposed no confidence. To permit a mercantile or a banking firm, of which the administrator is a partner, to take the assets of the decedent's estate into its possession and to share in the disposition of them is to invite what the plea shows happened in this case, misappropriation and loss. It is a gross breach of trust, a violation of legal duty. It must be, therefore, that any contract which has for its object such a faithless abandonment of the duties of an administrator cannot be enforced in a court of law.

It is not to be said that the implied promise of the partners or the firm was only collateral to the illegal arrangement. It was a part of it. The signing of the bond and the promise to indemnify were both not only in view of a contemplated transfer of the administrator's duties to the partnership, but they were means avowedly selected for that end. It follows that the plea set up no debt to the defendant due from the bankrupt firm which is recoverable at law and which can be made available as a set-off. The demurrer was therefore correctly sustained.

Judgment affirmed.

ARNOLD v. CLIFFORD.

(Circuit Court for Massachusetts: 2 Sumner, 238, 239. 1835.)

STATEMENT OF FACTS.—Action on the case for a libel. In the course of the trial, the question arose; whether, supposing the publication of the article complained to be a libel, a promise by the defendant to indemnify the publisher was valid in point of law.

§ 567. *A promise to indemnify one for doing a wrong is void as against public policy.*

Opinion by STORY, J.

I have not the least doubt upon this point. A promise to indemnify another for doing a private wrong, or for committing a public crime, is against public policy, and is void in law. It is common learning, that among tort-feasors, who are knowingly such, there can be no contribution for damages recovered against any one of them, even although there be a promise of indemnity or contribution. *A fortiori*, the same doctrine applies to cases of indemnity for the commission of a public crime. No one ever imagined that a promise to pay for the poisoning of another was capable of being enforced in a court of justice. It is universally treated as illegal, it being against the

first principles of justice, and morals, and religion. The man who is hired to publish a libel against another is guilty of an offense equally reprehensible in morals, though not so aggravated in its character; for the publication may not only be ruinous to the reputation of the individual aspersed, but may involve an innocent family in agonizing distress, and, perhaps, destroy its peace forever. There is no such right recognized in civil society, or, at least, in our forms of government, as the right of slandering or calumniating another. The liberty of the press does not include the right to publish libels. Much less does it include the right to be indemnified against the just legal consequences of such publications. See the case of *Colburn v. Patmore*, 1 Crompton, M. & R., 73; S. C., 4 Tyrw., 677; *Pearson v. Skelton*, 1 Mees. & W., 504.

Verdict for the plaintiff.

WICKER v. HOPPOCK.

(6 Wallace, 94-100. 1867.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—Chapin & Co. were lessees of a distillery under a three years' lease; the distillery was mortgaged to defendant in error Hoppock, and the yearly rent was to be paid by the lessees to the mortgagee. Chapin & Co. occupied the distillery for some months, put in some personal property, and then assigned the lease to Wicker, who occupied under it. Chapin & Co. failed to pay the rent, and Hoppock accordingly applied to Wicker, who agreed with Hoppock that if he would sue Chapin & Co., obtain judgment for the rent they owed, and levy on their said personal property, he (Wicker) "would bid it off at the sale for whatever the judgment and costs might be." Hoppock sued Chapin & Co., and obtained judgment for \$2,206. They were indebted to Wicker, who claimed that he had made advances to them on the personal property above mentioned, and a part of which he removed. Hoppock gave notice to Wicker of his intention to sell under his execution, and of the day of sale, but Wicker did not attend nor make any bid, and all the property levied on was sold to Hoppock for \$2. Thereupon Hoppock brought suit in the court below against Wicker to recover for the breach of his agreement to bid off the property for the amount of the judgment.

The court below charged: 1. That the agreement between Hoppock and Wicker was not invalid as tending to prevent the fairness of a judicial sale, and therefore against public policy. 2. That the measure of damages was the amount of the judgments with interest and costs.

Wicker brought the case to this court on writ of error.

§ 568. *The contract in the case at bar was valid.*

Opinion by MR. JUSTICE SWAYNE.

It is said that the agreement between the parties "was invalid because calculated to interfere with and prevent the fairness and freedom of a judicial sale; and prevent competition, and therefore against public policy."

The contract was that the defendant in error should procure judgments against Chapin & Co. for the rent in arrear, levy upon the machinery and fixtures in the distillery, and expose them for sale, and that the plaintiff in error should bid for them the amount of the judgments. The validity of such an arrangement depends upon the intention by which the parties are animated, and the object sought to be accomplished. If the object be fair — if there is no indirection — no purpose to prevent the competition of bidders, and such is

not the necessary effect of the arrangement in a way contrary to public policy, the agreement is unobjectionable and will be sustained.

In one of the cases to which our attention has been called (*Phippin v. Stickney*, 3 Metc., 384), there was an agreement between two persons that one of them only should bid, and that after buying the property he should sell a part of it to the other upon such terms as the witnesses to the agreement should decide to be just and reasonable. In another (*Bame v. Drew*, 4 Denio, 290), it was agreed that a party should bid a certain amount for a steamboat, about to be sold under a chattel mortgage, and transfer to the mortgagor an undivided interest of one-third, upon his paying a corresponding amount of the purchase money. In a third case (*Garrett v. Moss*, 20 Ill., 549), the agreement was between a senior and a junior mortgagee. The former agreed to bid the amount of his debt for a specific part of the mortgaged premises. In each of these cases the arrangement was sustained upon full consideration by the highest judicial authority of the state.

In the case before us the agreement was that Wicker should bid. There was no stipulation that Hoppock should not. There was nothing which forbade Hoppock to bid, if he thought proper to do so, and nothing which had any tendency to prevent bidding by others. The object of the contract obviously was to be secure — not to prevent bidding. The benefit and importance of the arrangement to the interests of the judgment debtors is made strikingly apparent when the subject is viewed in the light of the consequences which followed the breach of the agreement. Instead of the property selling for the amount of the judgments, Hoppock was the only bidder, and the property sold was struck off to him for a nominal sum. There was no error in the ruling of the court upon this subject.

§ 569. *Measure of damages.*

It is urged that the court erred in instructing the jury that, if the plaintiff was entitled to recover, the measure of damages was the amount of the judgments, with interest and the cost. The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed. In some instances he is made to bear a part of the loss, in others the amount to be recovered is allowed, as a punishment and example, to exceed the limits of a mere equivalent. It has been held that, "where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach thereof, at a trifling expense or with reasonable exertions, it is his duty to do it; and he can charge the delinquent party with such damages only as, with reasonable endeavors and expense, he could not prevent." *Miller v. Mariners' Church*, 7 Greenl., 56; *Russell v. Butterfield*, 21 Wend., 304; *Ketchell v. Burns*, 24 id., 457; *Taylor v. Read*, 4 Paige, 571; *United States v. Burnham*, 1 Mason, 57.

If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well settled distinction between an agreement to indemnify and an agreement to pay. In the latter case, a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid. In a note of Sergeant

Williams to Cutler v. Southern, it is said that in all cases of covenants to indemnify and save harmless, the proper plea is *non damnificatus*, and that if there is any injury the plaintiff must reply it, but that this plea "cannot be pleaded when the condition is to *discharge or acquit* the plaintiff from such bond or other particular thing, for the defendant must set forth affirmatively the special manner of performance." Sanders, 117, note 1.

In Port v. Jackson, 17 Johns., 239, the assignee of a lease covenanted to fulfil all the covenants which the lessee was bound to perform. It was held that the agreement was substantially a covenant to pay the rent reserved, as it should accrue; that a plea of *non damnificatus* was bad, and that the assignor could recover the amount of the rent in arrear as soon as a default occurred, without showing any injury to himself by the delinquency of the assignee. The assignee was liable also to the lessor for the same rent by privity of estate. The judgment was unanimously affirmed by the court of errors. In *Ex parte Negus*, 7 Wend., 503, the covenant was to pay certain partnership debts, and to indemnify the covenantee, a retiring partner, against them. It was held that the covenant to indemnify did not impair the effect of the covenant to pay, and the same principle was applied as in the case of Port v. Jackson. We might refer to numerous other authorities to the same effect, but it is deemed unnecessary.

In the case before us, as in the cases referred to, the defendant made a valid agreement, in effect, to pay certain specific liabilities. They consisted of the judgments of Hoppock against Chapin & Co. If Wicker had fulfilled, the judgments would have been extinguished. As soon as Hoppock performed, the promise of Wicker became absolute. No provision was made for the non-performance of Wicker, and the further pursuit by Hoppock of the judgment debtors. Indemnity was not named. That idea seems not to have been present to the minds of the parties. The purpose of Hoppock obviously was to get his money without the necessity of proceeding further against Chapin & Co. than his contract required. There is no ground upon which Wicker can properly claim absolution. He removed and keeps the property he was to have bought in. The consideration for his undertaking became complete when it was exposed to sale. The amount recovered only puts the other party where he would have been if Wicker had fulfilled, instead of violating, the agreement. The rule of damages given to the jury was correct.

Judgment affirmed.

BROWN v. TARKINGTON.

(3 Wallace, 877-392. 1865.)

ERROR to U. S. Circuit Court, District of Indiana.

STATEMENT OF FACTS.—A bank had been organized in the territory of Nebraska under a void charter, and the notes which were the foundation of the suit were given in settlement of its balances due to plaintiff, whom the evidence involved in the fraudulent transactions of the bank. There was judgment for defendant.

§ 570. *A new promise growing out of an illegal consideration is as infirm in legal contemplation as the original implied promise.*

Opinion by MR. JUSTICE NELSON.

We perceive no valid objection to the charge given by the learned judge below. It referred to the facts with great particularity and accuracy. The

principle of law which it laid down is familiar, and the evidence in the case called for its application. The illegality of the charter of the bank, and of the organization under it, as well as the business of banking conducted through its means, were matters not in controversy upon the evidence. The only material question open was, whether or not the plaintiff was *particeps criminis*. If he was, he was disabled, under the maxim, to recover. The law leaves the party thus situated where it finds him. If either has sustained loss by the bad faith of his associates, it is but a just punishment for the illegal adventure.

To the argument of the counsel for the plaintiff — that admitting the banking transactions to be illegal, yet that the settlement of the balance and giving notes for the same purged the new promise, as he calls it, from the original taint — the answer is, that the new promise is founded upon the illegal consideration; a debt or demand growing out of the illegal transactions; and is as infirm, in the eye of the law, as the implied promise that existed previous to the giving of the notes. There were several prayers for instructions on the part of the plaintiff, which were refused in the form presented. Most of them were irrelevant and immaterial, and neither even alluded to the ground upon which the case was placed before the jury. The court embraced in its charge all that was material or pertinent in the instructions prayed for.

§ 571. *An objection to a deposition is waived if not taken advantage of on the trial.*

It is also insisted for the plaintiff that the deposition of S. L. Campbell, the president of the bank, was improperly admitted on account of an irregularity in taking it under the act of congress. It appears that a motion had been made, at a previous term of the court, to set aside this deposition on the ground stated; which was denied. On the trial, when the deposition was offered, no objection was made to it. The question, therefore, is not in the bill of exceptions; on the contrary, if any valid objection existed, it was waived by not taking advantage of it at the trial.

Judgment affirmed.

ROESNER v. HERMANN.

(Circuit Court for Indiana: 8 Federal Reporter, 782, 783. 1881.)

§ 572. *Contract excusing negligence is against public policy.*

Opinion by GRESHAM, J.

The substance of the complaint is that the defendant's machinery was defective and unsafe; that while operating the same with reasonable care, and without knowledge of its defective character, the deceased received the injuries which caused his death, and that the defendant knew of the character of the machinery, or with proper diligence might have known it. So far as he could do so by the exercise of reasonable care, the defendant was bound to supply his factory with suitable and safe machinery. If he failed to do this, and required his employee to operate machinery which was unsound and unsafe, and in doing so the latter, while exercising ordinary care and prudence, received injuries which caused his death, his personal representative has a right of action for the benefit of those who have sustained loss from the injury and death. When the defendant's negligence in supplying his employees with unsafe machinery has caused the death of the latter, the law will not allow the defendant to say, as in effect he does say in this answer: "It is true that my machinery was defective and unsafe, and my negligence caused the death of

my employee, but I am not liable to those who have suffered from the loss of his life, because I had a contract with my employee which secured to me the right to supply him with defective and unsafe machinery, and to be negligent." Such a contract is void as against public policy.

If there was no negligence the defendant needed no contract to exempt him from liability; if he was negligent, the contract set out in his answer will be of no avail.

BIERBAUER v. WIRTH.

(Circuit Court for Wisconsin: 5 Federal Reporter, 836-840. 1880.)

Opinion by DYER, J.

STATEMENT OF FACTS.—The question to be determined in this case arises on a motion for a new trial. The action is one brought by the plaintiff to recover for services rendered and disbursements alleged to have been made by him between the 1st day of April, 1875, and the 1st day of December, 1876, for the defendants, who were the managers of a rectifying and redistilling establishment at Milwaukee. At the trial it was disclosed by the evidence introduced on the part of the plaintiff that about the 1st day of April, 1875, he was employed as a book-keeper at the defendants' place of business; that he rendered legitimate services as such book-keeper from that day until the 10th day of May, 1875, when the defendants' establishment, together with a large number of distilleries and rectifying houses in Milwaukee, were seized by the government for frauds upon the revenue. It appeared from the testimony given by the plaintiff himself that in the evening of the day of the seizure he made an arrangement with the defendants, or some of them, by which he was to go out of the jurisdiction of this court, so that he could not be reached by its process, and his attendance compelled as a witness in behalf of the government and against the defendants, in forfeiture and criminal proceedings, which it was expected would follow the seizures, and that he should remain away until such proceedings should be terminated. It appeared, further, that the defendants promised him that in consideration of such service the salary agreed to be paid him in his original employment should continue, and that all expenses he might incur during his absence, and consequent upon carrying out the arrangement on his part, should be repaid to him. Pursuant to this understanding, and more or less under the direction of the defendants, the plaintiff immediately went away, and thereafter traveled in various parts of the United States and Canada, sometimes under an assumed name, and sometimes not, and thus continued absent, for the purpose of avoiding the process of this court, until December, 1876, when he returned. Most of the services and disbursements, for which this suit was brought, are those which the plaintiff claims he thus rendered and paid during the period of his absence under the circumstances mentioned.

§ 573. *An action will not lie for a claim based upon services rendered in obstruction of public justice.*

At the trial it was held that the contract between the plaintiff and defendants, except for the service actually rendered as book-keeper between April 1 and May 10, 1875, was one which, if executed, tended to obstruct the course of public justice; that, consequently, it could not receive judicial sanction, or even toleration, and that the plaintiff could not recover either for the service he rendered the defendants in thus avoiding the jurisdiction and process of the court,

nor the moneys he expended in carrying out such an unlawful enterprise. On the argument of the present motion it is not contended that there was any error in the ruling of the court as to the plaintiff's claim for services. Indeed, the case in its facts and circumstances, as disclosed by the plaintiff himself, is so flagrant that there can be, and ought to be, no ground upon which to base a right to recover for such a service. "Courts owe it to public justice, and to their own integrity, to refuse to become parties to contracts essentially violating morality or public policy by entertaining actions upon them. It is judicial duty always to turn a suitor, upon such a contract, out of court, whenever and however the contract is made to appear." *Wight v. Rindskopf*, 43 Wis., 348. See, also, *Badger v. Williams*, 1 Chip. (Vt.), 137, and *Valentine v. Stewart*, 15 Cal., 387.

But it is insisted that the plaintiff is entitled to recover the amount of his actual expenses incurred and paid while absent at the instance and request of the defendants. The argument in support of the point is that as the moneys so expended were paid out at the request of the defendants, the law will imply a promise to repay them, and that it is not necessary to go behind such request and implied obligation, and show the character of the employment which made the expenditure necessary; and *Armstrong v. Toler*, 11 Wheat., 258 (§§ 581–586, *infra*), and *Planters' Bank v. Union Bank*, 16 Wall., 483, are relied on in support of the plaintiff's claim to recover the moneys he has actually paid. Of the first-named case it is sufficient to say that it holds no more than that if an illegal act *is not the consideration of a contract, and is entirely disconnected from it*, the contract is valid, though the occasion for making it arose out of the existence of the illegal act. In the opinion of the court various cases arising in England are cited, all or most of which were cases where there were new and subsequent contracts between the parties, not stipulating a prohibited act, and entirely disconnected from a previous illegal act, although they were contracts for the repayment of money originally advanced in satisfaction of an unlawful transaction; and in which cases it was held that such new, subsequent and independent contracts might be sustained in a court of justice; and the point of law decided in the principal case is that a subsequent, independent contract, founded on a new consideration, is not so contaminated by an illegal act which lies back of the contract itself as to render it unworthy of enforcement by the court.

The case of *The Planters' Bank v. Union Bank* was similar in principle. It was there held that "though an illegal contract will not be enforced by the courts, yet . . . where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it *may be a legal consideration between the parties for a promise, express or implied*, and that the court will not unravel the transaction to discover its origin." The alleged illegal acts in question in the case cited were not acts involving moral turpitude. They were not acts *mala in se*. One question involved and illustrating the character of the case was whether an action would lie for the proceeds of the sale of Confederate bonds which had been sent by the plaintiff bank to the defendant bank for sale, and which had been sold by that bank and the proceeds carried to the credit of the plaintiff. And the court say: "It may be that no action would lie against a purchaser of the bonds, or against the defendant on any engagement made by him to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid

to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs,—the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them.”

The case at bar is plainly distinguishable from both this case and *Armstrong v. Toler*. Here the court is called upon to give aid to the enforcement of an unlawful contract. The agreement to reimburse the plaintiff his expenses, incurred in keeping himself beyond the process of the court, was as much infected with the taint of immorality and illegality as was the promise to pay a compensation for the service. It is not the case of a subsequent independent contract between the parties to pay the moneys here claimed, founded on a new consideration and disconnected from the illegal act. It is not the case where an illegal object was accomplished, and the money which was the price of it was then made the consideration for a new promise, express or implied. The defendants in effect said to the plaintiff, if you will do certain acts for the purpose of obstructing public justice, we will compensate you for the service and reimburse you the expenses you incur in doing them. Upon this promise the plaintiff acted and paid out his money. Upon this promise necessarily rests his right of action, and so it becomes essential, in showing the consideration for the promise, to “unravel the transaction and discover its origin.” There was no other consideration for the expenditure of the moneys than the original unlawful consideration. Further discussion of the point is unnecessary. On the faith of the agreement which the plaintiff made with the defendants he advanced the moneys which he seeks to recover. The whole transaction was illegal, and the plaintiff having thus voluntarily put himself in a position where he was exposed to the liability of loss, he cannot ask the court to extricate him from that position. Motion for a new trial denied.

WILSON SEWING MACHINE COMPANY *v.* MORENO.

(Circuit Court for Oregon: 6 Sawyer, 35-40. 1879.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—On September 1, 1877, the defendant, Moreno, with four others as his sureties, executed and delivered a bond to the plaintiff in the penal sum of \$1,000, conditioned for the payment of all indebtedness on the part of Moreno to the plaintiff, and on November 23, 1877, said Moreno, with two others as his sureties, executed and delivered another bond of like amount and condition to the plaintiff. These actions are brought upon these two bonds to recover an amount alleged to be due from said Moreno for goods, wares and merchandise sold and delivered to him by the plaintiff, and it is agreed that the amount due the plaintiff on such account is on promissory notes \$741.74, and upon an open account \$629.70, in all the sum of \$1,371.44. Each bond contains a stipulation to the effect that in case suit is brought upon the same, the obligors therein will pay, in addition to the penalty thereof, the sum of \$100 “for attorneys’ fees.” The plaintiff now moves for judgment upon the complaint for the amount admitted to be due, and for \$100 in each action as an attorney’s fee therein. This latter part of the motion the defendant resists upon the ground that the provision in the bond for the payment of such fee, in addition to the penalty thereof, is void.

§ 574. *An agreement to pay a reasonable attorney's fee in addition to the face of a negotiable note in case suit for collection is brought upon it is a valid agreement. Authorities examined.*

It appears from the books that the question raised upon this motion is comparatively a new and vexed one. It has mostly arisen in actions upon promissory notes containing a stipulation for the payment of a fixed sum or percentage as an attorney's fee to the plaintiff, in case an action is brought to collect the same. And the objection to the stipulation usually is that the amount which may be collected upon the note being thereby rendered uncertain, it is non-negotiable and not valid as against an indorser, or that such stipulation makes it usurious, and therefore void in whole or part. But in some few instances the courts have gone farther, and held that such a stipulation is absolutely void, as contrary to the policy of the law, and tending to the oppression of the debtor.

In *Bullock v. Taylor*, 7 Cent. L. J., 217, decided by the supreme court of Michigan in 1878, a stipulation in a note for the payment of a certain sum as an attorney's fee over and above all taxable costs, in case the same was sued upon, was held void as opposed to the policy of the law upon the subject of attorneys' fees, and susceptible of being made the instrument of oppression. In *Woods v. North*, 84 Penn. St., 409, it was held that a similar stipulation in a note rendered the instrument non-negotiable, and thereby relieved the indorser from liability thereon. In *Witherspoon v. Musselman*, 8 Cent. L. J., 24, decided by the Kentucky court of appeals in 1878, according to the brief abstract in the C. L. J., *supra*, it was held that such a stipulation in a note was void, because it tended to the oppression of the debtor and the encouragement of litigation. On the contrary, in *Smith v. Silvers*, 32 Ind., 321, it was held that a stipulation "whereby the debtor agrees to be liable for reasonable attorneys' fees, in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand, is not only not usurious, but is so eminently just that there should be no hesitation in enforcing it."

In *Wyant v. Pottorf*, 37 Ind., 512, a stipulation in a note for a reasonable attorney's fee was impliedly sustained, though it was held that there must be proof of what is a reasonable fee. In *Nickerson v. Shelden*, 33 Ill., 372, it was held that a stipulation for any attorney's fee did not affect the negotiability of the note, but the fee was not claimed in the action. In *Clawson v. Munson*, 55 Ill., 394, a stipulation in a mortgage to secure a note for an attorney's fee to be paid as part of the costs of collection was held valid — the court citing *Dunn v. Rogers*, 43 id., 260, in which a similar stipulation in a mortgage was enforced,—and upon the question of hardship said that the defendants had expressly provided in the mortgage for the consequences in default of payment, which they might have avoided "by paying the notes at maturity."

In *Gar v. Louisville Banking Co.*, 11 Bush, 189, it was held that a stipulation in a note for an attorney's fee was not usurious, but an agreement to pay a penalty in default of prompt payment of the notes, and valid. In *Howenstein v. Barnes*, 9 Cent. L. J., 48, decided by the United States circuit court for the district of Kansas in 1879, it was held that a stipulation for an attorney's fee is valid — that it did not affect the negotiability of the paper.

The ruling that such a stipulation makes the amount payable upon the note uncertain, and it is therefore non-negotiable, is extremely technical, and I think unsound. The principal and interest is the sum due upon the note at maturity, and by the payment thereof it will be fully satisfied. And it is only in case

of default in such payment, and after the note is overdue, and has therefore lost its character of negotiability, that the penalty or attorney's fee can be claimed or collected at all. In fact, the stipulation, although considered in the note, is, strictly and properly speaking, no part of it, but a distinct contract, collateral thereto, as much as if it was written on a separate piece of paper.

The ruling that such stipulation makes the note usurious is founded upon the unauthorized assumption of fact that the sum agreed to be paid as an attorney's fee in case the note is not paid at maturity is not what it purports to be, but illegal interest in the disguise thereof. Of course, where it appears that such is the real nature of the transaction it should be treated accordingly. But the fact cannot be assumed any more than that a like sum of the alleged principal is illegal interest in disguise. Accordingly, the tendency of the decisions hostile to this stipulation is to leave these untenable grounds, and hold it void upon the ground that it is a convenient device for usury, and tends to the oppression of the debtor. And it may be admitted that this suggestion is not without force, particularly in cases where the amount provided is largely in excess of what such collection could ordinarily be made for. But a court assumes to make the law, rather than declare it, when it pronounces such a contract void, not because it is prohibited or intrinsically wrong, but because it may be used as a cover for usury and a means of oppressing the debtor.

An agreement by a debtor to pay a reasonable attorney's fee in case his creditor is compelled to incur the expense of an action to collect the debt is only an agreement to so far reimburse the creditor the loss which he may sustain by reason of the debtor's failure to perform his contract to pay his debt. In justice and fairness it stands on as high ground as the right to recover damages for the non-performance of any contract — such as to deliver grain or goods at a certain time and place. If A. loans B. \$1,000 for the period of one year, for the sum of \$100, and, by reason of the failure of A. to perform his contract, B. is put to the expense of paying an attorney \$50 to collect the same by action, no reason can be given why A. should not make good this loss; and if so, why may he not agree to do so in advance? As it is, the law compels A. to repay the fees which B. is required to pay the officers of the court in the prosecution of his action, including a nominal attorney's fee of not more than \$20. Secs. 824, 983, of the Revised Statutes.

The provision in section 824, *supra*, allowing the prevailing party to tax an attorney's fee of from \$5 to \$20, is not, in my judgment, exclusive, but only applies in cases where the contract of the parties is silent on the subject. In such cases the law allows the fee prescribed, and no more. But this does not prohibit the parties from contracting that a greater or less one shall be paid. A statute which simply provides that a plaintiff may recover interest on money overdue at a certain rate does not preclude parties from agreeing that a different rate may be recovered under like circumstances. And if the borrower and lender, in the absence of any statute to the contrary, may agree upon any rate of interest for the use or detention of the loan, it is not apparent why they may not agree upon the payment of an attorney's fee, in case the latter is required to collect the same by law.

But where the fee is so large as to suggest that it is a mere device to secure illegal interest, or some unconscionable advantage, the court should be slow to enforce the payment of it, and ought, probably, upon slight additional evidence to that effect, to refuse to allow it, or reduce it to a reasonable sum. Borrowers and lenders seldom deal on equal terms, and the necessities of the

former often constrain them to accede to terms and conditions which are oppressive, in the vain hope that they will be able to meet their engagements promptly, and thereby avoid the payment of the charges and penalties stipulated for in case of failure. It would, then, be better if these stipulations were not made for a fixed sum or percentage, but rather for such sums as the court, under all the circumstances, might judge reasonable and right. In this way, regard might be had to the nature and value of the services actually rendered by the attorney. Where the judgment is obtained without opposition on the part of the debtor, as is often the case, the fee should be less than where it is obtained against such opposition.

But, after all, the right of the parties, in the absence of any statute to the contrary, to contract for the payment of a reasonable attorney's fee by the debtor, in case his creditor is put to the expense of collecting his debt by law, rests upon the same ground as the right to make any other contract not prohibited by law, or *contra bonos mores*. Assuming, then, what has not been questioned, and upon which I express no opinion, that \$100 is no more than a reasonable fee in each of these cases, the stipulation is both just and valid, and therefore ought to be enforced. There must be judgment accordingly.

THOMAS v. BROWNSVILLE, FORT KEARNEY & PACIFIC RAILWAY COMPANY.

(Circuit Court for Nebraska: 1 McCrary, 392-397. 1890.)

Opinion by MCCRARY, J.

STATEMENT OF FACTS.—The defendant railway company is a corporation organized under the laws of Nebraska, and had authority to construct a railroad from Brownsville westward to the west line of Gage county, Nebraska. It possessed certain property and assets, which, on the 18th day of September, 1871, according to the report of the master herein, amounted to \$117,042.56. Said company having commenced the construction of said railroad, and being unable to complete it without securing capital from other parties, on the said 18th day of September, 1871, entered into a contract with Benjamin E. Smith and William Dennison, of Ohio, and J. N. Converse, of Indiana, and such others as might thereafter be associated with them, whereby the latter, for certain considerations named, agreed to complete the construction of the road over and along the route above named.

The mortgage sued on in this case was executed to Joseph T. Thomas, trustee, to secure the payment of certain bonds issued under the said construction contract for the purpose of building the road. The validity of this contract is assailed upon the ground that subsequently to its execution, and before any work was done under it, two of the stockholders and directors of the defendant corporation became interested with Smith, Dennison and Converse as parties thereto, so that two of the five contractors were parties to the contract on both sides. The construction company thus organized went on under the contract for several years, expending large sums of money in the construction of the road, and now claims a large balance as due to it on said contract, for which it holds bonds secured by the mortgage sued on. It seeks to recover judgment and a foreclosure of said mortgage. The validity of the mortgage, and of the bonds to secure which it was given, depends upon the validity of the construction contract, which is the foundation upon which alone they must be supported.

§ 575. *A contract between a railroad company and a construction company is void if any of the directors of the former are members of the latter company.*

Upon consideration of the proofs in the case, the master's report, and the law, I have reached the following conclusions: 1. That the admission into the construction company, under the construction contract, of two officers of the railroad company, was unlawful and vitiated the contract. It matters not whether the contract was entered into with the understanding that the two railroad directors were to be admitted or not; their presence as parties on both sides during the progress of the work, and when payments and settlements were to be made under the contract, is enough. *Wardell v. Railway Co.*, 4 Dill., 330; *Railway Co. v. Poor*, 59 Me., 270.

§ 576. *What constitutes a valid ratification.*

2. It is insisted that there has been such acquiescence on the part of the stockholders of the defendant company in the matters of which they now complain that they are estopped. It appears that the contract was openly made and reported to the board of directors of the railroad company, and by them approved without any apparent effort at secrecy, and that the work of constructing the road was carried on by the construction company under the contract for a period of several years. It is inferred, and perhaps not without reason from these facts, that the stockholders generally were advised of the particulars of the contract, including the fact that two members of the board of directors were interested in it. It does not, however, follow, in my opinion, that the contract should be upheld and enforced in a court of equity as against the stockholders. A ratification, to have this effect, must be made by a board composed of *disinterested* directors. It is not enough that such a contract has been ratified by a board composed in part of the interested directors. The least that can be required in such a case is that the directors concerned in the contract shall resign, and allow their places to be filled by persons who can, without bias, represent the interests of the corporation, and particularly of the individual stockholders.

In the case of *Railway Co. v. Dewey*, 14 Mich., 477, the supreme court of that state had occasion to comment upon a contract made with a corporation by a company in which two of the directors were interested, and in the course of the opinion grave doubts were expressed by the court as to whether a ratification by the board, even with full knowledge of all the facts, could render the contract valid while the two interested directors remained influential members of the board, especially if they took part in such ratification. The court was evidently strongly inclined to the opinion that such a ratification, even if made upon a full disclosure, would amount to nothing. The vice of the original contract would, in such a case, enter into the act of ratification—the latter, like the former, being a transaction in part by directors with themselves. Besides, where shall we draw the line? If the presence of two interested directors in the board at the time of ratification does not vitiate the act, would the presence of a larger number of such directors have that effect, and if so, what number?

§ 577. *Equity cannot grant relief upon an illegal contract, as was this in the case at bar.*

3. It remains to be determined whether the plaintiff can have relief to the extent that the railroad company has been benefited by the contract. This depends upon the question whether the contract was tainted with vice or immorality. *Creath v. Sims*, 5 How., 204. If it were possible to do so, con-

sistently with well-settled principles of great public importance, I should be inclined to grant this relief, since, as between the parties, it is equitable that the corporation should account for whatever of value it has received from the construction company. But if there is in the contract the element of moral turpitude which the law denounces so strongly, I am bound to hold that the parties must be left, without relief from the courts, where they have placed themselves.

The fact that two of the directors of the corporation were admitted to an interest in the contract, bad as that is in itself, is not all, nor the worst part of the transaction. On the same day that the construction contract was executed, and as a part of the transaction, the members of the construction company executed the following agreement with the members of the board of directors and certain other stockholders:

"In consideration of the execution and delivery of a certain contract to construct the Brownsville, Fort Kearney & Pacific Railroad of Nebraska, wherein said railroad company agrees to turn over to us and our associates all of the property owned, and assets, subscriptions, etc., of said company, we therefore do promise and agree and bind ourselves to relieve the following named subscribers to the capital stock of said company from the payment of any further amounts or assessments upon the stock which they may have subscribed thereto, by our paying out said stock and receiving same assigned by them to us, viz.: Henry M. Atkinson, John L. Carson, R. W. Furnas, F. A. Tisdell, James L. McGee, C. F. Stewart, A. J. Ritter, H. C. Lett, T. W. Bedford, T. W. Tipton, John McPherson, and \$500 on the stock of Evan Worthing, in all not to exceed \$16,500 of the \$41,000 of individual subscriptions to said company.

"Witness our hands, this 18th day of September, 1871, at the city of Columbus, state of Ohio.

"Witness: G. MOODIE.

[U. S. Int. Rev. Stamp, 5c.]

"B. E. SMITH,

"W. DENNISON,

"J. N. CONVERSE."

The list of stockholders in this agreement includes all the directors and five others. I am unable to construe this contract as anything else than a promise to pay each member of the board individually a consideration for his action as a director, in voting for and executing the construction contract. The members of the board were stockholders, and as such liable to assessments. The construction company, "in consideration of the execution and delivery of" the construction contract, undertook to relieve the directors "from the payment of any further amounts or assessments upon the stock which they may have subscribed," etc. The construction company agreed to "pay out" the stock of each director. The transaction then was as follows: The directors executed a contract, by which they transferred to the construction company substantially all the property of the corporation, and employed them to construct the road. In order to secure this contract, the construction company took two of the directors into their firm, giving them an interest in the contract, and agreed to pay each of the other directors a pecuniary consideration for making the contract. There was, therefore, not a single member of the board who was not personally interested in favor of making the contract and in hostility to the interests of the stockholders for whom they were trustees, and whose rights they were bound to protect.

It may be that this agreement was not much considered at the time; that the directors and others interested were anxious to induce the construction

company to take hold of the enterprise upon any terms, the company being unable to go on with the work. All this is doubtless true, but it does not change the character of the written contract with which we have now to deal. I am of the opinion that the contract is so clearly illegal, against public policy, and vicious, that a court of equity cannot enforce it or grant any relief upon it. The bill must, therefore, be dismissed. *Marshall v. Baltimore, etc.*, R. Co., 16 How., 314 (§§ 555-562, *supra*); *Bank of United States v. Owens*, 2 Pet., 539; 2 Redfield on R's, 576, 584; *Pomeroy on Contracts and Specific Performances*, §§ 284, 285, 286; *Wight v. Rindskopf*, 43 Wis., 344; *McWilliams v. Phillips*, 57 Miss., 196; *Guernsey v. Cook*, 120 Mass., 501; *Letter v. Alvey*, 15 Kan., 157.

McMICKEN v. PERIN.

(18 Howard, 507-511. 1855.)

APPEAL from U. S. Circuit Court, Eastern District of Louisiana.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—The appellee (Perin) filed his bill in the circuit court, alleging that he had been employed to institute suits in the courts of Louisiana, on behalf of certain persons claiming to be the heirs of James Fletcher, for which service he was to receive fifty per cent. on the money value, or a fee equal to one-half the net value of the property, real or personal, in controversy. Pending the suits his clients offered to sell their interest to him for \$5,000, or to other persons for \$10,000. There were some negotiations upon this subject, but nothing seems to have been concluded until after the final judgment had been rendered; after that time, the bill proceeds to state as follows:

"That, upon the said proposition being renewed, the complainant addressed divers letters to the defendant, asking for a loan of \$5,000 for the purpose of purchasing the said interest of the Fletchers in and to the said property; and that, in reply to the complainant's said letters, the defendant answered in writing, giving a promise of said loan," as will appear by the exhibits C and D; one of which was written by the defendant on the 8th of September, 1848, nearly three months after the judgment for the land had become final and executory.

"And your orator further shows unto your honors, that, relying on the promises and the honesty of the defendant, and upon the understanding and agreement with him, the complainant purchased the said property of the said Fletcher, on the 19th of October, 1848, while the defendant was absent in Cincinnati; and in order to secure the said McMicken in the loan of the said \$5,000, the complainant caused the title of the said property to be made out in the name of the defendant, with the express condition that the purchase was made in the name of the defendant for the use and benefit of the complainant, all of which will appear by reference to the act of sale, marked exhibit F; to the letter of the complainant to the defendant, dated on the 19th of October, 1848, accompanying a copy of the act of sale sent to the defendant, marked exhibit G, and other proofs to be hereafter exhibited. The said defendant accepted the said sale, etc., took the said property, etc., and held the same in trust for the use of complainant, and upon no other condition or understanding, subject only to the repayment of the money advanced for the purchase thereof."

The bill avers that the plaintiff being thus invested with all the legal and

equitable rights of the heirs of Fletcher, he tendered to the defendant (McMicken), immediately after his ratification of the sale, the sum of \$5,050, with the proper interest due thereon, and demanded a conveyance of all the said property and rights so purchased and held in trust, which the defendant refused. The bill charges certain fraudulent pretenses on the part of McMicken for withholding the deed according to his agreement, denies their validity, and affirms that the plaintiff has been forced into a court of chancery in consequence of the repeated refusals of the defendant to deliver up his property and convey the same to him. The bill prays that the defendant may, by the order and decree of the court, be required to convey the said property to the plaintiff upon the payment or tender to the said defendant the amount of his advances, and for general relief.

A decree *pro confesso* was entered at the spring term of the circuit court, 1853, and at the same term of the court in 1854 a decree was rendered requiring the defendant to convey the property specified in the bill to the plaintiff, upon the payment to the said defendant of the debt reported to be due within six months after the date of the decree.

It is objected in this court that the arrangement between the heirs of Fletcher and his attorney (Perin), by which the latter became the purchaser of their interest in the subject of the litigation he had been conducting in their behalf, was illegal, and he could take no benefit from his contract. The articles of the code of Louisiana affecting this question are as follows: Article 2623, "a right is said to be litigious whenever there exists a suit and contestation about the same;" article 3522, No. 22, "litigious rights are those which cannot be exercised without undergoing a lawsuit;" article 2624, "public officers connected with courts of justice, such as judges, advocates, attorneys, clerks and sheriffs, cannot purchase litigious rights which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity and of having to defray all costs, damages and interest."

§ 578. *A thing is not litigious in Louisiana, when.*

The courts of Louisiana have decided "that, where a judgment has been rendered, litigation has ceased." *Marshall v. McCrea*, 2 La. Ann., 79. And when the thing ceded is not contested, and is not the subject of a suit at the time of cession, the thing is not litigious. *Prevost v. Johnson*, 9 Mart. (La. Cond. Rep.), 184. The bill charges that the purchase was made after a final judgment had been rendered declaring the property to belong to the heirs of Fletcher. The subject of the sale was ascertained, the title recognized, and, consequently, none of the mischiefs which occasioned these articles could then follow. Such is the conclusion of the commentators and courts of France upon the corresponding articles in the Code Napoleon. *Trop. de Vente*, § 201; 39 Dall., part 2, 196. But, upon well established principles, the appellant is estopped from contesting the title of the appellee. The case made is that the appellee borrowed of the appellant a sum of money to complete his purchase, and that the title was placed in the name of the appellant to secure the repayment of that advance. The latter cannot be heard to object that there was illegality in the contract between Fletcher's heirs and the appellee, nor to appropriate to himself the fruit of that contract. The contract between the appellee and appellant is uninfected by any illegality. The consideration was a loan of money upon a security. The contract between Fletcher's heirs and the appellee is completed and closed, and will not be disturbed by anything which the court may decree in this case. *McBlair v. Gibbes*, 17 How., 232 (§§ 457, 458, *supra*).

§ 579. *Objections to a master's report cannot be made for the first time on appeal.*

The appellant further objects that his debt was not accurately ascertained by the master upon the decree of reference. In *Story v. Livingston*, 13 Pet., 359, this court decided that no objections to a master's report can be made which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors and reconsider his opinion. And, in *Heyn v. Heyn*, Jacob., 49, it was decided that, after a decree *pro confesso*, the defendant is not at liberty to go before the master without a special order, but the accounts are to be taken *ex parte*. This court will not review a master's report upon objections taken here for the first time. Our conclusion is, there is no error in the final decree rendered in the circuit court.

§ 580. *Appeal does not lie from refusal to open decree.*

At a subsequent term, the appellant filed a petition in the circuit court, alleging that he had been deceived by the appellee in reference to the prosecution of the bill, and had consequently failed to make any appearance or answer, and that he had a meritorious defense. He prayed the court to set aside the decree, and to allow him to file an answer to the bill. This petition was dismissed. We concur in the judgment of the circuit court as to the propriety of this course. This court, in *Brockett v. Brockett*, 2 How., 238, determined that an appeal would not lie from the refusal of a court to open a former decree, though the petition in that case was filed during the term at which the decree was entered. In *Cameron v. McRoberts*, 3 Wheat., 591, it decided that the circuit courts have no power to set aside their decrees in equity, on motion, after the term at which they were rendered. These decisions are conclusive of the questions raised upon the order dismissing the petition. The decrees of the circuit court are affirmed, with costs.

ARMSTRONG v. TOLER.

(11 Wheaton, 258-279. 1826.)

ERROR to U. S. Circuit Court for Pennsylvania.

STATEMENT OF FACTS.—During the war with Great Britain, goods were shipped from St. Johns, New Brunswick, for Armstrong and other citizens and residents of the United States, and consigned to Toler, a resident citizen. The goods, being seized and libeled, were delivered to an agent of the claimants, on a stipulation to abide the event of the suit. Toler became liable for the appraised value. Subsequently the part of the goods belonging to Armstrong were delivered to him, on his promise to pay Toler his proportion of any sum for which Toler might be liable if the goods were condemned. The goods were condemned, and Toler, having paid the appraised value, brought this action in *assumpsit* to recover from Armstrong his proportion of the amount pursuant to agreement. Armstrong insisted that the contract was void. There was judgment for the plaintiff.

§ 581. *Where a case is left to the jury upon a charge of certain legal principles, the judgment will not be reversed unless such principles are erroneous.*

Opinion by MARSHALL, C. J.

The only point moved by the defendant's counsel to the court was, that the evidence was not decisive in favor of the plaintiff. The court gave this opinion. The charge does not intimate that the testimony was conclusive, but leaves the case to the jury to be decided by them under the control of certain legal

principles which are stated in the charge. To entitle the plaintiff in error to a judgment of reversal, he must show that some one of these principles is erroneous, to his prejudice. The main object of the charge is to state to the jury the law of contracts on an illegal consideration, so far as it was supposed to bear on the case before them. To enable them to apply the law to the facts, the court supposed many cases in which the contract would be void, the consideration being illegal. It is unnecessary to review this part of the charge, because it is entirely favorable to the plaintiff in error.

§ 582. *A new contract founded on a new consideration, although relating to property in respect to which there have been unlawful dealings between the parties, is not an unlawful contract.*

After having stated the law to be, that where the contract grows immediately out of an illegal act a court of justice will not enforce it, the court proceeds to say: "But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. Thus, if A. should, during war, contrive a plan for importing goods from the country of the enemy, on his own account, by means of smuggling or of a collusive capture, and goods should be sent in the same vessel for B.; and A. should, upon the request of B., become surety for the payment of the duties, or should undertake to become answerable for the expenses on account of a prosecution for illegal importation, or should advance money to B. to enable him to pay those expenses, these acts constituting no part of the original scheme, here would be a new contract upon a valid and legal consideration, unconnected with the original act, although remotely caused by it, and such contract would not be so contaminated by the turpitude of the offensive act as to turn A. out of court when seeking to enforce it; although the illegal introduction of the goods into the country was the consequence of the scheme projected by A. in relation to his own goods."

If this opinion be contrary to law, the judgment ought to be reversed. The opinion is, that a new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful. This general proposition is illustrated by particular examples, and will be best understood by considering the examples themselves. The case supposed is, that A., during a war, contrives a plan for importing goods on his own account from the country of the enemy, and that goods are sent to B. by the same vessel. A., at the request of B., becomes surety for the payment of the duties which accrue on the goods of B., and is compelled to pay them; can he maintain an action on the promise of B. to return this money? The opinion is, that such an action may be sustained. The case does not suppose A. to be concerned, or in any manner instrumental, in promoting the illegal importation of B., but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself, which B. afterwards adopted. This illustration explains what was meant by the general words previously used, which, unexplained, would have been exceptionable.

The contract made with the government for the payment of duties is a substantive independent contract entirely distinct from the unlawful importation. The consideration is not infected with the vice of the importation. If the amount of duties be paid by A. for B., it is the payment of a debt due in good faith from B. to the government; and if it may not constitute the considera-

tion of a promise to repay it, the reason must be, that two persons who are separately engaged in an unlawful trade can make no contract with each other; at any rate, no contract which in any manner respects the goods unlawfully imported by either of them. This would be to connect distinct and independent transactions with each other, and to infuse into one which was perfectly fair and legal in itself, the contaminating matter which infected the other. This would introduce extensive mischief into the ordinary affairs and transactions of life, not compensated by any one accompanying advantage. The same principle, diversified in form, is illustrated by another example. If A. should become answerable for expenses on account of a prosecution for the illegal importation, or should advance money to B. to enable him to pay those expenses, these acts, the court thought, would constitute a new contract, the consideration of which would be sufficient to maintain an action.

§ 583. *It is not unlawful to defend against a prosecution for the illegal importation of goods, and a promise to pay expenses incurred in such defense may be enforced.*

It cannot be questioned that, however strongly the laws may denounce the crime of importing goods from the enemy in time of war, the act of defending a prosecution instituted in consequence of such illegal importation is perfectly lawful. Money advanced then by a friend in such a case is advanced for a lawful purpose, and a promise to repay it is made on a lawful consideration. The criminal importation constitutes no part of this consideration.

§ 584. — *circumstances which would render the contract unlawful.*

It is laid down with great clearness, that if the importation was the result of a scheme between the plaintiff and defendant, or if the plaintiff had any interest in the goods, or if they were consigned to him with his privity, that he might protect and defend them for the owner, a bond or promise, given to repay any advances made in pursuance of such understanding or agreement, would be utterly void. The questions whether the plaintiff had any interest in the goods of the defendant, or was the contriver of, or concerned in, a scheme to introduce them, or consented to become the consignee of the defendant's goods, with a view to their introduction, were left to the jury. The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made, provided he was not interested in the goods, and had no previous concern in their importation.

§ 585. *A contract, the consideration of which is either wicked in itself or prohibited by law, is void. English authorities examined.*

Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law. How far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen, and many decisions have been made. In *Faikney v. Reynous*, 4 Burr., 2069, the plaintiff and one Richardson were jointly concerned in certain contracts prohibited by law, on which a loss was sustained, the whole of which was paid by the plaintiffs; and a bond was given for securing the repayment of Richardson's proportion of the loss. To a suit on this bond the defendants pleaded the statute prohibiting the original transaction, but the court held, on

demurrer, that the plaintiff was entitled to recover. Although this was the case of a bond, the judgment does not appear to have turned on that circumstance. Lord Mansfield gave his opinion on the general ground that if one person apply to another to pay his debt (whether contracted on the score of usury or for any other purpose), he is entitled to recover it back again. This is a strong case to show that a subsequent contract, not stipulating a prohibited act, although for money advanced in satisfaction of an unlawful transaction, may be sustained in a court of justice. In a subsequent case (6 Term R., 410), Ashhurst, J., said the defendants were held liable because they had voluntarily given another security.

In the case of *Petrie v. Hannay*, 3 Term R., 418, the testator of the plaintiffs was engaged with the defendant and others in stock transactions, which were forbidden by law, on which considerable losses had been sustained, which were paid by Portis, their broker. Keeble repaid the broker the whole sum advanced by him, except £84, which was in part the defendant's share of the loss, for which Keeble drew a bill on the defendant, which was accepted. The bill not being paid, a suit was brought upon it by Portis against the executors of Keeble, and judgment obtained, they not setting up the illegal consideration. The executors brought this action to recover the money they had paid, and it was held by three judges against one, on the authority of *Faikney v. Reynous*, that the plaintiffs could maintain their action. A distinction was taken in cases where money was paid by one person for another, on an illegal transaction, by which the parties were not bound; between a voluntary payment, and one made on the request of the party; between an *assumpsit* raised by operation of law, and an express *assumpsit*. Although the former would not support the action, it was held that the latter would. This, also, is a strong case to show that a new contract, by which money is advanced at the request of another, or, which is the same thing, where there is an express promise to pay, may sustain an action, although the money was advanced to satisfy an illegal claim.

In *Farmer v. Russell*, 1 Bos. & Pull., 236, it was held that if A. is indebted to B. on a contract forbidden by law, and pays the money to C. for the use of B., a court will give judgment in favor of B. against C. for this money. In this case, B. could not have recovered against A.; but when the money came into the hands of C., a new promise was raised on a new consideration, which was not infected by the vice of the original contract. In this case, Chief Justice Eyre said that the plaintiff's demand arose simply from the circumstance that money was put into the hands of C. for his use; and Justice Buller said that the action did not arise upon the ground of the illegal contract. Yet, in this case, A.'s original title to the money was founded on an unlawful contract, and he could not have maintained an action against B. The general proposition stated by Lord Mansfield, in *Faikney v. Reynous*, that if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law has never been held to alter the case. A subsequent express promise is, undoubtedly, equivalent to a previous request.

In most of the cases cited by the counsel for the plaintiff in error, the suit has been brought by a party to the original transaction, or on a contract so connected with it as to be inseparable from it. As, where a vendor in a for-

foreign country packs up goods for the purpose of enabling the vendee to smuggle them; or where a suit is brought on a policy of insurance on an illegal voyage; or on a contract which amounts to maintenance; or on one for the sale of a lottery ticket, where such sale is prohibited; or on a bill which is payable in notes issued contrary to law. In these, and in all similar cases, the consideration of the very contract on which the suit is brought is vicious, and the plaintiff has contributed to the illegal transaction. One of the strongest cases in the books is *Steers v. Lashley*, 6 Term R., 61, where the broker, who had been concerned in stock-jobbing transactions, and had paid the losses, drew a bill of exchange for the amount on the defendant, and, after its acceptance, indorsed it to a person who knew of the illegal transaction on which it was drawn; the court held that such indorsee could not recover on the bill.

In this case, the broker himself could not recover, being a party in the original offense against the law, and his bill being drawn for the very money which was due on the original transaction, and indorsed to a person having notice, left the indorsee in the same situation with the drawer. Yet, Lord Kenyon said, in this case, that if the plaintiff had lent the money to the defendant to pay the differences, and had afterwards received the bill for the money so lent, he might have recovered on it. The difference between the case decided, and that put by the judge, is not very discernible, as the one or the other may affect morals, or the policy of the law. The distinction would seem to be founded on this legal ground, that the money lent would constitute a new consideration, and be the foundation of a new contract, which could not be vitiated by a knowledge of the purpose for which the money was lent and the bill drawn. So Toler's knowledge of the illegal transactions of Armstrong, and that his money was advanced to procure the delivery of goods which had been illegally imported, could not vitiate a contract to repay that money.

In the case of *Booth v. Hodgson*, 8 Term R., 405, the suit was between the original parties to the illegal transaction, and was bottomed on it.

Supposing the opinions actually contained in the charge to be correct, it is still contended to be liable to exception, because there is a material part of the very case which it does not embrace. The charge, it is said, does not state what the law would be, if Toler knew, previous to the consignment, that Armstrong was engaged in this illicit commerce. Without entering into the inquiry whether this criticism on the charge be well or ill founded, the court think it proper to declare, in explicit terms, that the plaintiff in error cannot avail himself of it in this stage of the cause.

§ 586. *The supreme court will not examine and weigh the testimony in a case to ascertain whether the judge below has omitted any material point in his charge to the jury.*

To bring all the testimony offered at the trial of a cause at common law, instead of facts, into this court, by a bill of exceptions, or otherwise, is a practice which, to say the least, is extremely inconvenient. Its tendency is to convert this court from a tribunal for the decision of points of law, into one for the investigation of facts, and for weighing evidence. To look into that testimony for the purpose of inquiring whether the judge has omitted anything material in his charge would be to yield to this practice, and to sanction it in its most exceptionable form. If the defendant's counsel wished the instruction of the judge to the jury, on any point which was omitted in the charge, his course was to suggest the point, and request an opinion on it. If counsel may, without pursuing this course, spread the whole testimony on the record, and

then, by a general exception to the charge, enable himself to take advantage, not only of a misdirection, but of any omission to notice any question which may be supposed, by this court, to have arisen in the case, such a course would obviously transfer to the supreme court the appropriate duties of a circuit court, and cannot be countenanced.

It is also contended by the counsel for the plaintiff in error, that the judge has erred in not answering fully the inquiry made by the jury. That was in these words: "The jury beg leave to ask the judges whether Toler must have an interest in Armstrong's goods to constitute him a participator in the voyage; if simply having goods on board will constitute him such?" The court answered as follows: "The plaintiff simply having goods on board would not constitute him a participator, or affect the contract with the defendant. Being interested in the goods would." There is much reason to believe that the first of these questions was not understood by the jury, or by the judge, according to the literal import of the words. The inquiry would seem to be, whether under any possible view of the transaction, Toler could be tainted with the guilt of Armstrong, so as to affect the contract in suit, unless he had an interest in the goods. This was probably not the intention of the jury, because an answer to this question is to be found in the charge. The judge had stated that if Toler was the contriver of, or concerned in, a scheme to introduce these goods into the United States, or had consented to become the consignee with a view to their introduction, these circumstances would vitiate the contract. He had already said, therefore, that an interest in Armstrong's goods was not indispensably necessary to make Toler a participator in the voyage, as to all the purposes of the defense. He had stated two cases specially, either of which the jury might consider as proved by the evidence, in which the consideration would be unlawful; and he had said generally: "That where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be, in fact, only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it." There is much reason to believe that the jury could not have intended to put a question which had been already answered, and that they might design to ask, whether, having goods on board belonging to himself, would place him in the same situation as if interested with Armstrong. The answer of the court would show that the questions were understood in this sense, and that answer appears to have been satisfactory to the jury. However this may be, we think the law was correctly stated by the court; and we cannot admit that a judgment is to be reversed because an answer does not go to the full extent of the question. Had the jury desired further information, they might, and probably would, have signified their desire to the court. The utmost willingness was manifested to gratify them, and it may fairly be presumed that they had nothing further to ask.

We think that there is no error in the judgment of the circuit court, and that it ought to be affirmed, with costs and damages, at the rate of six per centum per annum. (a)

(a) Affirming *Toler v. Armstrong*, *4 Wash., 297. Washington, J., in the lower court, charged the jury as follows: "The principle of the rule is, that no man ought to be heard in a court of justice who seeks to enforce a contract founded in, or arising out of, moral or political turpitude. The rule itself has sometimes been carried to inconvenient lengths; the difficulty being, not in any unsoundness in the rule itself, but in its fitness to the particular cases to which it has been applied. Does the taint in the original transaction infect and vitiate every contract growing out of it, however remotely connected with it? This would be to extend the rule beyond the policy which produced it, and would lead to the most inconvenient consequences. Carried out to such an extent,

HOOVER v. WOOD.

(Supreme Court of the Territory of Kansas: McCahon, 79-82. 1860.)

Opinion by ELMORE, J.

STATEMENT OF FACTS.—This action was brought in the district court of the second judicial district, on a note for the sum of \$200, dated March 27, 1857, payable on demand, for value received, to J. D. Allen or order. On the 30th of March, A. D. 1858, L. W. Hoover filed the following answer:

"The above named defendant, for himself alone, for answer and defense to the declaration of the said plaintiff, admits the execution of the said note in said declaration mentioned, but avers that the consideration for said note was illegal; for that the said J. D. Allen, prior to the making and delivery of said note, preferred and made against the said defendant the charge and accusation of embezzlement, to wit, the felonious appropriation to his own use of goods and chattels of the said J. D. Allen, by the said defendant, of the value of \$200. That the said J. D. Allen, prior to the time that the said note was executed, promised and agreed, to and with the said defendant, to compound and adjust the matter between them, to wit, the matter of which the said charge and accusation of embezzlement was made against the said defendant.

"That upon this agreement of the said J. D. Allen with the said defendant, and in consideration therefor, the defendant executed the said note; and this the defendant is ready to verify."

To this answer the defendant in error demurred, and the court below sustained the demurrer, and rendered judgment in his favor for \$300 damages, to be discharged on the payment of \$220.25, with interest thereon at the rate of ten per cent. per annum. The error complained of is in the ruling of the court in sustaining the demurrer. By the demurrer, the defendant in error admits the truth of the answer, but says that, in law, it is not sufficient to prevent a recovery.

There is no allegation in the answer that Allen, the payee of the note, had knowledge of the actual commission by Hoover of a felony under the laws of the territory; nor is there an allegation "that the note was delivered by Hoover to Allen on the promise, agreement or understanding, express or implied, that Allen was to conceal such felony, or to abstain from a prosecution or withhold any evidence in relation thereto." It is true that the answer sets forth that, prior to the execution of the note, Allen "agreed and promised, to and with the defendant Hoover, to compound and adjust the matter between them." What matter? The payment, by Hoover to Allen, for the property used or taken by Hoover; not a promise on Allen's part not to do anything which the law made it incumbent on him to perform, but simply to pay Allen

it would deserve to be entitled a rule to encourage and protect fraud. So far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason; but it cannot safely be pushed farther. If, for example, the man who imports goods for another, by means of a violation of the laws of his country, is disqualified from founding any action upon such illegal transaction for the value or freight of the goods, or for other advances made on them, he is justly punished for the immorality of the act, and a powerful discouragement from the perpetration of it is provided by the rule. But after the act is accomplished, no new contract ought to be affected by it. It ought not to vitiate the contract of the retail merchant who buys these goods from the importer; that of the tailor, who purchases from the merchant; or of the customers of the former, amongst whom the goods are distributed in clothing, although the illegality of the original act was known to each of those persons at the time he contracted. I understand the rule, as now clearly settled, to be that where the contract grows *immediately* out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it. . . . But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act."

the money demand which he (Allen) claimed against Hoover. Compounding has a technical meaning in criminal law and in criminal practice, but we apprehend the same technical signification does not obtain in civil cases.

§ 587. *Suit may be maintained on a note given on account of property embezzled.*

It has been held, and we suppose it to be the law, that a party can receive compensation for a felony, and that, by so doing, does not necessarily result in compounding. Whart. Crim. L., p. 833, ch. 5. For these reasons we think the demurrer was properly sustained; but the court below erred in giving judgment for \$300, to be satisfied on the payment of \$220.25, and interest at the rate of ten per cent. per annum. A proper judgment would have been for the sum of \$200, and for the further sum of — dollars damages, and costs of suit. We therefore render such judgment in this court as, in our opinion, should have been rendered below, to wit: That the said Samuel N. Wood recover of the said L. W. Hoover and J. D. Hutchinson the sum of \$200, and the further sum of \$20.25 damages, and their costs in this behalf expended in the court below, said judgment to bear date on the 8th day of April, A. D. 1858, and the further sum of one-half the costs of this court; and that the said Hoover and Hutchinson recover of the said Samuel N. Wood one-half of the costs which have accrued in this case in this court.

§ 588. *Part against public policy and part not.*—Where a contract is in part repugnant to public policy, and a part is not so, it may be divided, and so much of it as is unexceptionable may be enforced. Fackler v. Ford, McCahon, 35.

§ 589. *Wagers and gambling contracts.*—A wager that Andrew Jackson would not receive the electoral vote of Kentucky was held to be a contract void from public policy, even though neither of the parties was a voter. Denney v. Elkins, 4 Cr. C. C., 161.

§ 590. A contract of wager, though valid at common law, will not be enforced in Colorado. So a contract to pay a sum of money upon condition that a railroad be built to a certain place by a certain time will not be enforced where it appears that it was a wager. Eldred v. Malloy, * 2 Colo. T'y. 321.

§ 591. A fair wager, not contrary to public policy, may be recovered at common law. Fleming v. Foy, 4 Cr. C. C., 423.

§ 592. It seems that while all wagers are not void, yet wagers which are against public policy or good morals are void as gaming contracts. Harding v. Walker, Hemp., 53.

§ 593. A wager contrary to public policy is void at common law. Contracts for future delivery, known as "puts," are usually such wagers, and void. *Ex parte Young*, 6 Biss., 53 (§§ 727-730).

§ 594. If it appears that a written contract does not express the real intent of the parties, but is merely colorable and used as a cloak to cover a gambling transaction, the court will not lend its aid to enforce the contract, however fair on its face, and if securities are given will interfere on grounds of public policy, and for the public good, rather than for the purpose of relieving a party who is himself *particeps criminis*. Clarke v. Foss, 17 N. B. R., 271 (§§ 738-742).

§ 595. Gaming contracts are contrary to good morals and void. Harding v. Walker, Hemp., 53.

§ 596. *Letting of a race-field.*—Where the owner of a race-field lets the same for public races, knowing that it will be used for the accommodation of licentious and disorderly persons for the purposes of unlawful gaming and gross immorality and debauchery, and it is so used, he cannot recover the rent in an action of covenant. Holmead v. Maddox, * 2 Cr. C. C., 161.

§ 597. *Note given for lottery ticket.*—An action will not lie upon a note given for a ticket in a lottery prohibited by law. Hawkins v. Cox, * 2 Cr. C. C., 173.

§ 598. *Champerty.*—McP. was employed by C. as an attorney and agreed to wait for his fees until C. could sell certain land which was the subject of the controversy between C. and a third person; and McP. also agreed to receive his fee (a fixed sum) out of the purchase money of this land. He did not agree to pay any of the costs of C.'s suit, nor to take any part of the land in compensation, nor to take anything but money. It was held that the

contract between McP. and C., as to the former's fees, was not void on the ground of champerty. *McPherson v. Cox*, 6 Otto, 416. See CHAMPERTY.

§ 599. A contract by an attorney that he will manage a certain suit in relation to some land, and, if successful, will have a certain fee out of the proceeds of the land as sold, is not champertous. There is no agreement to pay any part of the costs, or to receive any part of the land in controversy. *Ibid*.

§ 600. Contingent attorney's fee — Lobbying. — A contract with an attorney for his services in prosecuting a claim against a foreign government, and by which the attorney's fee is contingent upon his success, is valid and proper. Such a contract is not a contract for lobbying, and courts of justice cannot adjudge such contracts illegal, if free from any taint of fraud, misrepresentation or unfairness. *Stanton v. Embry*, 3 Otto, 556. See §§ 521, 522.

§ 601. Contract for part of the profits by attorneys prosecuting claim against the government. — A contract by which attorneys employed in prosecuting a claim against the government before congress are to receive twenty per cent. of the amount collected, and are to pay out of that sum such an amount as a delegate to congress from the territory in which the claims arose should charge for his services in procuring the allowance of the claim, is void as against public policy. *Weed v. Clarke*, * 2 MacArth., 274. See § 523.

§ 602. Contingent fee for prosecuting claim against the government. — A contract providing for a contingent fee for the prosecution of a claim against the government, and which is fair and unobjectionable on its face, can be enforced. *Burbridge v. Fackler*, * 2 MacArth., 408.

§ 603. Agreement to procure an abandonment of a caveat against the issuance of a patent. — G. having filed a caveat in a land office against the issuance of a patent to M., setting up that his application was fraudulent, H. contracted with M. that he would procure G. to abandon his caveat if M. would pay him a certain sum. *Held*, that this contract was void as being against public policy, and that a note founded thereon was void, and that, although it appeared that G. relinquished to M. certain improvements on the land in pursuance of the agreement, yet that was not a consideration of established value, and was, besides, so intimately connected with the fraudulent part of the contract that the whole was tainted with fraud. *Hoyt v. Macon*, * 2 Colo. T'y, 505.

§ 604. All contracts for the procuring of legislation are void; but contracts which are for the collection of evidence, the preparation of papers, and the delivery of arguments in favor of a claim, are valid and should be upheld. *Weed v. Black*, * 2 MacArth., 274.

§ 605. A contract for "lobby" services in preventing a threatened legislative investigation of the affairs of a railway corporation is void, and confers no right upon the promisee to the compensation named therein. *Usher v. McBratney*, * 3 Dill., 385. See §§ 521, 522.

§ 606. Agreement to forego the right of trial prescribed by law. — It seems that a contract made in advance to forego the right of trial prescribed by law is against public policy and cannot be enforced specifically. Parties cannot, by an agreement in advance, oust the courts of their jurisdiction. *Insurance Co. v. Morse*, 20 Wall., 451 (CONST., §§ 2505-2509).

§ 607. Agreement not to remove causes to federal courts. — An agreement by an insurance company, made as a condition precedent to the doing of business by it in a state, that in case of suits against it by residents of the state it would not exercise its privilege of removal to the federal courts, is against public policy and void. Nor does such agreement acquire any validity from the fact that it was required by the statutes of the state. *Ibid*.

§ 608. In order to obtain permission to do business within a state an insurance company promised that it would not remove any action in which it might be a party from the state to the federal courts. *Held*, that the agreement was contrary to public policy and void, and the company had a right to remove a suit notwithstanding its agreement. *Doyle v. Continental Ins. Co.*, 4 Otto, 587 (CONST., §§ 2510-15).

§ 609. Agreement to arbitrate. — An express agreement to arbitrate, and an agreement not to sue till the arbitrators have decided, is valid in the absence of any illegality in the contract. It cannot be held to be against public policy. It cannot be said that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to an action until their liability has been ascertained by a domestic and private tribunal upon which they themselves agree. So, under such an agreement, no suit can be maintained until an award has been had and shown. *Fox v. Railroad*, 3 Wall. Jr., 245.

§ 610. A contract with an alien enemy may be good when entered into from necessity. *Crawford v. The William Penn*, 3 Wash., 495.

§ 611. During the war between England and the United States a firm in the United States sent an order to a firm in England to purchase goods for them. The goods were furnished, and the English firm advanced their money to pay for them. *Held*, that the order was a nullity, and could not be the basis of a contract, and that the purchases under it could not add to its validity. *Scholefield v. Eichelberger*, 7 Pet., 595.

§ 612. After the capture of New Orleans by the Union forces, a person, whose domicile was in that place, went inside the rebel lines and purchased cotton. *Held*, that his contract for the purchase was void, and gave him no title. *Desmare v. United States*, 8 Otto, 611.

§ 613. A contract made without government license or permission, between a resident of a state in rebellion and a resident of a loyal state, is void by public policy as well as by international law and express statute, and in an action on such contract after the war has terminated its illegality may be shown as a defense. *Philips v. Hatch*, 1 Dill., 575.

§ 614. It seems that an executory contract of continuing performance, made before the breaking out of a war, with an alien enemy, if it cannot be performed except in the way of commercial intercourse with an enemy, is, *ipso facto*, dissolved by the declaration of war, which operates, for that purpose, with a force equal to positive law. But where a contract is of such a character that it does not necessitate continued intercourse between the parties, the only effect of the war is to suspend its operation, and, on the return of peace, the rights of the parties under it may be enforced. *Hamilton v. Mutual Life Ins. Co.*, 9 Blatch., 243.

§ 615. Though it is true that a debt is suspended by the existence of a war which makes the debtor and creditor public enemies, yet an executory contract, instead of being suspended in such a case, and reviving when the war is over, is entirely extinguished, if, owing to the lapse of time or change of circumstances, its enforcement is unjust or inequitable. *New York Life Ins. Co. v. Statham*, 8 Otto, 81.

§ 616. — ratification of contract of agent.— A transaction originally unlawful cannot be made any better by being ratified. So an act of an agent in trading with an enemy is not changed, as far as respects its invalidity, by a subsequent ratification by the principal. *United States v. Grossmayer*, 9 Wall., 75.

§ 617. Alien enemy — Insurance.— A contract of insurance on the life of a person who afterwards becomes an alien enemy is not rendered void by the war, where the party insured was a non-combatant and was neutral and passive during the existence of the war. *Hamilton v. Mutual Life Ins. Co.*, 9 Blatch., 245.

§ 618. Against public policy and the neutrality laws.— A contract was entered into in 1836, in Ohio, between certain citizens of Ohio and a general of the Texan army, by which the former were to furnish certain funds to be used by the latter in raising and equipping troops for the Texan war of independence, and in consideration of which the latter was to convey to the former certain lands owned by him in Texas. The independence of Texas was not acknowledged by the United States till 1837, and at the time of the making of this contract there was a treaty of friendship between the United States and Mexico, and by an existing treaty the right of Mexico to Texas was acknowledged. *Held*, that the contract was void, as being against public policy and in violation of the neutrality laws of the United States; and that it was made in Ohio where the money was advanced, and not in Texas; and even if that were not the case the contract was one in violation of the duties imposed upon the citizens of the United States, and would not be enforced by the courts of the United States. *Kennett v. Chambers*, 14 How., 45.

§ 619. Infringement of belligerent rights.— In time of war property shall not be permitted to change character in its transit, nor shall property consigned to become the property of the enemy on arrival be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. Where, however, the contract is made in time of peace and war subsequently breaks out, the contract should receive a more liberal consideration. *The Ship Ann Green*, 1 Gall., 291.

§ 620. Contract between belligerents as to cartel ships.— A contract made during a state of war for the equipping and fitting out of a cartel ship is to be considered as a contract made between friends, and consequently ought to be enforced by the courts of either belligerent having jurisdiction of the subject. *Crawford v. The William Penn*, Pet. C. C., 112.

§ 621. Shipment by belligerent of property in the name of another, to prevent capture.— An arrangement by which, during a time of war, a person who is a belligerent ships property in the name of another to avoid capture and condemnation, is not so contrary to the laws of war or of nations, that an action may not be maintained in a neutral country, by the real owner, for the proceeds of the property which were recovered by the person in whose name they were shipped, from a government unlawfully capturing the same. *De Valengin v. Duffy*, 14 Pet., 280.

§ 622. Contract during the rebellion to prevent cotton from capture.— During the war of the rebellion the British consul at New Orleans contracted, in consideration of a certain share of the profits, to protect from capture, by the use of certificates that the property was in a British subject, certain cotton within and belonging to persons residing within the Confederate lines, and owing allegiance to the Confederate government. *Held*, that such contract

was void as against public policy and the prohibition of the government. *Coppell v. Hall*, 7 Wall., 552.

§ 623. Price payable in Confederate notes.—Note.—A. sold property during the war of the rebellion for \$15,000, payable in Confederate notes. Held, that A. could not sue on this contract, nor on a note for \$15,000 given to secure payment, though the note did not specify what currency it should be payable in. *Nordlinger v. Vaiden*, * 2 Am. L. Rev., 183.

§ 624. Contracts made during the war of the rebellion, in one of the Confederate States, providing for the payment of Confederate currency, if not made in aid of the insurrectionary government, are still valid, notwithstanding the currency in which they are payable, and may be enforced. *Wilmington & Weldon R'y Co. v. King*, 1 Otto, 3.

§ 625. A contract for the payment of Confederate notes, made during the rebellion, between parties residing within so-called Confederate States, can be enforced after peace in the courts of the United States; and though the promise was made in dollars, evidence may be introduced to show that the dollars meant were Confederate dollars. The recovery in such a case will be the value of such notes at the time and place of the contract in the lawful money of the United States. *Thorington v. Smith*, 8 Wall., 6.

§ 626. Contract in aid of rebellion.—A contract made in furtherance or in aid of the late rebellion is void. So where A. had sold goods to a contractor for the Confederate government and received his notes therefor, and had also taken up due bills of the contractor given for supplies purchased for the rebel government, it was held that he could recover on neither, and that both were void as being contracts tainted with the vice of the purpose for which they were given. *Hanauer v. Doane*, 12 Wall., 845.

§ 627. A contract made in aid of the rebellion is void and cannot be enforced in the courts of this country; and bills of a city, issued under the authority of the legislature of a Confederate state to circulate as money, are likewise void. *Thomas v. City of Richmond*, 12 Wall., 357.

§ 628. No contracts in aid of a rebellion can be enforced in the courts of the government which was sought to be overthrown. But a contract for the sale of property which is to be paid for with the notes of the insurgent government is not such a contract and may be enforced. *Thorington v. Smith*, 8 Wall., 7; *Dean v. Younell*, 8 Wall., 15.

§ 629. A contract or undertaking of any kind to destroy or impair the supremacy of the constitution of the United States, or to aid or encourage any attempt to that end, is necessarily unlawful, and cannot be treated as valid by a court sitting under that constitution. The obligations of a traitorous combination, issued expressly to make war against and overthrow the government of the United States, can never give validity to any transaction which must seek the courts of that government for enforcement. So bonds issued by the convention of Arkansas which attempted to take that state out of the Union, which were issued to support the rebellion, form no consideration to support a promissory note, although they circulated as money. *Hanauer v. Woodruff*, 15 Wall., 442.

§ 630. Agreement to make fraudulent pre-emption.—An agreement between two parties, by which one is to make a fraudulent pre-emption of public land, which they are to divide between themselves, is contrary to public policy, and can have no standing in a court of justice. *Harkness v. Underhill*, 1 Black, 825.

§ 631. Entry and lease of public lands reserved from sale and settlement.—Certain land was reserved by the government from sale and settlement. A. entered thereon and made certain improvements, which he leased to B. for a certain annual ground rent. Held, that the lease was absolutely void as being in derogation of public rights and against public policy. A. being a trespasser, and liable to criminal prosecution for erecting the improvements, his lease of them was absolutely void. *Dupas v. Wassell*, 1 Dill., 214.

§ 632. Agreement to attend sales and buy public lands.—An agreement between two land companies to appoint a common agent to attend a public sale of public lands, and buy lands, on their joint and several account, is not an illegal combination in fraud of the rights of the United States, and does not render such purchases a nullity. *Oliver v. Piatt*, 8 How., 411. See § 527.

§ 633. Combination by bidders at auction sale of public lands.—A contract made in fraud of the law, or against public policy, is void, and courts will aid neither party to carry it into effect. So where parties present at an auction sale of public lands combined with each other not to bid against each other, so that the lands could be procured cheap, and agreed to divide the profits between themselves, the agreement was held void. *Piatt v. Oliver*, 1 McL., 299; 3 C., 2 McL., 270.

§ 634. Sale of public land by trespasser.—No contract is valid which is made in contravention of law or of public policy. So the sale by a party of public land which is a part of the public domain, and upon which he is a mere trespasser, is void. *Scudder v. Andrews*, 3 McL., 469.

§ 635. Agreement by executor to pay his surety part of his compensation.—Where a person has been appointed executor, an agreement between him and his surety, by which, in consideration of the latter's assuming that obligation, he will pay him one-half of his compensation as it is allowed to him, is a valid contract, and not contrary to the policy of the law. *Culbertson v. Stillinger*, Taney, 78.

§ 636. Agreement between executrix and purchasers from her.—Under an agreement with an executrix, parties purchased the lands of the testator, which were sold to pay his debts for less than their value, and agreed to hold them on an understanding with her that she might purchase from them at the same rate. *Held*, that the contract was illegal, being against public policy, and voidable, if not void. *Tufts v. Tufts*, 3 Woodb. & M., 485.

§ 637. Agreement between executor and heir to divide the property in case the will is declared invalid.—After the death of a testator who had devised his property to the exclusion of his heirs, the will was attacked by one of the heirs. Pending suit the executor and the heir agreed that if the will was held void they would divide the property between them, to the exclusion of the devisees. *Held*, that the agreement was a flagrant breach of trust on the part of the executor, and void as against public policy. *Wilson v. Jordan*, 8 Woods, 647.

§ 638. Against public policy—Suit by guilty party.—In the case of an undertaking which is void as against public policy, no action can be maintained thereon by one member of the partnership against another. A party alleging his own turpitude shall not be heard in a court of justice to sustain an action founded upon it. Where the parties stand *in pari delicto* the law leaves them as it finds them, to reap the fruits of their own dishonesty as best they may. *Fales v. Mayberry*,* 2 Gall., 563.

§ 639. Contract in fraud of the revenue laws of a foreign country.—A Spanish ship was captured by a Columbian privateer, and to avoid the necessity of a condemnation in the courts of Columbia the prize was intentionally wrecked on the coast of the United States. The goods were landed and the duties paid. A purchaser of the cargo gave bills of exchange therefor, and resisted payment thereof on the ground that the wrecking was by collusion between himself and the captors. *Held*, that this was no defense in the courts of the United States, as no fraud was intended upon any revenue law or regulation of the United States. *Hopner v. Appleby*, 5 Mason, 74.

§ 640. Compounding a felony.—In order to avoid an instrument on the ground that it was given to compound a felony, it must appear that the compounding of the felony was the consideration. A bond given for a valid and subsisting obligation due from the obligor to the obligee is not void as compounding a felony, though the obligor was threatened with criminal prosecution unless the indebtedness was secured. *Plant v. Gunn*, 2 Woods, 877. See § 585.

§ 641. Money loaned or goods sold to be used in the commission of a criminal act.—If a vendor knows that his goods are purchased, or if a lender knows that his money was borrowed, for the purpose of being employed in the commission of a criminal act injurious to society or to any of its members, courts will not give their aid to enable him to recover. *Hanauer v. Doane*, 12 Wall., 349.

§ 642. Boarding and lodging a prostitute.—One who furnishes a prostitute with food and lodging, and derives any profit from the latter's prostitution, cannot recover in contract for such board and lodging furnished. *Mackbee v. Griffith*,* 2 Cr. C. C., 836.

§ 643. Against public policy—Executed.—Though a contract be against public policy and therefore void, yet it seems that where it has been executed it can only be avoided where the illegality is set up technically as a defense in some of the pleadings and answers. *Tufts v. Tufts*, 3 Woodb. & M., 493.

§ 644. Contract sanctioned by legislature.—Where a contract by a city to issue its bonds in aid of the building of a railroad has been expressly sanctioned by the legislature, and the city has secured the advantages of the contract, it cannot escape from its obligations by contending that the contract is against public policy and without consideration. *City of Winona v. Cowdrey*,* 3 Otto, 612.

§ 645. Contract of marriage between nephew and aunt.—Whether a contract to marry, made between a nephew and aunt, is contrary to morality and public policy, discussed in *Campbell v. Crampton*, 18 Blatch., 150 (§§ 1190-94).

§ 646. Agreement between railroad and telegraph company as to transmission of messages of officers of former free.—A contract between a telegraph company and a railway company provided that, in return for certain privileges granted to it, the telegraph company should transmit free of charge all the family and social messages of the officers of the road. *Held*, that such contract was against public policy and void, and that such provision was a part of the consideration of the contract, and being thus contrary to public policy, it vitiated the whole contract. *Western Union Tel. Co. v. Union Pac. R'y Co.*, 1 McC., 426.

§ 647. A contract was entered into between a railway company and a telegraph company

by which the telegraph company, in return for certain privileges, granted to the officers of the railway company the privilege of sending all their private messages over the wires of the telegraph company free of charge. *Held*, that to insert such a stipulation in a contract was a misuse of corporate property for which the contract might be avoided. *Held*, also, that although the railway company had acquiesced in the contract for thirteen years, yet no ratification thereof could be presumed from such acquiescence, as the stipulation was not restricted to those who were the officers of the company at the time of the making of the contract, but included all the officers who came in afterwards. The contract rested on the continually recurring acts of the parties, and the company could hardly be charged with negligence in failing to repudiate an agreement which continually supplied its officers with reasons for keeping silent. *Western Union Tel. Co. v. Kansas Pac. R'y Co.*, 4 Fed. R., 291.

§ 648. *Formation of auxiliary company by directors of corporation.*—An arrangement by the directors of a corporation by which they or some of them are to form an auxiliary company, to which valuable contracts are awarded by the directors in behalf of the corporation, is one which courts will not enforce, and one which is perfectly indefensible and illegal. *Wardell v. Railway Co.*, 18 Otto, 657.

§ 649. *Wicked or prohibited consideration*—*Contract to prevent liberation of negroes.*—No principle is better settled than that no action can be maintained on a contract the consideration of which is either wicked of itself, or is prohibited by law. A contract of hiring of negroes in 1864, by which they were to be kept outside the federal lines with a view to prevent their liberation from servitude, is in contravention of the policy of the government, and cannot be enforced. *Martin v. Bartow Iron Works*,* 35 Ga., 329.

§ 650. *Partners engaged in slave trade*—*Assignment of claim.*—Partners engaged in the slave trade can maintain no action against copartners-upon contracts growing out of the partnership business. So where plaintiffs owned two-thirds of a vessel, of which defendant was master and owner of the remaining third, and she was fitted out and sent to Africa for a cargo of slaves, which were carried to the West Indies and there sold together with the vessel, no action can be maintained for the proceeds of the voyage in defendant's hands, nor for his share of expenses incurred in the outfit. That there has been an assignment of the claim by orders drawn in favor of a third person, which orders have been accepted, does not purge the illegality of the original transaction, the action being between the original parties to the transaction. *Fales v. Mayberry*,* 2 Gall., 559.

3. *Duress and Undue Influence.*

SUMMARY—*Payment by duress of goods*, § 651.

§ 651. To constitute payment by duress of goods there must be an illegal demand of payment, coupled with a present power in the person making such demand to dispose of the property in question unless the payment is made. So where plaintiff's real estate was sold illegally under a decree of foreclosure, and defendant, being the purchaser, was about to take a deed of the property, plaintiff, to avoid any cloud upon the title, paid him the sum which he pretended to have paid at the sale; it was held that plaintiff was not entitled to recover back the money paid. *Mariposa Co. v. Bowman*, §§ 652-655. See § 660.

[NOTES.—See §§ 656-675.]

THE MARIPOSA COMPANY v. BOWMAN.

(Circuit Court for California: Deady, 228-233. 1867.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—The complaint states that on November 18, 1862, Cyrus A. Eastman obtained a decree in the proper court of the state of California for foreclosure and order of sale of a portion of the real property known as the Mariposa estate; and that such portion of said property was then owned by John C. Fremont and others, but that for a year prior to the commencement of this action—September 24, 1866,—such estate, including the mortgaged premises, was the property of the plaintiff—a foreign corporation, formed under the laws of the state of New York, for the purpose of mining on such estate. That while such order of sale was in the hands of the sheriff, and

before a sale of the premises was made thereunder, the decree of foreclosure was duly paid and satisfied, but the sheriff afterwards sold the property in question under such order, and wholly disregarded the fact that the amount due upon said decree had been fully paid. That at such sale the defendant became the purchaser, and received from the sheriff a certificate of sale, dated March 22, 1866, and was about to receive a deed from him therefor, and that the proceedings were a cloud upon the title of the plaintiff and impaired the value of its stock. That a deed from the sheriff in pursuance of such proceedings would have been a further cloud upon such title, and that the plaintiff, for the purpose of dispelling this cloud and "preventing the injury done to it by the acts and proceedings aforesaid," on September 18, 1866, paid to defendant the sum which he pretended to have paid for the property at the sale—namely, \$38,003.60, together with twelve per centum thereon, and the fee for the certificate—\$2. That there was collusion between said Eastman and the defendant in this—that defendant did not pay any money on account of the purchase, but by an arrangement with Eastman the amount bid was credited on the decree, and that the defendant then knew that the decree had been fully paid.

Although the fact is not explicitly stated in the complaint, it must be inferred from what appears therein, that the plaintiff, after the order of sale was issued, succeeded in some way to the interest of Fremont and others, and thereby became entitled to redeem the property from the purchaser, at the sale aforesaid. On this state of facts the plaintiff claims that the payment by it to the defendant was made under such compulsion as entitles it to maintain this action to recover back the amount so paid.

The case of the plaintiff has been presented with great zeal and ability by counsel, but my judgment is not convinced.

§ 652. *Rule as to payment of money under alleged duress.*

The leading case cited for the plaintiff—*Boston & Sandwich Glass Co. v. City of Boston*, 4 Metc., 187—gives the rule on this subject as follows: "If a party, with a full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterwards allege such payment to have been made by compulsion, and recover back the money, even though he should protest, at the time of such payment, that he was not legally bound to pay the same. The reason of the rule, and its propriety, are quite obvious, when applied to a case of payment upon a mere demand of money, unaccompanied with any power or authority to enforce such demand except by a suit at law. In such case, if a party would resist such demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment. If it were not so, the effect would be to leave the party who pays the money the privilege of selecting his own time and convenience for litigation; delaying it, as the case may be, until the evidence, which the other party would have relied upon to sustain his claim, may be lost by the lapse of time and the various casualties to which human affairs are exposed. The rule alluded to, when properly applied, is doubtless a salutary one, and is not to be departed from but in cases resting in a plain and obvious distinction from such as are ordinarily and familiarly known as embraced within it."

§ 653. — *exception to the rule.*

The court then states the exception as follows: "If there be a controlling

necessity in the case, arising from the peculiar circumstances *under which the money is demanded*, the rule does not apply." The cases cited in support of this exception to the general rule are, where money is extorted by duress of goods, as where a party, having the plate of another in pawn, refuses to deliver it to the owner, except upon the payment of an illegal demand; or where tonnage or light money is illegally demanded by a collector as a condition precedent to granting a clearance to a vessel, or to liberate a raft of lumber detained to exact an illegal toll, "and generally, where money is paid *to obtain possession* of property which the party making the illegal demand *has under his control*, such payment will be considered compulsory." *Astley v. Reynolds*, 2 Strange, 915; *Ripley v. Gelston*, 9 Johns., 201; *Chase v. Dwinal*, 7 Green., 134; *Shaw v. Woodcock*, 7 Barn. & Cress., 73; *Morgan v. Palmer*, 2 Barn. & Cress., 729.

§ 654. *Payment in the case at bar was made voluntarily and cannot be recovered back.*

In the case at bar the facts were all known to the plaintiff at the time of payment. The property alleged to be in duress was in its possession and still remains so. No *demand* was made upon the plaintiff for money whatever. But, on the contrary, the plaintiff as a volunteer came forward and paid this money to the defendant, for the purpose, at most, of removing what it deemed a cloud upon its title, or preventing a further cloud from settling thereon. While I do not admit the doctrine contended for by defendant's counsel, that the duress of real property is never a sufficient compulsion to justify the payment of an illegal demand, I think it will be found that a mere cloud upon the title, or of a threat to create one, has never been held to produce such compulsion. Suppose a case: A mechanic files a lien upon the property of A. The demand for which the lien is filed is an illegal one, in whole or in part. So long as this claim remains of record unsatisfied, it may be said to be a cloud upon the title of the owner. But that is not a controlling necessity which compels the owner to pay the illegal demand, and if he does pay it with knowledge of the facts, he cannot recover back the amount.

§ 655. *What constitutes payment under duress.*

To make it a case of payment under compulsion there must be an illegal demand, coupled with a present power or authority in the person making such demand to sell or dispose of the property if payment is not made as demanded. The case of a mortgage with a power of sale by the mortgagor, without judicial proceedings, or of a mortgagor in possession after condition broken, or of a tax collector armed with a warrant which authorizes him to distrain property for taxes, are the leading instances given in the books of duress of real property which excuses the payment of an illegal demand, with knowledge of the fact.

Hays v. Hogan, 5 Cal., 241, is cited by plaintiff to show that a party paying money to prevent a cloud upon his title to real property may recover the amount because paid under compulsion. In that case the defendant was proceeding to sell the property of the plaintiff for municipal taxes, upon a warrant authorizing him to distrain for the same. The court held that the tax was illegally assessed, and this was sufficient to justify the conclusion that the plaintiff was entitled to recover back the money. It is true that the court, in the course of its opinion, say that the plaintiff paid his money "to protect his property from a clouded title," but it appears to me that the expression was a mere inadvertence. The illegal collection or exaction of taxes, tolls or fees, by persons having official position or under color of office, are placed upon peculiar

grounds, and for obvious reasons. Money paid upon a demand made under such circumstances has been recovered back, when, as between private parties, dealing upon equal terms, the action could not have been maintained.

In this case the plaintiff was under no such compulsion; at most there was but a cloud upon his title, by reason of the sale and sheriff's certificate. The money was not paid to prevent this, for it was already a fact accomplished. True, a conveyance from the sheriff to the defendant would follow in six months, unless the plaintiff redeemed, by the payment to the former of the purchase money. But the defendant did not demand this money of the plaintiff and could not collect it by law. The plaintiff having volunteered to become the successor in interest to the judgment debtor, sought to redeem the property from the effects of the sale. This was a privilege which the law gave it, to be exercised or not, at its own option. The plaintiff was the actor. Under these circumstances one of two courses was open to it: either to resist the proceedings founded on the sale, on the ground of its illegality, or to submit to them and redeem.

In the former case the plaintiff could have had the sale set aside and the order therefor returned. The court where the proceedings were pending had control over its officer and process, and upon the facts alleged would undoubtedly have given the plaintiff relief. And, in any event, it might have brought a suit in equity to set aside the conveyance and sale as illegal and a cloud upon its title. But the plaintiff, instead of resisting this claim at the threshold, chose to pay the defendant the purchase money and redeem. Having made its election, without such compulsion as makes the payment in contemplation of law involuntary, it must abide the result, and cannot recover the money back. The demurrer to the complaint is sustained.

§ 656. To constitute a coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of the person making it, from which he has no other means of immediate relief than by making the payment. *Radich v. Hutchins*, 5 Otto, 213.

§ 657. Threats of criminal prosecution do not constitute duress either at common law or under the civil code of Georgia. *Plant v. Gunn*, 2 Woods, 377.

§ 658. Threats by a captor to destroy a vessel and cargo, unaccompanied by personal duress or maltreatment, are not such duress as will avoid a contract of ransom. *Maisonnaire v. Keating*, 2 Gall., 387.

§ 659. Deed procured by duress—What constitutes duress.—A settler on public land was warned that if he perfected his claim he would be required to deed it to the person threatening him, who was a member of a known illegal organization, or else he and his associates would kill him, and a few days after perfecting his claim the same person and his associates called on him and threatened to hang or drown him unless he executed the deed required. Under the influence of these threats he deeded his land as directed, and wholly without consideration. *Held*, that the deed was procured by duress, and was therefore void. Actual violence is not necessary to constitute duress, because consent is of the very essence of the contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as is produced by threats to take life, or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract. *Brown v. Pierce*, 7 Wall., 214; *Baker v. Morton*, 12 Wall., 153.

§ 660. Duress of goods.—Whether there is duress of goods depends upon the fact whether the party demanding them has a right to their possession. If he only has a right to the possession of the goods upon the compliance with certain conditions, it is not duress to refuse them till the terms are complied with. *Blook v. United States*,* 8 Ct. Cl., 461. See § 631.

§ 661. A common carrier agreed to convey certain property to a certain place for a certain price per hundred weight. On arrival of the goods at the destination the carrier refused to deliver them to the owner unless he should pay a certain rate largely in excess of amount agreed upon. In order to obtain the goods the owner paid the excess demanded. In an

action to recover the amount thus paid in excess of the stipulated rate, it was held that the payment was not voluntary, but was compulsory, and that the excess could be recovered back. *Tutt v. Ide*, 3 Blatch., 250.

§ 662. **Duress of imprisonment.**— It seems that a contract is not void as obtained under duress of imprisonment unless the imprisonment was unlawful and the contract was entered into as a condition for the release. *Plant v. Gunn*, 2 Woods, 876.

§ 663. **Promise extorted by arrest and confinement.**— A promise not again to lay claim to certain lands held by a settler in Oregon under the donation acts, which was extorted by arrest, and removal and confinement in another state, is of no binding force or validity. *United States v. Tichenor*, 12 Fed. R., 424.

§ 664. **Payment of void judgment in order to obtain release from imprisonment.**— A justice of the peace without jurisdiction rendered judgment against an executor and he was committed upon a *ca. sa.* In order to obtain his release he paid the amount of the judgment. *Held*, that it was paid under duress. *Foy v. Talburt*, 5 Gr. C. C., 125.

§ 665. **Notes given for a debt by one lawfully under arrest.**— A party having been discharged under the insolvent laws of Pennsylvania, was arrested in Delaware on a debt due before the discharge, and while in jail gave notes for the debt. *Held*, that the arrest was lawful in Delaware, though it would have been unlawful in Pennsylvania, and that the notes were not void as having been given under duress. *Latapic v. Pechalier*, 2 Wash., 182.

§ 666. **Promise by one in order to procure the release of another — Who may avail himself of a duress.**— While A. was imprisoned, at the instance of B., and to procure his release, A. and C. signed a note to B. and A. was released. *Held*, that C. could not avoid the note on the ground of duress, and that duress to avoid a contract must be the duress of the person himself and not of another. *McClintick v. Cummings*, 8 McL., 159.

§ 667. **Settlement by person under arrest of an account not included in the suit.**— It seems that where a party, detained under arrest in a city distant from his home, by his inability to procure special bail, settles an account which is not included in the suit, in a manner injurious to himself, and without any opportunity to examine the books and papers relating to the matters in controversy, such settlement will not be allowed to stand. *Kelsey v. Hobby*, 16 Pet., 279.

§ 668. **Official authority illegally exerted to compel the execution of a bond.**— If an officer authorized to take a bond illegally exerts his official authority, and thereby compels the obligee to enter into an obligation not required by law, it is not binding. So where a party confined in jail on civil process rightfully has the liberties of the jail, and is induced to enter the close jail, and is only released on condition of giving a new bond, it is held that such a bond is void as executed under duress. *Hawes v. Marchant*, 1 Curt., 139.

§ 669. **Sale to Confederate government — Duress.**— During the war of the rebellion a manufacturing company which had been furnishing supplies to the Confederate government was informed by the Confederate government that it must either contract to furnish the supplies at a certain rate, or it must sell or lease its works to the government, or otherwise they would be impressed. At this time the company was largely in debt. A guard prevented its products being sent except to the government, and the guard controlled all the skilful laborers of that region. Upon consultation the managers of the company concluded that to contract at the terms proposed, or to lease the works, would be ruinous, and therefore sold the works to the government. *Held*, that the sale was not made under duress. *United States v. Huckabee*, 16 Wall., 431.

§ 670. **Duress as a defense to a note.**— Though a note may be void for duress as against the original payee, yet, where it has been assigned, duress cannot be set up to avoid the note as against the assignee, unless he had notice of the duress. *McClintick v. Johnston*, 1 McL., 417.

§ 671. **Release by seaman under apprehension of ill-treatment.**— Where a seaman assented to his discharge, on the payment of a nominal sum, from just apprehension of future ill-treatment, arising from the misconduct of the master, such settlement was held to be made under a species of duress, and was no bar to an action for what was actually due him at the time of discharge. *Bates v. Seabury*, 1 Spr., 434.

§ 672. **Property improperly sold for salvage — Payment by owner with reservation of all rights.**— Property having been improperly sold for salvage, the owners, for the sake of obtaining possession of the property, paid a certain sum therefor, expressly reserving all rights. *Held*, that the owners, notwithstanding such payment, may have an action against the salvors founded upon such wrongful sale. *American Insurance Co. v. Johnson*, Bl. & How., 27.

§ 673. **Payment made involuntarily or procured by fraud, oppression or extortion.**— It seems that where a payment has been obtained by fraud, or by oppression, or extortion, or when it has been made to secure some right which the party paying was entitled to without such payment, and which was withheld by the party receiving the payment until such pay-

ment was made, such payment is not voluntary, and the money can be recovered back. And it may be said, that where the money was paid upon an unlawful demand, to save the party paying from some great or irreparable mischief or damage from which he could not be saved but by the payment of the sum wrongfully demanded, it may be recovered back. *Corkle v. Maxwell*, 3 Blatch., 416.

§ 674. *Mortgage, whether extorted by threats.*—A. placed funds in B.'s hands for investment and B. misapplied and lost them. B. having made a fraudulent certificate, A. informed him in the presence of his wife that if the certificate was produced in court he would go to the penitentiary. B. begged A. not to expose him, as also did his wife, who promised to help her husband raise the money, and who often promised to pay A. the amount misapplied and lost by her husband. B. died five years afterwards. Some time after his death his widow executed a mortgage to A. to reimburse him for the money lost by her husband. *Held*, that under the circumstances the mortgage was not extorted by threats. *Jackson v. Ashton*, 11 Pet., 248.

§ 675. *Undue influence*—Contract between clergyman and member of his church.—A contract between a clergyman and a female member of his church is valid unless actual imposition or undue influence is shown. There is nothing in the relation itself to raise the presumption of undue influence. *Ibid*.

4. *As to Mental Incapacity, whether Natural, or Produced by Intoxication.*

SUMMARY — *Trade made while suffering from a concussion of the brain*, § 676.—*Intoxication*, § 677.

§ 676. Plaintiff was thrown from his wagon and received a concussion of the brain. While still suffering from this cause he traded with defendants property worth about \$900 for property worth not more than \$400. *Held*, that upon the facts of the case there was sufficient evidence to warrant a decree for the rescission of the contract, and judgment for the value of the plaintiff's property disposed of by defendants. *Kilgore v. Cross*, §§ 678-681.

§ 677. A deed of trust and notes, executed by a party while so intoxicated as to be unable to comprehend their terms, conditions and consequences, are voidable at his election. *Johnson v. Harmon*, §§ 682-684. See § 685.

[NOTES.—See §§ 685-689.]

KILGORE v. CROSS.

(Circuit Court for Arkansas: 1 McCrary, 144-151. 1890.)

Opinion by CALDWELL, J.

STATEMENT OF FACTS.—The plaintiff was the owner, among other property, of five head of horses, two sets of double harness and one Concord eight-seat stage-coach or wagon. He desired to sell or exchange this property, and having been informed that Cross & Diver, the defendants, had obtained a contract for carrying the United States mail, and were running a street railway in Little Rock, and that they would probably purchase the property, he caused inquiry to be made of them on the subject, and received an answer, in substance, that if he would bring his property from Hot Springs, where plaintiff then was, to Little Rock, they might purchase or trade for it. Encouraged to believe that he could dispose of his property to the defendants, the plaintiff, on the 14th day of July, 1878, started from Hot Springs to Little Rock with his stage-coach, drawn by four horses, himself driving.

In or near Hot Springs the horses drawing the coach took fright, ran away and overturned the coach, seriously injuring the plaintiff. The extent and character of this injury is the turning point in this case and will be more fully considered hereafter. On the next day after he received his injury the plaintiff directed one of his hired men to take his coach and five horses to Little Rock and sell or trade them at his discretion, and on the 16th of July his hired man proceeded to Little Rock with the property upon the understanding that he was to sell or dispose of the same for the plaintiff according to his

own discretion, unless the plaintiff should, himself, go to Little Rock by rail the next day.

On the 17th of July, the stock and coach arrived at Little Rock, and were put up at defendants' stable, and in the afternoon of the same day the plaintiff arrived by rail. The next day the plaintiff and defendants effected an exchange of property as follows: The plaintiff gave the defendants his five horses, two sets of harness and stage-coach and \$150, for an old glass-front Clarence carriage. The \$150 was not paid in money, but the plaintiff gave his note for that sum; and, to secure its payment, executed to defendants a mortgage on the carriage. The defendants loaned plaintiff a span of horses to haul the carriage which he received in the trade to Hot Springs, and it was driven to the latter place by the plaintiff's hired man. The plaintiff arrived at Hot Springs with the carriage on the 19th or 20th of July, and within a week thereafter returned to Little Rock with the carriage, and tendered it back to the defendants and demanded a return of the property which they had received from him for the carriage, upon the ground that at the time he made the trade he was *non compos mentis*.

The defendants refused to rescind the trade, and thereupon the plaintiff filed his bill, alleging that by reason of the injury plaintiff received when thrown from his coach he was, at the time of the trade, incapable of transacting business, or knowing what he was doing, and was in fact *non compos mentis*; and that defendants, knowing his condition, fraudulently worried and bewildered him, by artful language and constant offers and proposals, until they finally induced him to make the trade. The bill prays for a rescission of the contract and a return of the property, or judgment for its value.

There is much conflict in the evidence in relation to the value of the property included in the trade, the valuation of plaintiff's property by the witnesses running from \$650 to \$1,400, and of the defendants' carriage from \$250 to \$800, but the weight of evidence warrants the conclusion that the property which defendants received from the plaintiff was worth, at a fair cash valuation, \$750, exclusive of the mortgage for \$150, and that on a like scale of cash valuation the carriage which plaintiff received from the defendants was not worth, at most, over \$400. In other words, the plaintiff agreed to pay for the carriage more than twice its value in this or any other market; and this disparity in the value of the property given and received does not disclose the extent of the plaintiff's improvidence and folly in making the trade, for the only use plaintiff had for the carriage, and the use to which he expected to put it, so far as he had any comprehension on the subject, was that of a public hack or carriage to carry passengers in and about Hot Springs. Its age and construction rendered it unfit for such service on the rough and rocky roads of that region, and at that place and to the plaintiff it was worth but little more than the amount of the mortgage lien retained upon it by the defendants.

§ 678. *Circumstances under which the mental condition of a person incapacitates him from making a contract.*

The evidence as to the mental condition of the plaintiff at the time he made this contract is voluminous and somewhat conflicting, but the weight of evidence establishes these facts: That the plaintiff, for some years preceding the making of this trade, had been first a stage driver, and afterward a mail contractor and proprietor of horses and mail coaches, and that for some months immediately preceding the trade he had been at Hot Springs engaged in keeping hacks and other vehicles and teams for carrying persons and hauling freights

for hire. In the conduct of this business he employed two or more teamsters, and was unusually diligent and careful in the direction and management of his business and the care of his property, attending at the stable where his stock was kept early and late, exacting from his hired men the strictest attention to their duties, constantly supervising them himself, and seemingly indisposed to trust the care and management of his stock to any one. He was a good judge of vehicles of all kinds and horses, and knew their value; was a shrewd and close trader in such property, and those who dealt with him had to pay full value for what they got. When his team ran away with him on the 14th of July, and upset his coach, he was thrown from the driver's seat and his head and other parts of his body struck the ground with considerable force. He was conveyed to his boarding house, and Dr. Barry, a reputable physician of more than twenty years' practice, called to see him. The doctor found him suffering from concussion of the brain and a painful injury to the foot or ankle-joint. He was then, in the language of the doctor, "partially delirious, and his acts and speeches indicated a deranged condition of mind." The doctor saw him no more, but he testifies that the condition of mind in which he found him might have continued ten or fifteen days, and other witnesses testify that there was no change in his condition up to the time the trade was made. Those who were with him during this time testify that he begged them to kill him, threatened to commit suicide, seemed utterly indifferent as to what became of his property; that he was in this condition when he directed his hired man to take his property to Little Rock and dispose of it; that he was in this condition when he arrived at Little Rock, and during all the time he remained there; that he had to be assisted in and out of the hack, and could walk with difficulty by the aid of crutches; that he seemed to be suffering intense pain from his injuries, and had to be watched while in bed at night; that the night after he got to Little Rock, in the absence of his watchers, he got out of his bed and went out in town at 1 or 2 o'clock in the morning to find a purchaser for his property; that against the earnest protest and advice of his hired man he made the trade in question that morning; that he exaggerated the value of the carriage he got, saying that it was worth \$10,000, and that the speaking tube extending from the inside of the carriage to the driver's seat was worth \$500. Other acts and speeches of plaintiff are detailed by the witnesses, going to show his reasoning faculties were more or less deranged. His condition remained the same for four or five days after the trade, when his mind seemed to be restored to its normal condition and he inquired for his property, and seemed quite confounded when told he had traded it for the carriage. He testifies that he has no knowledge or recollection of anything that he said or did from the 14th of July, the date he received his injury, until the 22d day of that month.

Persons who saw the plaintiff casually during this time testify that they observed nothing in his speech or action to indicate that he was not sane; but those who were well acquainted with him, and who were with him much before and after the injury, and who had the best opportunity of forming a correct opinion on the subject, agree in saying he was not in his right mind, and was utterly incapable of transacting business or forming or exercising a deliberate and intelligent judgment on any subject.

§ 679. *When opinions of witnesses, not experts, are competent evidence.*

Opinions of witnesses not experts are competent evidence in cases where the object is to prove capacity or incapacity to make a contract when the facts or

circumstances are disclosed on which they found their opinions. *Kelly v. McGuire*, 15 Ark., 555, 601. In answer to a hypothetical question which fairly stated the plaintiff's condition as disclosed by the evidence, Dr. Barry gives it as his opinion that the facts indicate a deranged condition of mind at the time the trade was made. One of the physical causes of insanity is severe injuries to the head from blows, causing concussion of the brain. The evidence satisfactorily establishes the fact that the fall plaintiff received produced concussion of the brain, and that this condition continued until after the trade with defendants.

§ 680. *Courts cannot relieve in cases of contracts made under a mistake of judgment. Circumstances under which relief will be granted in equity.*

Against the consequences of mistaken judgment or mere imprudence and folly on the part of one making a contract, courts can grant no relief. If the party was capable of entering into a contract, and there was no fraud, it is binding, though it may be obvious that he acted improvidently, and paid for property purchased greatly more, or received from property sold greatly less, than it was worth. It is impossible to define with exactness the degree of unsoundness of mind that renders a party incapable of entering into a binding contract. Weakness of understanding, or that deficiency of intellect which errs in judgment and easily makes mistakes, is not enough of itself to avoid a contract. But the acts and contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented, or overcome by cunning, artifice or undue influence. 1 Story, Eq. Jur., § 238.

In *Kelly v. McGuire*, 15 Ark., 555, 603, the court say: "If a person, although not positively *non compos* or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition or resist importunity or undue influence, a contract made by him under such circumstances will be set aside;" and in *Beller v. Jones*, 22 Ark., 92, 99, the court said: "No evidence was introduced by Jones so effective, none could be introduced more convincing, to show mental derangement or want of natural sense, as is the agreement itself charged by him and admitted by Beller to have been made." It must be conceded that the contract from which the plaintiff seeks to be relieved cannot be said to be so grossly improvident as in itself to justify the conclusion of insanity on his part, or fraud on the part of the defendants; nevertheless, its improvidence and folly are an important circumstance, tending to strengthen the conclusion, supported by the evidence, that his mental capacity was not adequate to the making of a valid contract, for it shows that in the very matter under consideration he did not act like a sensible or sane man, but quite the contrary.

§ 681. *A party is not bound by a contract entered into when his mental condition precludes fair and reasonable exercise of reasoning faculties.*

It is obvious from the evidence that the plaintiff, at the very time he made this trade, ought to have been in his bed receiving proper medical treatment for his injuries; and he probably would have been there if the purpose of visiting Little Rock to dispose of his property had not been the one thought fixed in his mind and in course of execution at the moment of the injury. In his delirious condition, after the injury, he fancied that purpose must be carried out; and his trip to Little Rock, while laboring under concussion of the brain, and suffering excruciating pain from the injury to his ankle, was itself an in-

sane act, or at least an act that no man in the full possession of his senses would have attempted. A party is not bound by a contract entered into where his mental condition is such as to preclude any fair or reasonable exercise of the reasoning faculties. While the plaintiff's injuries did not produce a total eclipse of his mental faculties, they did so weaken and derange them that he was not capable of comprehending the subject of the contract, and its nature and probable consequences, and he is not, therefore, bound by it. It is a fortunate circumstance that the carriage received by plaintiff from the defendants has been securely housed during this litigation, and that it remains in the same condition as when plaintiff received it, so that defendants can be placed *in statu quo*. The defendants having parted with the property received from the plaintiff must account for the fair cash value of the same at the time the trade was made, which is found to be \$750, and six per cent. interest on the same to date of decree.

The cross-bill of defendants, seeking to foreclose the mortgage on the carriage, given to secure the \$150 "boot money," must be dismissed, and the defendants required to surrender the notes and mortgages for cancellation, and to pay all costs.

JOHNSON v. HARMON.

(4 Otto, 371-382. 1876.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Bill in equity, involving the validity of a trust deed given by complainant to secure certain notes. The complainant charged in his bill that he was so intoxicated when he executed the deed and notes as to be incapable of understanding what he was doing. This issue was referred to a jury, and there was a finding for the complainant.

The opinion of the court in this case was rendered by MR. JUSTICE BRADLEY, the case being disposed of on questions of practice. (See APPEALS, § 1757, note.) MR. JUSTICE CLIFFORD concurred in the opinion of the court, and rendered the opinion which follows.

§ 682. *Degree of mental unsoundness necessary to make a person incapable of making contracts.*

Opinion by MR. JUSTICE CLIFFORD.

Difficulty attends the efforts to define with clearness and precision what degree of mental unsoundness in a grantor is sufficient, in contemplation of law, to render him incapable of giving a valid and effectual deed of conveyance. Confirmed insanity which deprives a person of mental capacity to distinguish between right and wrong, in respect to the act in question, renders the person irresponsible for such an act, though criminal, and disqualifies him to enter into a contract or to execute a valid instrument to convey real or personal estate. Deeds made by such a person are at least voidable; but mere weakness of understanding is not of itself any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions in respect to the subject-matter of the contract.

Men of such understanding are held responsible for criminal acts, and they may make valid contracts; but when it appears that a contractor or grantor has not strength of mind and reason sufficient to understand the nature and consequences of his act in making a contract or in executing a deed, the instrument may be avoided, on the ground of the mental incapacity of the party to

contract or to execute the conveyance. Both minds must meet in such a transaction; and if one is so weak, unsound and diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the instrument, whether that state of his mind was produced by mental or physical disease, and whether it resulted from ordinary sickness, or from accident, or from debauchery, or from habitual and protracted intemperance. *Dennett v. Dennett*, 44 N. H., 535; 2 Kent, Com. (12th ed.), 45.

Enough appears to show that the complainant owned lot numbered twenty-six, described in the record, with the two dwelling-houses erected thereon; that on the 3d of February, 1871, he indorsed two notes of that date, each for the sum of \$300, payable one in five and the other in six months from date, with ten per cent. interest, to the order of the first-named respondent; and that he, on the same day, executed and delivered to the other respondent a deed of conveyance of the houses and lot in trust to suffer and permit the complainant to occupy and enjoy the premises until some default made in the payment of those two promissory notes, with power in the trustee, in case of default of payment, to proceed, on the request of the payee of the notes, to sell the premises. Default of payment of the first note was made, and complainant alleges, in his original bill of complaint, that the trustee threatens to sell the premises. Subsequently he, by leave of court, filed an amended bill of complaint. Reference will only be made to the amended bill, as the matters in controversy arose out of charges contained in that pleading, which are as follows: That when the complainant executed the deed of trust and the notes he was so intoxicated that he did not know what he was doing; that he did not know that he was making his property liable for the notes, or that he was incurring any obligation to pay the notes; that the trustee, on the 21st of September last, sold the property at public auction to the payee of the notes, and that he claims the property as his own, and has given the complainant notice to leave the premises.

Based upon these allegations, and others not necessary to be reproduced, the complainant prays as follows: 1. That the sale to the payee of the notes may be annulled and set aside. 2. That the trustee may be enjoined and restrained from making any conveyance of the premises to any person. 3. That if the trustee has made any conveyance of the same, that the conveyance may be annulled and set aside. 4. That the deed of trust may be decreed null and void. 5. That the payee of the notes may be enjoined and restrained from taking possession, or in any way interfering with the premises or with the complainant, or any tenant thereof, in the free use and enjoyment of the property; and for general relief. Process was issued; and the first-named respondent appeared and filed a separate answer, which consists of a denial of every allegation of the bill of complaint, together with two affirmative averments: 1. That the complainant several times asked for extension of time for the payment of the notes. 2. That he, the respondent, saw no signs of intoxication in the complainant at the time the notes and deed of trust were executed, and that he never set up any such pretense before the first note was sued.

Proofs were taken, and it appears that the cause was submitted to the court upon the pleadings and evidence without argument. Before decision, the court directed that a feigned issue should be tried by a jury in the law court of the District, as follows, to wit: Whether or not the complainant, at the time the deed of trust and notes were executed, was capable of executing a valid deed or contract. Pending that proceeding, the complainant filed in the equity

court a supplemental bill, in which he alleged that the jury impaneled to try the feigned issue failed to agree, and that the issue was still pending in the law court; that the payee of the notes brought suit against him before a justice of the peace to obtain possession of the premises; that he recovered judgment in the case, and that the present complainant appealed the same to the supreme court of the District; that the appellee in that suit, notwithstanding the pendency of the feigned issue in the court of law, caused the appeal from the judgment rendered by the justice of the peace to be docketed and affirmed, without evidence or inquiry into the merits. Wherefore he prayed that the writ of possession might be annulled and set aside, and for an injunction.

Instead of that, the court first issued a summons commanding the respondents to appear and answer the allegations of the supplemental bill. Service being made, the first-named respondent appeared and filed an answer, in which he admits that the complainant did set up the defense of intoxication in the suit on the note; that he, the present respondent, did obtain judgment for possession; but he avers that the appeal was never perfected, and that the judgment of the justice of the peace was affirmed. Hearing was had; and the court awarded an injunction restraining the respondent from interfering with the property, but requiring the complainant to give bond to pay rent, in case the final decree should be in favor of the respondent. Those matters being adjusted, the parties went to trial upon the feigned issue in the court of law, and the jury found that the complainant, at the time he signed the deed of trust and notes, was not capable of executing a valid deed or contract. Exceptions were filed by the respondent as in a common law action, in which is given what purports to be the testimony introduced in the trial of the issue.

Evidence was offered by the plaintiff tending to prove that at and after the time of the making of the deed and notes, he, the plaintiff, was in the habit of using intoxicating liquors to excess; that he was more or less under such stimulants all the time; that at the date of the deed he had been drinking freely; and the bill of exceptions shows that several witnesses testified that they did not consider him fit to do business. Among others, the makers of the notes secured by the deed of trust were called, and they testified that they were present at the making of the deed and notes; that the complainant was very much intoxicated, so much so that they did not consider him fit to transact business or capable of executing a deed or contract. Testimony to the same effect was given by another witness who was also present when the deed and notes were executed. Support to that theory, of a decided character, was also derived from the testimony of a physician, who testified that he saw the party almost daily about that time, and "that he was not competent to contract at the time of making the deed," in which statements he was confirmed by other witnesses called during the trial.

Opposing evidence was introduced by the defendant. In the first place, he called the trustee who prepared the deed and notes, and he testified that the parties, including the makers of the notes, came to his office to have the deed prepared; that he informed him that he must have the title deed of the plaintiff to obtain the description of the premises; that the plaintiff and the payee of the notes left his office for that purpose, and returned with the title deed; that he prepared the trust deed, read it over to the plaintiff, and explained it to him; that he expressed himself satisfied with it, and signed it. He also called the magistrate who took the acknowledgment of the grantor; and both of these witnesses testified that they thought that the grantor was sober. Wit-

nesses were also examined by the defendant, whose testimony tended to prove that the plaintiff said nothing of the deed being invalid because of his intoxication before the property was sold, and that he signed a paper six weeks afterwards, agreeing to the assignment of the lease for which the notes secured by the deed of trust were given.

Three exceptions were taken by the defendant to rulings of the presiding justice in refusing to instruct the jury as requested, as follows: 1. That, to set aside a deed or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of his reason and understanding. 2. That the jury must find for the defendants unless they believe that the plaintiff was in such a state of intoxication as not to know what he was doing when he signed the deed in controversy. 3. That if the jury believe from the evidence that the plaintiff knew that he was signing a deed of trust upon his property, they must find for the defendant.

By the record it appears that the judge held that if the word "utterly," in the first prayer as here reported, was intended to express an entire loss of reason in all respects, it was not good law; but if it meant that the defendant must be incapable of understanding the terms and conditions of the deed of trust, in order to avoid it, then it was good law; and, so modified, the instruction was given to the jury. That the other two requests were granted subject to the following modification: that it was not sufficient to make the deed a valid one for the plaintiff to know that he was signing a deed of trust on his property; but he must have been in such a condition of mind as to be able to know and understand the terms and condition of the deed. That it is not necessary, in order to render the deed of the plaintiff invalid, that at the time of its execution and acknowledgment he was entirely demented by intoxicating drink; but his act will be rendered invalid if he was in such a condition of mind that he could not comprehend what were the terms and condition of the instrument.

Subsequently the parties were heard on the exceptions in the equity court, and the exceptions were overruled. Neither party moving for a rehearing or a new trial, the cause came up for consideration in the supreme court of the District, and the court affirmed the decree of the chancellor, overruling the exceptions of the defendant to the rulings of the justice presiding at the trial before the jury. All interlocutory matters having been disposed of, the cause came on to be heard upon the original bill, the amended and supplemental bills, the answers of the respondent, the verdict of the jury, the decree in general term overruling the exceptions to the ruling of the justice in the trial of the feigned issue; and, upon consideration thereof, it is ordered, adjudged and decreed that the deed of trust and the indorsement of the complainant on the notes are hereby vacated, annulled and set aside, and for the other relief, as more fully set forth in the interlocutory decree exhibited in the record, which was in all things affirmed by the final decree of the supreme court of the District, from which the respondent appealed to this court.

§ 683. *Appeals to this court can be sustained only when the decree appealed from is final.*

Erroneous rulings of the judge presiding in the trial of feigned issues are the proper subject of a motion for new trial before the chancellor who formed the issues and sent them to the law court for trial, but they do not of themselves constitute a ground of appeal to this court. Appeals here can only be sustained

where the decree is final, and such an appeal brings up the whole case. Where exceptions are taken on the trial of an issue out of chancery, and made part of the record, the certificate to the verdict by the court of law is a certificate to the whole record, and the exceptions, though not expressly certified, become a part of the chancery record. 2 Dan. Ch. Pr. (4th Am. ed.), 1120; *Watkins v. Carlton*, 10 Leigh, 560. Issues of the kind are directed to be had at law, to inform the conscience of the chancellor as to doubtful facts in controversy. *Harding v. Handy*, 11 Wheat., 125; *Goodyear v. Rubber Co.*, 2 Cliff., 351.

Power to grant a new trial of the issues is unquestionably vested in the chancellor; but, in determining that matter, the practice is to consider the whole of the evidence given at or before the trial and what has since become known to the court; and the rule is, that if the court is satisfied that full and complete justice has been done between the parties, the motion for new trial will be denied. 2 Dan. Ch. Pr., 1121; *Patterson v. Ackerson*, 1 Edw. Ch., 102. Applications for new trial in an issue sent out of chancery must be made to the court of chancery after the proceedings are certified back from the court of law. 1 Barb. Ch. Pr. (2d ed.), 456; *Van Alst v. Hunter*, 5 Johns. Ch., 153; *Birdsall v. Patterson*, 51 N. Y., 43. Such an issue is directed, as before remarked, to inform the conscience of the chancery court, and the application for new trial must be made to the chancellor; nor will the chancellor grant a new trial for every error of the judge presiding at the trial of the issues, if, on the whole facts, he is satisfied that the result is correct. *Apthorp v. Comstock*, 2 Paige, 486-488; *Silsby v. Foote*, 20 How., 385; *Clayton v. Garrington*, 33 Barb., 145.

Instructions given in the trial of such an issue are not the proper subject of appeal to this court, the rule being that this court can only examine the final decrees of the equity court. *Brockett v. Brockett*, 3 How., 691; *McLaughlan v. Bank of Potomac*, 7 id., 227. Suppose that is so, still it is insisted by the appellant that the evidence reported in the record is sufficient to show that the final decree of the court below is erroneous.

§ 684. *Contracts made by parties so intoxicated as to be incapable of understanding the consequences are voidable. Authorities reviewed.*

Imbecility of mind is not of itself sufficient to set aside a contract, when there is not an essential privation of the reasoning faculties or an incapacity of understanding and acting with discretion in the ordinary affairs of life. Weakness of understanding may be a material circumstance in every case where the charge is that one of the contracting parties has taken undue advantage of the other, or has been guilty of unfair practice or imposition. Formerly it was considered that intoxication was no excuse for the non-fulfillment of a pecuniary liability, and that it constituted no sufficient plea in avoidance of a contract; but it is now settled, says Chancellor Kent, according to the dictate of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is at least voidable. 2 Kent, Com. (12th ed.), 451. Much consideration was given to that question in the case of *Barret v. Burton*, 2 Aik. (Vt.), 167, and it was there decided that an obligation executed by a man deprived of the exercise of his understanding, by intoxication, was voidable by himself, though the intoxication was voluntary and not procured by the circumvention of the other party. *Young v. Stevens*, 48 N. H., 136.

Other courts and text-writers of the highest authority adopt that view, and

support the proposition without qualification, except where the contract was for necessities, or where the intoxicated party keeps the goods and uses the same as his own property after he becomes sober. It appears to have been at one time considered, says Chitty, that an agreement was not void even in equity, although it was entered into by the party charged thereon while he was in a state of absolute intoxication, unless such intoxication had been occasioned by the contrivance of the other party, or some positive fraud had been practiced; but it would seem, says the author, that, on principle, such a degree of intoxication as entirely deprives a party of the use of his reason must avoid an engagement entered into by him while in that state, even although it was produced by his own folly, and although no actual fraud was intended or practiced; giving the same reason for the conclusion given at a much earlier period, that "such a person had no agreeing mind," which of itself is sufficient to show that the intoxicated man cannot be held bound to the alleged contract. Chitty on Contr. (10th ed.), 137; *Pitt v. Smith*, 3 Camp., 33; *Fenton v. Holloway*, 1 Stark., 126.

Beyond doubt, these authorities support the proposition advanced; and the same writer adds that it is now settled that where a party, when he enters into a contract, is in such a state of intoxication as not to know what he is doing, and particularly when it appears that this was known to the other party, his contract is at least voidable. *Matthews v. Baxter*, Law Rep., 8 Exch., 132; *Molton v. Camroux*, 2 Exch., 501. When intoxication goes so far as absolutely to destroy the reason, it is evident that it renders the person in that state incapable of contracting so long as it continues, since it renders him incapable of giving consent. 1 Poth. on Obl., by Evans, p. 29. Modern text-writers treat of contracts with intoxicated persons under a distinct head; and Addison says that a party who makes a contract in such a state of intoxication as not to know what he is doing cannot be compelled to perform the contract by the other party who knew him to be in that state, and that a man who takes an obligation from another so circumstanced is guilty of actual fraud. Examples are given which support the proposition; but the author holds that a contract made by a man in a state of intoxication is voidable only and not void, and therefore the intoxicated man may, if he pleases, when he becomes sober, ratify it, and that it will then be binding. Addison on Contr. (3d Am. ed.), 285.

Courts of justice in repeated instances have decided in the same way. Reference will be made to a few such cases, with the remark that the number might be greatly increased. Undoubtedly, said the supreme court of Pennsylvania, the total drunkenness of the maker of a note when he executed it, if known to the payee, rendered it void as to the latter; and they remark that the old rule that a man should be held liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, has been long since exploded, and that it is now settled, according to the dictate of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is void as between the parties. *Bank v. McCoy*, 69 Penn. St., 207.

Except where the contract is for necessities, the court of exchequer held that where the right of action is grounded upon a specific, distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, as in consequence of intoxication, in such a case there can be no binding contract. Parke, B., said, where the party, when he entered into the contract, was in such

a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether, and he cannot be compelled to perform it; adding, that a person who takes an obligation from another under such circumstances is guilty of actual fraud. *Gore v. Gibson*, 13 M. & W., 625. In regard to drunkenness, says Greenleaf, it is now settled that incapacity from that cause is a valid defense to an action upon the contract made while under its influence, as well where it was voluntary and by the fault of the defendant as where it was caused by the fraud or procurement of the plaintiff. 2 Greenl. Ev. (12th ed.), sec. 374.

Whether the intoxication was so great as to suspend or destroy the power of intelligent assent is a question of fact. Nor does it make any difference that the drunkenness was voluntary and wilful, for the legal theory is that, without the capacity of giving a deliberate assent, no contract can be made. Story on Contr. (5th ed.), 86. But the author adds that intoxication only renders the contract voidable, not void; so that the party intoxicated may, upon recovering his understanding, adopt it, when it will become obligatory. *Reinskopf v. Rugge*, 37 Ind., 207. Contracts of the kind are voidable only, not void, and therefore capable of being ratified when the party becomes sober. *Molton v. Camroux*, 2 Exch., 501; *Matthews v. Baxter*, Law Rep., 8 Exch., 132. Apply these rules to the facts of the case as disclosed by the proofs, and it is clear that there is no error in the record.

§ 685. **Intoxication as a ground of relief in equity.**—It seems that courts of equity, as a matter of public policy, do not incline on the one hand to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication, and on the other hand they are equally unwilling to aid the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. *Bowen v. Clark*, 1 Biss., 183. See § 677.

§ 686. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or imposition practiced. *Ibid.*

§ 687. **Occasional insanity arising from intemperance.**—It seems that occasional insanity arising from intemperance is not sufficient to set aside a contract, where it appears that for some days previous the person had not been drinking, and was capable of transacting business at the time. *Lewis v. Baird*, 8 McL., 71.

§ 688. **Feebleness of mind caused by disease—Undue influence.**—A person enfeebled in mind and body by disease, and incapable in law to enter into a contract or manage his property, was induced by undue influence, and with an intention to overreach, to purchase a patent right of known doubtful utility, and to assign in return therefor certain notes and mortgages to the owner of the patent right. *Held*, that such assignment was void and conferred no title on the assignee. *Colburn v. Van Velzer*, 3 McC., 650.

§ 689. **Ignorant and unlettered person—Written contract.**—Where a party seeks to bind an ignorant and unlettered man by a written contract, it is incumbent upon him to show beyond doubt that such person fully understood the object and import of the contract upon which he is sought to be charged. *Selden v. Myers*, 20 How., 509.

5. *Restraint of Trade.*

SUMMARY—*Sale of steamboat with agreement as to use on certain waters*, § 690.—*Exclusive right to maintain a telegraph line*, §§ 691, 693.—*Contract valid in part*, § 692.

§ 690. Plaintiff bought a steamship of C., and agreed that for ten years thereafter she should not be used upon waters of the state in which C. was domiciled. Three years later plaintiff resold the vessel to defendant, who agreed that for ten years thereafter she should not be used upon the waters either of the state where C. lived or of that where plaintiff lived. Within two years from the time of his purchase defendant did use the vessel within the bounds of the state where C. lived, and plaintiff brought suit. *Held*, that the contract sued on was divisible and was good as to the remaining seven years in which plaintiff was under contract with C., even if void as to the three others: and also *held*, that the portion of

the contract relating to the seven years was not void as in restraint of trade. *Oregon Steam Nav. Co. v. Winsor*, §§ 694-697.

§ 691. A contract by which a railroad company attempts to grant to a single telegraph company the exclusive right to establish telegraph lines along the former's right of way is a contract void as in restraint of trade and against public policy. *Western Union Tel. Co. v. Burlington & Southwestern R'y Co.*, §§ 698-703.

§ 692. If a contract embraces several distinct promises, one of which is in restraint of trade and therefore void, the consideration for all the promises being legal, the invalid provision does not render the entire agreement null and void, where the contract is capable of being construed divisibly. *Ibid.* See § 697.

§ 693. Although a contract by which a railroad company grants to a telegraph company the exclusive right of establishing lines of telegraphic communication along its right of way is void as being in restraint of trade, yet if both the parties thereto have furnished, under its provisions, labor and materials for the erection and operation of the line, equity will not refuse to deal with the property according to the equitable rights of the parties, and prevent the railroad company from taking all the property. *Ibid.*

[NOTES.—See §§ 703-703.]

OREGON STEAM NAVIGATION COMPANY v. WINSOR.

(20 Wallace, 64-72. 1873.)

ERROR to the Supreme Court of the Territory of Washington.

STATEMENT OF FACTS.—In 1864 the California Steam Navigation Company sold to plaintiff a steamer, with a stipulation that for ten years from May 1, 1864, she should not be used upon any waters within the state of California. In 1867 plaintiff sold the same vessel to defendant, with a like stipulation, that she should not be used for ten years from May 1, 1867, upon any waters within the states of California or Oregon. On and after November 1, 1868, the vessel was used upon waters within the state of California. Suit was brought, and a demurrer was filed, which was sustained. That judgment was affirmed by the supreme court of the territory.

§ 694. *The law as to contracts in restraint of trade.*

Opinion by MR. JUSTICE BRADLEY.

It is a well settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. Chitty on Contracts, 576, 8th American ed. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. *Id.*; Tindal, C. J., in *Horner v. Graves*, 7 Bing., 743. A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration, and be made for a proper and useful purpose, is valid. 2 Williams' Saunders, 156, note 1. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void. The application of the rule is more difficult than a clear understanding of it. In this country especially, where state lines interpose such a slight barrier to social and business intercourse, it is often difficult to decide whether a contract not to exercise a trade in a particular state is, or is not, within the rule. It has generally been held to be so, on the ground that it would compel a man thus bound to transfer his residence and allegiance to another state in order to pursue his avocation. *Taylor v. Blanchard*, 13 Allen, 375; *Dunlop v. Gregory*, 6 Seld., 241.

But this mode of applying the rule must be received with some caution. This country is substantially one country, especially in all matters of trade and busi-

ness; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state. Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and that the latter shall not sell the article in New York, where his associate is to reside and carry on business. Can there be any doubt that such an agreement would be valid and binding? Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered.

§ 695. — *reasons for the rule.*

There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm of country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection and may be enforced.

In accordance with these principles, it is well settled that a stipulation by a vendee of any trade, business or establishment, that the vendor shall not exercise the same trade or business or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding. The point of difficulty in these cases is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. And it is obvious, at first glance, that this must depend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that a stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protected as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions.

§ 696. — *application of the rule to the case at bar.*

To apply these principles to the case before us: The California Steam Navi-

gation Company, being engaged in the business of transportation on the rivers, bays and waters of California, was willing to sell one of their steamers to the Oregon Steam Navigation Company, which was engaged in a similar business on the Columbia river and its tributaries, provided the latter company would agree that the steamer should not be used in the California waters for the period of ten years from the 1st day of May, 1864. This stipulation was necessary to protect the former company from interference with its own business. It had no tendency to destroy the usefulness of the steamer, and did not deprive the country of any industrial agency. The transaction merely transferred the steamer from the employment of one company to that of another situated and doing business in another state. It involved no transfer of residence or allegiance on the part of the vendee in order to pursue its employment, nor any cessation or diminution of its business whatever. The presumption is that the arrangement was mutually beneficial to both companies, and that it promoted the general interests of commerce on the Pacific coast. Again, the Oregon company were afterwards willing to dispose of the same steamer to the defendants, who were engaged in the like business of transportation in the waters of Puget Sound, Washington territory, provided that the latter would agree that the steamer should not be run or employed upon any of the routes of travel or rivers, bays or waters of California; or the Columbia river and its tributaries, for the period of ten years from the 1st day of May, 1867. This stipulation excluded the steamer from the territory covered by the former stipulation exacted by the California company, and also from the territory occupied by the Oregon company itself. The latter portion of the stipulation stands on the same ground and reason as did the first stipulation between the California and Oregon companies. The former portion was necessary in order that the Oregon company might faithfully keep its covenant with the California company. It is true that the stipulation in question covers a period of time which extends three years beyond the period for which the Oregon company is bound to the California company. The latter would expire on the 1st of May, 1874, and the stipulation in question extends to the 1st of May, 1877. This extra period of three years, in reference to the waters of California, is not necessary to the protection of the Oregon company. That company is under no obligation with regard to those three years.

§ 697. *If a contract in restraint of trade is divisible it may be held void as to part of its stipulations and valid as to part.*

But the suit is brought and the breach is alleged for a portion of time during which the Oregon company is bound to protect the California company from the interference of said steamer. And the question arises whether the contract is so divisible in relation to the California portion that it can stand for the seven years for which the Oregon company is bound, though it be void as to the remaining three years. We think it is so divisible. It is laid down by Chitty as the result of the cases, and his authorities support the statement, "that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether." The cases cited in support of this proposition are *Chesman v. Nainby*, 2 Strange, 739; *Wood v. Benson*, 2 Crompt. & J., 94; *Mallan v. May*, 11 Mees. & W., 653; *Price v. Green*, 16 id., 346; *Nicholls v. Stretton*, 10 Q. B., 346. In *Price v.*

Green the contract was not to exercise the trade of a perfumer in London, or within six hundred miles thereof; and it was held divisible and good for London only. This case was carried through all the courts. In *Nicholls v. Stretton* the stipulation was that an attorney's apprentice, who was to serve five years, should not, after his term expired, be concerned as attorney for any persons who had, previous to the expiration of said apprenticeship, been a client of the attorney with whom the contract was made, or who should at any time thereafter become his client. It was strenuously and fully argued that whilst the contract might have been good as to past clients it was certainly not good as to future ones, and being an entire contract, the whole was bad. But the court followed the previous decision of the exchequer chamber in *Price v. Green*, held the contract divisible, and sustained the action. We see no reason why this principle should not be followed in the present case. The line of division between the period which is properly covered by the restriction and that which is not so is clearly defined and easily drawn. It is subject to no confusion or uncertainty, and the court can have no difficulty in applying it.

Regarding this objection, therefore, as removed, the covenant made by the defendant seems to stand on the same ground as that made by the plaintiffs with the California company. The same observations may be made with reference to it. The public was not injured by being deprived of any of the business enterprise of the country. The vendees did not incapacitate themselves from carrying on business just as they had previously done, and in the same locality. Their business was rather facilitated by the arrangement. Finally, the stipulation, it will be presumed, was founded on a valuable consideration in its influence upon the price paid for the steamer; its object and purpose was simply to protect the vendors, and if we except the three years before considered in its relation to California, its restraining effect extended no farther than was necessary for their protection. We are unable, therefore, to see anything in the contract, so far as it is now in question, which militates against public policy.

There are no other points adverted to which demand the serious consideration of the court. Judgment reversed, and the case remanded to be proceeded in according to law.

JUSTICES CLIFFORD, SWAYNE and DAVIS dissented.

WESTERN UNION TELEGRAPH COMPANY v. BURLINGTON & SOUTHWESTERN RAILWAY COMPANY.

(Circuit Court for Iowa: 3 McCrary, 180-143; 11 Federal Reporter, 1-10. 1882.)

STATEMENT OF FACTS.—The Burlington & Southwestern Railroad Company gave a mortgage on its property, and on default a bill was filed to foreclose, a receiver was appointed, and the property was sold, pursuant to decree. After the execution of the mortgage, but before its foreclosure, the company contracted with the Western Union Telegraph Company to construct and operate a line of telegraph along the line of the road, giving said company certain exclusive privileges over other telegraph companies. The telegraph line was duly built and operated, and, after the foreclosure sale, the purchaser claimed the telegraph line as passing by the master's deed. A bill was filed by the telegraph company, and a cross-bill by the purchaser. Further facts appear in the opinion of the court.

Opinion by McCrarty, J.

We will consider, in the light of the foregoing facts — *First*, what are the rights of the telegraph company with respect to the telegraph line and property, independently of the foreclosure proceedings; and *second*, to what extent, if at all, are those rights affected by those proceedings. It is insisted, on the part of the respondent, that the contract which is set out in the original bill, and under which complainant claims, is void by reason of certain provisions therein contained, which are alleged to be illegal, immoral and contrary to public policy. Several clauses of the contract have been pointed out as coming within this description, but the one mainly relied upon is the second subdivision thereof, and which is as follows:

“The said railway company further agrees to give to said telegraph company the exclusive right of way on and along the line of said railway, its branches and extensions, for the construction and use of said telegraph lines for commercial and public uses and business; and said railway will not transport upon said railway any material for the construction of a line of telegraph in competition with the lines of said telegraph company, except and for the usual rates charged for similar transportation to other persons doing business with said railway company, nor stop its trains, or distribute material for such parties or their employees, at other than regular stations.”

§ 698. *A railroad company cannot grant one telegraph company an exclusive right to establish lines along its right of way.*

In our opinion it is not competent for a railroad company to grant to a single telegraph company the exclusive right of establishing lines of telegraphic communication along its right of way. The purpose of such contracts is very plainly to cripple and prevent competition, and they are therefore void, as being in restraint of trade and contrary to public policy. They are also in contravention of the act of congress of July 24, 1866, which authorizes telegraph companies to maintain and operate lines of telegraph “over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress.” 14 St., 221. All railroads are by law made post roads. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S., 1; *Western Union Tel. Co. v. St. Joseph, etc., R. Co.*, 1 McC., 569; S. C., 3 Fed. R., 430; *Western Union Tel. Co. v. American Union Tel. Co.*, Supreme Court of Ga., 1880.

§ 699. *The fact that one part of a divisible contract is void, as against public policy, does not make other parts null and void.*

We therefore must hold the second subdivision of the contract to be void. We are, however, inclined to the opinion that the invalidity of this provision of the contract does not render the entire agreement null and void. The contract embraces several distinct promises on the part of the railroad company, besides the one respecting the exclusive right of way; as, for example: (1) That it will furnish and distribute the poles; (2) that it will furnish laborers to erect the line; (3) that it will maintain the poles in good order, and keep the wires in good repair; (4) that it will furnish office room at its railway stations; (5) that the telegraph company shall control the commercial telegraphing along the line, and receive the proceeds thereof; and numerous other engagements of like character. The consideration for these promises, and for the additional illegal promise concerning the exclusive right of way, was certain promises on the part of the telegraph company, all of which are legal. It is, therefore, a case in which the railroad company makes a number of promises

to the telegraph company, one of which promises is illegal, but all the others legal, in consideration of certain promises on the part of the telegraph company, all of which are legal. The rule respecting such a contract is thus stated in *Smith, Lead. Cas., Hare & Wall, notes* (5th Am. ed.), 502: "In cases where the consideration is tainted by no illegality, but some of the . . . promises . . . are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another." And in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall., 64 (§§ 694–697, *supra*), the supreme court laid down the rule that contracts in restraint of trade are divisible, and "when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void, as being in restraint of trade, while the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether." Page 70. We think the contract is capable of being construed divisibly.

§ 700. *Rights acquired under an invalid contract, how far protected.*

It is not, however, necessary to pass finally upon this question, for we are clearly of the opinion that, even assuming the invalidity of the entire contract, the plaintiff is entitled to relief, unless deprived of its interest in the property by the foreclosure proceedings, of which we shall speak presently. If we leave out of view entirely any claim of right based upon the contract, we find the complainant in possession of a line of telegraph constructed jointly by it and the railway company, each party furnishing portions of the material and labor for its erection, repair and operation. The railway company furnished the poles and all the labor, except a foreman, to construct the line; the telegraph company furnished a foreman to superintend the work, and also furnished the wire and insulators. This certainly constituted the two companies joint owners of the property. In this respect the case does not differ materially from several other telegraph cases which have recently been considered in this circuit. *Atlantic & Pacific Tel. Co. v. Union Pac. R. Co.*, 1 McC., 541; *Western Union Tel. Co. v. Union Pac. R'y Co.*, id., 558; S. C., 3 Fed. R., 1; *Western Union Tel. Co. v. St. Joseph, etc., R. Co.*, id., 565; S. C., 3 Fed. R., 430. (a) In each of these cases the contract, being substantially the same as the one now before us, was held void, but the right of the railroad company, in consequence of such invalidity, to take the whole telegraph property, was emphatically denied. The following quotation from the opinion in the case first cited applies to the point now under consideration:

"No case has been cited in argument, nor have I been able to find one, which holds that a court of equity, having jurisdiction of the parties to and the subject-matter of an illegal contract should require one of such parties to give up what he has received under it, without requiring the other to do the same thing. Many cases hold that a corporation which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these con-

(a) See CORPORATIONS, §§ 875–881, 890–892, 893–900, 1018, 1019.

tracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and subject-matter are now before the court, it is the duty of the court, as far as possible, to place them *in statu quo*."

The ruling in that case was that the railroad company should be restrained by injunction from interfering with the possession of the telegraph company until a bill should be filed, or other proceedings instituted to cancel and set aside said contracts upon the return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties. And in the case last named this court, in discussing the same subject, said: "If the defendants, after years of acquiescence in the contract in question, after receiving its benefits, and after a property had been built up under it to which others made claim, became suddenly convinced that it was a void contract, it was their duty to apply to the court for relief, praying a cancellation of the contract, and a full and fair settlement of all accounts growing out of its execution in the past. Until they seek some such remedy, and until a fair settlement and a full accounting can be had, they will be enjoined from attempting to eject the plaintiff or to seize the property."

In the second case the court laid down the rule, and cited many authorities to sustain it, that, assuming the invalidity of the contract, and even assuming that it was immoral, the property accumulated and constructed under it must, as between the parties, be disposed of according to equity; and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract. *Planters' Bank v. Union Bank*, 16 Wall., 483, and cases cited. We are entirely satisfied with the ruling established in these cases, and it follows that the complainant, the Western Union Telegraph Company, is entitled to decree unless deprived of all interest in the property by the foreclosure proceedings, which will now be considered.

§ 701. *Rule of law as to personal property attached to the freehold. Fixtures.*

In considering the effect upon the rights of the telegraph company of the foreclosure sale, we will first inquire whether the telegraph poles and wire and the constructed line became a part of the realty, so as to pass under the mortgage to the mortgagees as after-acquired property. It is plain that the parties did not intend to make the line a part of the realty, so as to follow the fee to whomsoever conveyed. The contract into which they entered is entirely inconsistent with such an assumption, for, if the poles, wires and instruments had become at once part of the real estate, it would have been within the power of the railroad company, immediately upon their erection, to convey them to a third party, and thus deprive the telegraph company of all its interest under the contract. Whether the contract is valid or invalid, it may be looked into for the purpose of ascertaining the intent of the parties in placing the poles and wires upon the right of way. But the intention of the parties is not the only thing to be considered. Ordinarily the distinction between real estate and personal property exists in the nature of the thing itself, and does not depend upon the convention of the parties with respect to it. By no agreement of parties can the bricks which are built into the wall, or the shingles that form the roof, or the stones that go into the foundation of a house, be made to retain their character as personal property. This, for the reason that they become so inseparably affixed to the realty as to be a part of it, independently of any question as to the intent of the parties. But it is otherwise, says Denio, J., in

Ford v. Cobb, 20 N. Y., 348, "with things which, being originally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to, the things real with which they are connected; though their connection with the land or other real estate is such that, in the absence of an agreement or any special relation between the parties in interest, they would be a part of the real estate."

With respect to this class of property the parties in interest may agree that it shall remain personalty, subject to be removed. This rule is supported by a long line of well considered cases, and I do not understand that its soundness as a general rule is called in question here. Its application to this case can only be denied on the ground that the respondent is an innocent purchaser at the master's sale, without notice of any claim on the part of the complainant to the telegraph property. We do not find it necessary to decide the important question whether the railroad company has the fee of the land acquired for right of way. We should, however, be slow to hold that a railroad corporation, under the law of Iowa, may obtain for this purpose a strip of land across the state, perhaps cutting through farms and villages, and use it for any purpose except for right of way, or convey it to any party for private use. The consequences which might flow from such a doctrine would be very serious indeed. *Redfield, Railways*, 247, 249. As between the parties, it is well settled that the mortgagee, as to after-acquired property, takes only the interest of the mortgagor. Only the interest of the railway company in the telegraph line, subject to the interest of the telegraph company therein, passed under the mortgage. *United States v. New Orleans R. R.*, 12 Wall., 362; *Fosdick v. Schall*, 99 U. S., 235; *Myer v. Car. Co.*, 102 U. S., 1 (Conv., §§ 1550-53); *Loomis v. Railroad Co.*, Dist. Iowa, Jan., 1882.

§ 702. *Rule as to purchaser with notice, or put upon inquiry.*

It only remains to be determined whether the respondent, as purchaser at the master's sale, can be regarded as a *bona fide* purchaser of the telegraph line for value, and without notice of the claim of the telegraph company. We think he cannot be so regarded, and for the following reasons: 1. The telegraph company had a right to claim its interest in the telegraph line as personal property against the mortgagee, as well as against the railway company. The consent of the former to its retaining its character as personalty was not necessary. *Tift v. Horton*, 53 N. Y., 377, and cases cited.

Whether the purchaser at the foreclosure sale would ordinarily take only the right of the mortgagor in after-acquired property, or should be regarded in the light of a purchaser for value without notice, need not be determined, because,

2. The respondent, Smith, had notice of the complainant's claim upon said property, or at least, the facts, as they existed and were known to him, were sufficient to put him upon inquiry. The agreed statement of facts shows that he had operated the road as receiver for nearly five years prior to his purchase, during which time he must have known of the existence of the telegraph contract, and of the fact that the line had been constructed and was being constructed thereunder; and it is stipulated that "the trustees in the aforementioned mortgage and the said Smith had full knowledge that the contract had been made between the railroad company and the telegraph company; but said trustees were not informed of the contents thereof, save that some agreement was thereby made for the operation of the line." This was sufficient to put, not only respondent, but the trustees, upon inquiry, and inquiry would have led

them to a knowledge of all the facts. Besides, we think the telegraph company was, in an important sense, in possession of the line. All the commercial business done upon it was done in its name. Printed message blanks were in constant use, showing that it was operating the line. Its sign appeared at all the offices along the line, and even the operators were employees of the railway company. We think the possession of the telegraph company was sufficiently open and notorious to advise the public and the purchaser at the foreclosure sale that they had or claimed an interest in the property.

3. At the time of the master's sale there was on file in the foreclosure case an amended bill of the trustees in the mortgage, alleging the execution of the telegraph contract, reciting its provisions, and containing the following averment: "That said contract is subject to said mortgage, and these complainants are entitled to all the rights, privileges and benefits of said railway company, by, in, under or in relation thereto, and said mortgage is a first lien thereon." And said amended bill prayed for a decree "declaring said contract subject to said mortgage, and said mortgage a prior lien thereon, and foreclosing the right, title and interest of the railway company therein." To this amended bill an answer was filed, also prior to the master's sale, substantially admitting the allegations contained therein, and consenting to a decree as prayed. After the master's sale, and upon the filing of the bill in the case, said amended bill was dismissed.

Without considering the question so much discussed by counsel, whether this record should operate to estop the complainant from now claiming the ownership of the telegraph line, we have no hesitation in saying that it was sufficient notice to the purchaser at the sale that the telegraph company claimed an interest in that property, so that he was not a purchaser for value and without notice. We are thus brought to the conclusion that the rights of the complainant, the telegraph company, were in nowise affected by the foreclosure proceedings.

The respondent in his cross-bill does not offer to account. He does not recognize, but, on the contrary, distinctly repudiates, the claim of complainant of an interest in the telegraph property. The claim of the respondent plainly is that he is the owner of the entire line, and entitled to the possession and control of the same without interference from the complainant. In his answer he distinctly admits the seizing of the telegraph property and lines, and the cutting of the wires to destroy the connection between them and the remaining portion of the Western Union Telegraph system, and the prayer of his cross-bill is that the telegraph company may be enjoined from intermeddling or interfering with said lines and wires. In accordance with the principles above announced, the decree must, therefore, be against the complainant in the cross-bill. The prayer of the complainant in the original bill is as follows:

"Therefore, your orator prays that an injunction may issue to restrain these defendants, their agents, servants and employees, from preventing your orator's reconnecting the wires that have been severed as aforesaid, and to restore the connections which have been severed, and from preventing your orator from using the said lines and wires and enjoying the benefits to which it is entitled under said contract of June 28, 1871, and from interfering with your orator in the use of said telegraph wires until the rights of the parties may be adjudicated in the said foreclosure proceeding herein heretofore referred to, and until the further order of this court, and that upon the final hearing of this cause the said injunction may be made perpetual."

We do not think it proper to grant the complainant all the relief here asked, but in our own view of the case, it is entitled to a decree to enjoin and restrain the respondents, their agents, servants and employees, from preventing the complainant's reconnecting any wire that may have been severed, and from interfering with the restoration of any connection that may have been severed, and from preventing complainant from possessing and using said lines and wires as heretofore, until the rights of the parties with respect thereto shall be adjudicated.

LOVE, D. J., concurs.

§ 703. In restraint of trade—Reason of the rule.—The rule of the common law which makes contracts in restraint of trade void is founded on the principle that the obligation assumed by the contract is one hostile to the policy of the law, in that it surrenders legal rights, the exercise of which is conducive to public interest. If a case is not within this principle it is not within the rule to which this principle has given existence. So, if the policy of the law at the time a contract was entered into was to restrain the trade which the contract was alleged to be in restraint of, then it seems that the contract would be good unless it went so far as to contravene the spirit and intention of the law. *Dixon v. United States*, 1 Marsh., 181.

§ 704. Agreement to discontinue the manufacture and sale of a patented machine.—Two joint owners of a patent entered into an agreement by which one of such joint owners agreed that after reimbursing himself for advances, etc., he would discontinue the manufacture and sale of the patented machines. Instead of ceasing the sale and manufacture as soon as he had reimbursed himself, he continued to make and sell the patented machines. In an action by the other party to the contract against him for an accounting, it was held that the contract was not void as being in restraint of trade; that the defendant could not set up the invalidity of the patent as a defense, nor could he set up a right to manufacture the patented article under a license for a third party. *Kinsman v. Parkhurst*, 18 How., 201.

§ 705. Agreement to allow but one telegraph line along a railway.—A contract between a railway company and a telegraph company, that no other telegraph company shall be allowed to construct its line upon the right of way of the railway company, is not void as being against public policy. *Western Union Tel. Co. v. Atlantic & Pac. Tel. Co.*, 7 Biss., 370.

§ 706. Agreement by railroad company to lease sleeping cars of a certain company, and no other.—A contract which compels a certain railroad company to lease of a certain car company, and of no one else, such drawing room and sleeping cars as it requires, is a contract tending towards a monopoly, and is one which will not be favored in a court of equity. *Pullman Palace Car Co. v. Texas & Pac. R. Co.*, 11 Fed. R., 635 (§§ 1488-90).

6. Uncertainty.

§ 707. Sale of newspaper route—Uncertainty—Statute of frauds.—By a contract between the publisher of a newspaper and F., the latter, for a certain sum, was to have the exclusive right to sell and deliver that paper on a certain route in the city of Washington. The publisher sold the paper and the purchaser in turn disposed of it to the defendant. F., however, had renewed the contract with both the latter parties. The defendant having refused to deliver papers to F., the latter brought suit. *Held*, that no action could be maintained upon the contract, because it was void for uncertainty and want of mutuality, and also because it was not in writing, as is required by the statute of frauds in a case like this, where the contract is one which by its terms is not to be performed within a year. *Fallon v. Chronicle Publishing Co.*,* 1 MacArth., 483.

§ 708. Erasure of consideration expressed in a grant.—It is no objection to the validity of a grant that the consideration expressed therein has been erased, where there is no question of fraud. Had the whole grant been destroyed its contents could have been shown by parol, and therefore the amount erased from the deed can be so shown. *Polk v. Wendal*, 9 Cr., 97.

7. *Margins, or Optional Contracts.*

SUMMARY—Contract to sell goods which vendor does not own, §§ 703, 718.—Contract cannot be shown to be a wager by parol, § 710.—Optional contracts valid, when, § 711.—Contracts known as "puts," void at common law, § 712.—Contracts for future delivery, § 713.—Accounting for profits, § 714.—Rights of bona fide holder of note, § 715.—Secret intentions of one party, § 716; intention must be mutual, §§ 717, 720.—Courts may go behind the writing, § 719.—Contracts valid in their inception, § 731.—Money advanced by agents, § 723.—Intending to pay differences on a sale of wheat, 723.

§ 703. A contract to sell and deliver in future goods which the vendor does not then own is not an invalid contract. *Porter v. Vieta*, §§ 731, 735.

§ 710. A contract in writing to deliver a certain quantity of corn at a certain time, for a certain rice, cannot be shown by parol to have been a mere wager on the price of corn at a future day, without any intention of delivering the corn according to the writing. *Ibid*.

§ 711. A contract for delivery of goods at seller's option is valid if the option refers merely to the time of delivery; but if the option means that the seller may deliver or not, then the contract is invalid. If it was the *bona fide* intention of the parties, at the time of making the contract, that the goods specified should be in fact delivered, then the contract is valid, although the parties afterwards settled by payment of the difference between the market price and the contract price. And this intention is to be gathered from all the circumstances of the case. *Melchert v. American Union Tel. Co.*, § 736.

§ 712. Contracts known as "puts," and similar in form to the following: "Received of E. §70. in consideration of which we give him, or the holder of this contract, the privilege of delivering to us or not, prior to 8 o'clock P. M., of June 30, 1873, by notification or delivery, ten thousand bushels No. 2 oats, regular receipts, at forty-one cents per bushel, in store; and, if delivered, we agree to receive and pay for the same at the above price," are usually gambling contracts, contrary to public policy, and therefore void at common law. *Ex parte Young*, §§ 727-730.

§ 713. Contracts to deliver grain at a day future are not necessarily gambling contracts, within the meaning of the Revised Statutes of Illinois, ch. 83, § 180. *Gilbert v. Gaugar*, §§ 731, 733.

§ 714. Parties who engage together in an illegal stock transaction, and make a profit, are bound to account to one another in an action of contract for such profits, after the illegal transaction has been closed. *Wann v. Kelly*, §§ 733, 734.

§ 715. A contract which would be a wager may not be a "gambling contract," within the meaning of the Illinois statutes. And the guaranty of a note given in payment of such a contract is good in the hands of a *bona fide* holder for value. *Jackson v. Foote*, §§ 735-737.

§ 716. The secret intentions of one party, contrary to what appears on the face of the contract, and not communicated to the other party, cannot prevail to make a contract illegal which is otherwise valid. *Clarke v. Foss*, §§ 733-743.

§ 717. The intention that a contract shall be a mere betting upon the market, without any expectation of actual performance, must be mutual, and constitute an integral part of the real contract, in order to vitiate it. *Ibid*.

§ 718. A contract for the future delivery of personal property which the seller does not possess when the contract is made, or any means of getting, though entered into for the pure purpose of speculation, is not illegal. *Ibid*.

§ 719. Courts may go behind the writing and ascertain what the real intent and meaning of the parties to a contract were; and if it appears that the writing does not express the real intent of the parties, but is merely colorable, and used as a cloak to cover a gambling transaction, the court will not lend its aid to enforce the contract, however fair on its face; or, if securities are given, will interfere on grounds of public policy and for the public good, rather than for the purpose of relieving a party to the inhibited transaction to set aside such securities. *Ibid*.

§ 720. An assignee in bankruptcy brought suit to set aside and cancel certain notes and a mortgage given by the bankrupts to the defendants, on the ground that the same were void as being given to secure an indebtedness arising out of certain option contracts for the sale and delivery of grain, which were claimed to be wagering contracts under the laws of Illinois. The defendants as agents of the bankrupts had made the contracts with third persons, and paid what the bankrupts had lost on them. The bankrupts, when they gave the orders for the sale of the grain, had no grain to deliver, no contracts made by which they expected to obtain it, and no expectation of ever having it delivered by shipping it to the defendants. Part of the contracts were performed by the defendants by the purchase and actual delivery

of the grain to the parties to whom the sales were made. As to the balance of the grain contracted to be sold, the defendants went upon the market and purchased it of different persons, and had it ready for delivery; and then finding other persons who had similar deals for purchases and sales, formed rings or temporary clearing houses, through which, by means of a system of mutual offsets and cancellations that had grown up in the board of trade, where these transactions took place, the contracts were settled by an adjustment of differences, without an actual delivery or change of possession. The intention of the parties was that these contracts should be performed in much the same manner as they were actually performed. It was held (1) that these contracts were not void for illegality; (2) that, supposing it had been the intention of the bankrupts and the defendants that the contracts were not to be performed, this would not make them illegal so long as the parties to whom the grain was sold did not participate in the illegal intention; and (3) that, if the contracts were illegal as charged, it did not follow that the securities given by one of the principals in the transaction to secure the moneys previously advanced by their agents to pay the losses springing out of the contracts were contaminated with the same vice. *Ibid.*

§ 721. If contracts for the future delivery of grain are valid in their inception, and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, which takes the place of actual performance, will not make them illegal. *Ibid.*

§ 722. Under the statute of Wisconsin, declaring all contracts, notes or agreements for reimbursing or repaying any money knowingly advanced for any betting or gaming at the time or place of gaming to be void, agents who advance money for their principals to pay the margins on gambling contracts cannot claim repayment from their principals. Notes given for such a claim are void for want of consideration. *In re Green*, §§ 743, 744.

§ 723. A contract for the purchase and sale of wheat, which is only colorable, neither party intending to deliver or accept the wheat, but only to pay differences according to the rise and fall of the market price, is a gaming contract, and void as against public policy, as well as under the statutes of Wisconsin. These statutes make void all agreements to pay money lost on a wager, either to a party winning or to a party who advances it in aid of the enterprise. The form of the contract is not conclusive, and the circumstances will be inquired into. *Ibid.*

[NOTES.— See §§ 745-749.]

PORTER v. VIETS.

(Circuit Court for Illinois: 1 Bissell, 177-180. 1837.)

STATEMENT OF FACTS.— Action upon a contract entered into with plaintiff by defendant in April, 1857, for the delivery of fifteen thousand bushels of corn at forty-eight cents a bushel in the latter part of June. At the time it was to be delivered corn had risen to sixty-three cents a bushel. Defendant in his answer states that at the time the contract was made he did not have the corn and did not expect to get it, nor was there any intention to deliver it, but that the contract was one for the payment of the difference between the price at which he agreed to deliver the corn and the market value of the same at the time it was to be delivered; that it was a mere bet upon the price of corn at a future day.

§ 724. *An agreement to sell and deliver in future is valid.*

Opinion by DRUMMOND, J.

Whatever doubts may have formerly existed, it must now be considered the settled law both in England and in this country, that the mere fact that a man may not have in his possession, and has not attempted to acquire possession of, a particular commodity, which he undertakes to sell, deliverable at a future time, will not render illegal a contract made by him to sell and deliver the article. He is bound by his contract, nevertheless, and must deliver the property or be subject to the consequences of a non-delivery. It is an agreement to sell and deliver at a future day, and to release a party from such a contract, because he did not at the time possess the property, would interfere too much with commercial contracts. People might differ about the propriety of a man

making such a contract who did not know certainly where he was to acquire the property, but having made it, the courts will compel him to abide by it.

Stock contracts have in some of the states been placed under certain restrictions by the legislature, but there has been no legislation touching such contracts as this before the court. If corn had fallen fifteen cents a bushel, Viets would of course have insisted on Warren Porter & Co. complying with their contract. Both parties entered into it with full knowledge of the risk they run, and the court will not help one of them because his judgment was unsound or because something occurred that he did not foresee. If it be said that it causes personal or combined efforts to be made to affect the price of the article, of that also the parties were fully aware before they made the contract. In this respect they stood on terms of equality.

§ 725. *A written contract cannot be varied by oral testimony.*

It is not necessary to decide in this case whether a wager between these parties as to the price of corn at a particular time was valid or not. The defendant now insists that he did not make such a contract as is presented to the court by the pleadings in the case, but that it was an agreement to pay the difference between the price of corn as stated, and the price at a future day; in other words, he wishes to prove what the law determines is ordinarily the measure of damages for the non-performance of his contract. The rule is well settled that when two men make a contract, and reduce it to writing, and sign it, it is *the contract* between them. It cannot be shown verbally that something different was intended at the time from what appears in the writing.

It is a rule resting upon the soundest principles, and one of uniform application. Here no fraud is pretended. The contract is free from doubt or ambiguity. It is to deliver a certain quantity of corn at a certain time for a certain price, all set forth in writing. The defendant says he wishes to show that the intention of the parties at the time was to make a wager as to the price of corn during the last half of June, and that the amount of the wager and the party that was to win or lose was to depend upon the market price of the corn. Now it may be true that the result is precisely the same—that is, the one party loses and the other gains the same amount as in a wager. So it is in any case of this kind, when a party does not perform his contract. But that circumstance does not make the contract the same. In the case of a wager on the price, when a man pays the “difference,” he performs his contract, but he does not fulfil this contract by paying the difference. He meets the penalty the law imposes for a breach of it. Here this defendant wishes to establish orally that another contract was made at the time, not in writing, and which he alleges was illegal, in order to make out the illegality of the written contract. This cannot be done. No doubt all contracts which are illegal may be attacked, but no case has been shown which authorizes a party to prove, verbally, that another contract (in itself illegal) existed, and so get rid of a written contract on its face unexceptionable. Demurrer sustained and judgment for plaintiffs.

MELCHERT v. AMERICAN UNION TELEGRAPH COMPANY.

(Circuit Court for Iowa: 8 McCrary, 521-533; 11 Federal Reporter, 193-201. 1892.)

STATEMENT OF FACTS.—Action for damages for not delivering in due season a telegram intrusted to defendant instructing plaintiff's agent in Chicago as to the course he should take with reference to certain “option deals” in rye.

By reason of the failure of defendant to have the message promptly transmitted and delivered plaintiff alleges that he lost \$750. The defense was that the contracts by which plaintiff lost his money were illegal and void and that defendant was not responsible therefor.

Opinion by LOVE, J.

Several questions were argued at the bar, which, with my view of the case, I consider it unnecessary to decide. There is one view which is, in my judgment, entirely conclusive of the controversy. Assuming that the alleged negligence has been satisfactorily established, it is evident that we must proceed to inquire whether or not the contracts of July and August, 1880, were valid and binding agreements, which the plaintiff was required by law to fulfil. The telegram of September 8, 1880, instructed the plaintiff's agent to "cover rye," and it now clearly appears that these words referred to the two contracts for the sale of rye, to be delivered in September, at the plaintiff's option. The purpose of the telegram was to provide for the fulfillment of these contracts. If they were illegal contracts, the plaintiff was not bound to fulfil them, and he could have suffered no loss from the failure to fulfil them. Nay, if these contracts were illegal gambling contracts, within the statute laws of Illinois, it was the plaintiff's plain duty not to fulfil them, and he cannot complain of the defendant's telegraph company that they were not sufficiently diligent in aiding him to perform his unlawful agreements. The contracts in question were for the delivery of rye in the month of September, at the seller's option.

§ 726. *General rules as to sales at option of one party.*

A contract for delivery at the seller's option may be valid or invalid. It depends upon the nature of the option as shown in the intention and purpose of the parties. The option may refer to the fact of delivery, or merely to the time of delivery. If it be the intention of the parties that the property shall be in fact delivered, giving the seller's option as to the time of delivery within a certain period, I see no valid objection to such a contract. It is but a contract for sale of property to be delivered in the future within a given time. But if it be not the *bona fide* intention of the parties that the property shall be in fact delivered in fulfillment of the contract of sale, but that the seller may, at his election, deliver or not deliver, and pay "differences," then the contract is void. Such a dealing amounts to a mere speculation upon the rise and fall of prices. It required no capital, except the small sums demanded to put up margins and pay differences. It promotes no legitimate trade. Any impecunious gambler can engage in it, with infinite detriment to the *bona fide* dealer. It enables mere adventurers, at small risk, to agitate the markets, stimulate and depress prices, and bring down financial ruin upon the heads of the unwary. It enables the unscrupulous speculator, with little or no capital, to oppress and ruin the honest and legitimate trader. Corners and Black Fridays and sudden fluctuations in values are its illegitimate progeny.

The supreme court of Illinois, in *Pickering v. Chase*, held that contracts where the seller has the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for, the grain, just as they choose, are optional contracts in the most objectionable sense. 79 Ill., 328. The question is, what was the intention of the parties in the inception of the contract? For if, in its inception, the contract was *bona fide*—if it was the true intent of the parties that the property should be in fact delivered—it could be no valid objection that they afterwards, at the time for delivery, arranged the controversy between them by the payment of the difference between the contract

and market prices. Nevertheless, the subsequent conduct of the parties in dealing with the contract—in adjusting, settling, or fulfilling it—may often, as evidence, cast strong reflected light upon their original intentions in making it.

The contract now in question was made in Chicago, and being an Illinois contract, its validity must be determined by the law of that state. In the criminal code of that state we find the following:

“Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void.” R. S. 1874, pp. 372, 373, § 138.

In the case of *Tenny v. Foot*, Legal News, November 16, 1878, p. 71, Judge McAllister, speaking of the statute, says: “The statute was passed from motives of public policy, and to repress an evil; hence it follows, from established rules of law and their analogies in such cases, that, no matter what form the transaction bears as to the terms of the contract, still, if such form be colorable only, and the real intention of the parties be that there is to be no sale of the article—no delivery or acceptance of it—but the transaction is to be adjusted only upon differences, it is a gambling transaction within the statute.”

What, then, was the intention of the parties to the contract in question as to the delivery of the rye? Was it their purpose in making the contract that there should be delivery of the grain, either by consignment, or by purchase in store and transfer of warehouse receipts? Or was it their intention that the contract should be fulfilled by putting up margins and paying differences, without any delivery whatever? In seeking to ascertain the intentions of parties to such transactions as the one under consideration, it is evident that it will not do to place any great stress upon the mere terms of their contract, or upon their own declarations, whether under oath or not. Parties to such contracts will always seek to give them the form and semblance of legality, and all our experience admonishes us to receive with extreme caution, if not absolute distrust, what parties charged with transactions apparently illegal say respecting the innocency of their own intentions. In this connection it will not be amiss to advert to the just and pertinent observations of Chief Justice Cole, of the supreme court of Wisconsin, in *Barnard v. Backhaus*, found in the *Northwestern Reporter* of July 23, 1881, p. 596.

“But it is the manifest duty of the courts to scrutinize closely these time contracts, and determine whether they are really intended by the parties to be what their language imports,—real contracts for the future delivery of grain,—or whether, in fact, they are mere bets or wagers on the price at some distant day. It will not do to attach too much weight or importance to the mere form of the instrument, for it is quite certain that parties will be astute in concealing their intentions, and the real nature of the transaction, if it be illegal. It may safely be assumed that parties will make such contracts valid in form; but courts must not be deceived by what appears on the face of the agreement. It is often necessary to go behind or outside of the words of the contract—to look into the facts and circumstances which attended the making of it—in order to ascertain whether it was intended as a *bona fide* sale and purchase of property, or was only colorable. And to justify a court in upholding such an agreement, it is not too much to require a party claiming rights under it to

make it satisfactorily and affirmatively appear that the contract was made with actual view to the delivery and receipt of the grain; not as an evasion of the statute against gaming, or as a cover of gambling transactions."

We must look at the actions of interested or "accused parties, rather than their mere words, to ascertain their real intentions. We must consider what they have done, rather than what they have said, when called to account for their actions. We can best learn what interpretation the parties themselves have put upon their own contract, by considering what they have done under and in pursuance of it, with a view to its settlement or fulfillment.

Considered in this view, do we find that the plaintiff, after having sold fifteen thousand bushels of rye for September delivery, made any preparation whatever, prior to September 8th, for the purchase of rye, either in the country or upon the board of trade? None whatever. But it is equally evident that when, on the 8th of September, rye had advanced to eighty cents, and the plaintiff made up his mind to protect himself, he furnished no money to his factor to purchase rye in store. But he instructed his agent to "cover rye," and do it "immediately." What did he mean by this? Could he have supposed for a single moment that this factor would, without any arrangement whatever, advance \$12,000 to purchase rye for actual delivery? If it was his understanding of the contract that it called for actual delivery, why did he not, seeing that rye had advanced from sixty-five and one-half to eighty cents, and was still rising, remit money, or make some arrangement for money to purchase "immediately?" If he knew that it was the understanding of himself and his vendee that the contract should be settled upon differences, he might well ask his factor to advance the small sum required to pay differences. This would have been nothing extraordinary; and to my mind it is perfectly clear that when he said "cover rye," and do it "immediately," he meant that his factor should purchase rye on time for future delivery, to meet his own contracts for September delivery. Then one contract could be made to balance another by the mere payment of differences; and we shall presently see that the plaintiff's factor so understood him, and proceeded to make the purchase accordingly and settle the plaintiff's contracts upon the differences. In this way the plaintiff sought to protect himself against loss which might result from a still further advance in rye. We cannot for a moment suppose that the plaintiff meant to ask his factor to take \$12,000 in cash out of his own pocket and purchase fifteen thousand bushels of rye in store for his protection. He clearly had in view a purchase by which his factor could settle the contracts to be "covered" by the mere payment of differences. No inference opposed to the view here taken by the court, as to the plaintiff's intention to settle his contracts by the mere payment of differences, can be justly drawn from the mere suggestion in his telegram of September 8th, to the effect that his factor could possibly save money by "buying cash." Considering that the plaintiff was then already behind with his factor, and had failed even to furnish money to put up margins, it would be preposterous to suppose that he meant to intimate that his factor should advance \$12,000 cash to purchase rye on his account. What he doubtless meant was that money could be saved by purchasing rye for cash delivery instead of time delivery, in which case the differences would be payable in cash at the time of the purchase, instead of becoming payable at some future time in September. It was in this way, beyond question, that the plaintiff thought his factor could save money for him when he said, "I think if you would buy cash you save money."

Let us now turn our attention from the principal to the agent—from the plaintiff to Erick Gerstenberg, the factor, by whom the contracts were made and settled. The contracts were made in his name, not in the plaintiff's name. Was it Gerstenberg's understanding that it was the intention of the parties that there should be an actual delivery of the grain, or that it should be settled by the payment of differences at the option of the seller? Gerstenberg's testimony has been twice taken, and he has made the best case he could for the plaintiff. Nowhere do we find that the factor even notified the plaintiff to make consignments, or remit money to purchase in Chicago, or to prepare in any way to deliver the large amount of grain for which the factor was directly and personally responsible. Gerstenberg evidently understood that the contract was to be settled by the payment of differences, and that his responsibility extended no further than the sums which might be required for that purpose. In Gerstenberg's account with the plaintiff, which is exhibited, we find several entries for "differences" charged, paid and credited. The telegrams tell the same tale. Gerstenberg in one dispatch informs the plaintiff that he is "seven margins behind," and on the 8th of September, after Gerstenberg received orders to protect the plaintiff, to "send margins, sure." If Gerstenberg knew that the contract required actual delivery of grain, why did he not call for money to buy it? What good would mere margins have done for Gerstenberg's protection if he was compelled to make actual delivery? But, on the other hand, if it was Gerstenberg's understanding that the contracts were to be fulfilled by the payment of differences, it was very natural that he should call for margins from the plaintiff. Finally, how were the contracts in question adjusted by Gerstenberg? He had in July and August sold for September delivery, seller's option, ten thousand bushels of rye to the firm of A. M. Wright & Co., and five thousand bushels to another party in his own name, but for the plaintiff's account. On the 9th of September, after this factor had received orders to "cover rye," etc., he purchased from A. M. Wright & Co. fifteen thousand bushels of rye at, I suppose, of course, the then prevailing rate of eighty-five cents. Gerstenberg was then, by the form of his contract, to deliver to Wright & Co. ten thousand bushels of rye at sixty-five and one-half cents per bushel, and Wright & Co. were bound in terms to deliver to Gerstenberg fifteen thousand bushels at the price prevailing on the 9th of September; that is, eighty-five cents per bushel. But was any rye delivered or intended to be delivered by either party, or was it their understanding that their respective contracts should be settled and satisfied by the payment of differences? How can we judge of their intentions except by considering what they actually did in adjusting their contracts? Is it not just to conclude, in the absence of proof to the contrary, that parties to a contract adjusted according to their understanding of their own intentions in making it? There is no evidence that either Gerstenberg or Wright & Co. ever bought or owned a bushel of rye to deliver under their contracts. They settled by the payment of differences. It is perfectly evident that it was Gerstenberg's purpose, in the purchase of the fifteen thousand bushels from Wright & Co., to lay the foundation of a settlement in that way. Neither he nor Wright & Co. had evidently the least idea of investing money in these respective purchases for actual delivery. This is made further evident by the account which Gerstenberg gives of the remaining five thousand bushels which he had sold in August to another party for September delivery, at sixty-eight and one-half cents, on the plaintiff's account. This, he tells us, was settled by a "ring," of which he gives the following account: The

party to whom he had sold these five thousand bushels had the same quantity and quality of grain sold to Lyon & Co.; Lyon & Co. had the same thing sold to Nichols & Co., Nichols & Co. to Wright & Co., and Wright & Co. to Gerstenberg, as stated above. Instead of Wright & Co. delivering that rye to Gerstenberg, and Gerstenberg to the other people, and so on, so that eventually it would come back to Wright & Co., Gerstenberg simply paid the difference in money value, and "that is what the trade terms a ring."

The reasonings of the supreme court of Illinois in *Lyon v. Culbertson*, 83 Ill., 38, are applicable here:

"Had the agreement required the party, before he exercised the option, to have made an offer, or at least have shown that he was able to fulfil his part of the agreement, and was willing to do so, then the contract would have conformed to legal principles, etc.

"It is true, the contract speaks of wheat in store, but neither warehouse receipts were offered, nor was it shown that the appellee had any wheat in Chicago, and it could not have been in the contemplation of the parties to deliver or receive it elsewhere, or it would have been so stated in the contract. The fact that no wheat was offered or demanded shows, we think, that neither party expected to deliver any wheat, but in case of default in keeping margins good, or even at the time of delivery, they only expected to settle the contract on the basis of differences, without either party performing, or offering to perform, his part of the agreement; and, if this was the agreement, it was only gaming on the price of wheat, etc. A contract to be thus settled is no more than a bet on the price of grain during or at the end of a limited period. If one party is not to deliver or the other to receive the grain, it is in all but name a gambling on the price of the commodity, and the change of names never changes the quality or nature of things. There is no evidence that the appellees had contracted for the wheat necessary to fill the contract, or had incurred the least expense towards the performance. The statute has prohibited, under heavy penalties, the sale of wheat on called options, to buy or sell grain, because of its pernicious tendency; but it seems to me that these contracts for the sale of grain, where neither party intends to perform them, but simply to cancel them before or at their maturity, and pay differences, are injurious to trade, and fully as immoral as are the sales of options. It is claimed that this wheat was again sold to ascertain the difference that should be paid. What wheat? it may be asked. There is no evidence that the appellees had any wheat that could be delivered at the place of the contract. So far as we can see, the wheat only existed in imagination, and even this imaginary wheat may have been already sold a number of times before the imaginary fulfillment of the contract."

So, in the case at bar, there is no proof that the plaintiff or his agent, the factor, had in fact any rye to deliver, or any warehouse receipts representing rye in store. If this fact existed, it could easily have been proved, and would doubtless have been established by some competent evidence. There is no evidence that Wright & Co. had a pound of rye in store with which to fill their contract for the sale of fifteen thousand bushels to the plaintiff's factor. Wright & Co., as far as it appears, relied for the fulfillment of the contract upon receiving ten thousand bushels of rye from Gerstenberg, and five thousand bushels from other parties, who, as far as we know, had neither rye nor warehouse receipts to deliver. Why were not some of these parties called to show that

they hold rye or warehouse receipts ready for delivery in fulfillment of their contracts? The inference is that they had none, and that they all depended upon paying differences to adjust their contracts. In my judgment it appears, by a decided preponderance of evidence, that it was not the intention of the parties to the contracts of July and August, 1880, that the rye should be delivered in fulfillment of said contracts either by consignment or the transfer of warehouse receipts, but that said contracts should be adjusted and settled by the payment of differences. These contracts being therefore void, judgment must be given for the defendant.

EX PARTE YOUNG.

(District Court, Northern District of Illinois: 6 Bissell, 53-57. 1874.)

Motion by the assignee of certain bankrupts to expunge certain claims against the bankrupt estates. The facts appear in the opinion.

Opinion by BLODGETT, J.

STATEMENT OF FACTS.—It appears from the testimony submitted with the register's report that in the month of May, 1872, and for several years prior thereto, the bankrupts, Peyton R. Chandler and the firm of Chandler, Pomeroy & Co., were engaged in the business of buying and selling grain on the Chicago market, and as members of the board of trade of this city; that Chandler, Pomeroy & Co. were brokers and commission merchants, and Peyton R. Chandler dealt mainly on his own account as a capitalist, through Chandler, Pomeroy & Co., who acted as his brokers; that about the middle of May, Peyton R. Chandler conceived the idea of making a corner in oats for the month of June then ensuing, and with that view he purchased all the "cash oats" as they arrived in the market, and took all the "options" offered him for June delivery,—his purpose being to own all the oats in the market, and compel those who had sold "options" for June to pay his price; or, in other words, to settle with him by paying such differences as should exist between the prices at which he purchased the options, and the price he should establish for cash oats on the last day of June, when his options matured. In pursuance of this plan, he purchased, between the 15th of May and the 18th of June, two million five hundred thousand bushels of cash oats, being all, or substantially all, the cash oats on the market, and also bought June "options" to the amount of two million nine hundred and thirty-nine thousand four hundred bushels. The total amount of oats in store in this city on the 18th of June was only two million seven hundred thousand bushels, from which it will be seen that Chandler practically controlled the market up to that time, and the total amount received during the remainder of the month was only eight hundred thousand bushels. As incidental to and part of the machinery of this corner, Chandler also sold what are called "puts," or privileges of delivering to him oats during the month of June, for forty-one cents a bushel. These "put" contracts are alike in form, and read as follows:

"Received of E. F. \$50, in consideration of which we give him, or the holder of this contract, the privilege of delivering to us or not, prior to 3 o'clock, P. M., of June 30, 1872, by notification or delivery, ten thousand bushels No. 2 oats, regular receipts, at forty-one cents per bushel, in store; and, if delivered, we agree to receive and pay for the same at the above price.

"CHANDLER, POMEROY & Co.

"P. R. CHANDLER.

"CHICAGO, June —, 1872."

The amount paid by the purchaser of these "puts" was one-half cent per bushel for whatever quantity was named in the contracts. The tickets or contracts were all signed by Chandler, Pomeroy & Co., and part of them were also signed by P. R. Chandler, but Chandler, Pomeroy & Co. acted as the brokers of P. R. Chandler, and their contract was his. The total quantity of oats called for by these "puts" amounted to about three million seven hundred thousand bushels. When Chandler commenced to buy oats with a view to the corner, the price in this market was about thirty-nine cents a bushel. After he took possession of the market he put the price to forty-one cents and upward, and held it there until the 18th of June. In the mean time the price had declined in New York and other markets, so that oats to ship were not worth over thirty-three to thirty-five cents, and July options for this market were not worth over thirty-five cents. On the 18th of June, P. R. Chandler and Chandler, Pomeroy & Co. failed, and the price declined before the close of business that day from forty-one to thirty cents, and continued to decline during the remainder of the month, so that at one time they were as low as twenty-six cents per bushel. Between the time of the failure and 3 o'clock on the 30th of June, the holders of the "puts" claim to have made tender to the bankrupts of the quantity of oats called for by their respective tickets, and the oats not being accepted and paid for, they sold them upon the market that day or the next, under the rules of the board of trade, and have proved up their claims for the differences between the price named in the "put" and that for which they sold. The total amount of claims thus proved up is about \$400,000, and the total amount received by the bankrupts for these "puts" was less than \$19,000,—about \$18,500, as I compute it at half a cent a bushel.

The proof shows conclusively that the plans of Chandler, and the fact that he was manipulating the market with express reference to a corner in oats for June, were well known and understood on the board of trade, while the number of these "put" claims, about one hundred and twenty-five, all, or substantially all, in favor of members of the board, show that the struggle between Chandler, who was endeavoring to hold up prices, and the sellers of "options" and holders of "puts," who were endeavoring to break the price, was quite generally participated in by members of the board. In other words, it was notorious that Chandler was endeavoring to keep the price at forty-one cents or upwards, while the sellers of "options" and holders of "puts" were endeavoring to break down the price. It is true that in this testimony some of the claimants say there was no "corner," or that they did not know that there was a corner, but the cross-examination shows that they knew Chandler was trying to make a corner, and they say he did not do it because he failed before the end of the month, so that, by their own admission, they knew what he was attempting—knew the reasons for his purchase of such large quantities of "cash oats" and options, and knew he did not sustain his corner because the "short interest broke him down," and the moment a man bought a "put," he became identified with the short interest—his interests were antagonistic to Chandler.

§ 727. *"Puts," or undertakings to pay or receive the difference between the agreed price and the market price of grain, are gaming contracts and void.*

The assignee attacks these claims upon the ground that they are fraudulent as against the other creditors of the bankrupt. The main ground, and the only one which I shall consider, is that they are wager-contracts, and therefore void. Without taking time to discuss all the points raised by the

able arguments which have been adduced, and the various reasons urged for and against these claims, it is enough to say that it seems to me that the contracts in question partake of all the characteristics of a wager. It is, in substance, an assertion by the seller of the "put" that oats cannot be purchased on that market before 3 o'clock P. M. of the 30th of June for less than forty-one cents a bushel, and an undertaking to pay the difference between forty-one cents and any market price. If he, Chandler, sustains the price at forty-one cents or above, he wins the half-cent a bushel paid for the "put," because the holder will not deliver, while, if the price goes below that named, he is to pay the difference. This is practically the contract.

It is as manifestly a bet upon the future price of the grain in question as any which could be made upon the speed of a horse or the turn of a card. The evidence in this case shows that in nearly all the cases of settlements on "put" or "option" contracts the grain is never delivered, nor expected to be delivered, but the parties simply pay the difference as settled by the prices. But, if that were not so in all cases, it is clear that in this case no delivery of the grain was intended by these "put" holders, because they knew that Chandler controlled all the oats in the market and fixed the price, and that their only expectation for success depended on their being able to break the market before their time for delivery expired. Some of them say that they intended to deliver the oats, but it is absurd to suppose that they intended to deliver, unless they could do so for less than forty-one cents. They intended to deliver if they could break Chandler, or prevent his "corner" from culminating, as the jockey may intend to walk his own horse over the course after he has poisoned or lamed that of his competitor. They did not intend to deliver if Chandler succeeded. Thus a struggle inevitably ensued between Chandler and the holders of this immense amount of "puts" and "options," Chandler alone on one side attempting to hold up the price, and all the rest seeking to put it down. The fact that the sellers of "options" and holders of "puts" were able to get resolutions through the board of trade, making new warehouses, where oats had never been stored before, "regular" for the performance of these contracts, shows the intensity of the contest and the overwhelming influences with which Chandler had to contend. I do not mean to be understood as saying that the fact that Chandler sold "puts" to so many as to create an overwhelming opposition makes the transaction any more or less a wager than if he had only sold one "put," but it shows the notoriety of the whole proceedings.

From the very nature of the transaction the interest of the holder of the "put" is to break down the price, and that of the seller to maintain it. The number engaged in this transaction and the quantities involved demonstrate that neither party expected any grain to be delivered. Chandler expected to hold up the price, in which event no grain would be offered him, and the other parties must have known they could not get the grain to deliver unless they first broke Chandler, as he held all the grain, and then, although they might tender, he could not receive, so that in reality no actual delivery was anticipated. They made their tenders only as a method of establishing differences after he had failed and was powerless.

§ 728. — *authorities cited.*

That transactions of this kind are only wagers is abundantly established by authorities. *Grizewood v. Blane*, 11 Com. B., 538; *Brua's Appeal*, 55 Penn. St., 298; *Kirkpatrick v. Bonsall*, 72 Penn. St., 155; *Ex parte Marnham*, 2 De G.,

F. & J., 634; *Cassard v. Hinman*, 1 Bosw., 207. It is true those cases arose under statutes making such transactions void as gaming contracts. But the test applied was: Did the parties intend to sell on one side, and buy on the other, the stocks which purported to be the subject-matter of the transaction, or did they only intend to adjust the differences? And as it was found that they only meant differences when they said shares, the contracts were held to be essentially gambling contracts, and therefore void. It is said, however, that there is no statute in this state expressly prohibiting contracts of this kind, as there is in England and Pennsylvania; and, as the supreme court of this state has decided that wagers are not necessarily void, therefore these contracts — not being inhibited by any express law of this state — are not void. There is no dispute that contracts of wager are valid at common law, unless affected with some special cause of invalidity. *Ball v. Gilbert*, 12 Metc., 397.

But wagers which are contrary to public policy have always been held by the courts to be essentially void, without statutory prohibition, and cannot be made the ground of an action. * *Hartley v. Rice*, 10 East, 22. And a high authority in the profession has stated the law on the subject of the validity of wagers with great force and clearness, when he says: "As the moral sense of the present day regards all gaming or wagering contracts as inconsistent with the interests of the community and at variance with the laws of morality, the exception necessarily becomes the rule." 2 Smith's Lead. Cas., 306.

Indeed, any one rising from a full examination of the law applicable to wagers, as expounded by the courts, would undoubtedly testify that, while he has found in the books, and especially among the older text writers and cases, general expressions to the effect that wagers were valid at common law, he has found the cases where they have been enforced to be extremely rare, and the courts have been astute to find reasons for not enforcing them. Following this general current of authority, the supreme court of this state, under the statute prohibiting gaming, has decided that the wagers upon horse-races are void, and cannot be enforced; and that money paid on such wagers can be recovered back. *Tatman v. Strader*, 23 Ill., 493; *Garrison v. McGregor*, 51 Ill., 473.

The language of the Illinois statute on which these decisions are based is, in substance, that all promises made, etc., where the consideration, or any part thereof, shall be money won by gaming, etc., shall be void. The language of 8 and 9 Victoria, on which the *Grizewood v. Blain* and other English cases were decided, is: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void." The precise question made in this case has never been before the supreme court of this state, to my knowledge, and I am not aware that it has ever been raised at the circuit, except in a late case before his honor Judge Tree, of this city, when he held that "option contracts for grain, when the parties intended only to pay the differences, and not to deliver the grain, were void, as wagering contracts." But it hardly seems possible that any court called upon to construe the Illinois statute in the light of the expositions already made by our courts, and of the English decisions upon a statute so substantially similar, could hesitate to pronounce these contracts wagers, and void as contrary to the statute.

§ 729. *Wagers contrary to public policy are void at common law.*

But even if not within the letter or spirit of the statute of this state, the common law authorities quoted show that all wagers contrary to the public policy are void without reference to any statute. And, as the contracts under

consideration are essentially nothing but bets upon the price of oats in this market within the time limited, and as it is obvious that the effect of such transactions is to beget wild speculations, to derange prices, to make prices artificially high or low, as the interests, strength and skill of the manipulators shall dictate, thereby tending to destroy healthy business and unsettle legitimate commerce, there can be no doubt of the injurious tendency of such contracts, and that they should be held void as against public policy. As is most cogently said by the learned judge who delivered the opinion in the case cited from 55 Pennsylvania State Reports: "Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another is gambling, and demoralizes the community, no matter by what name it may be called."

The financial disaster and ruin which followed "Black Friday" in New York, and the scarcely less damaging local consequences which followed the various "corners" which have either succeeded or been attempted in this city, furnish conclusive proof, if proof were needed, that such gambling operations should be held void, as contrary to public policy. The total amount paid by the claimants in these cases was less than \$19,000, and yet the amount they claim is within a fraction of \$400,000—a disparity between the consideration paid and the sum demanded which strikes the mind at once as so grossly inequitable that the judicial conscience is shocked, and revolts from being made the instrument for enforcing such outrageous injustice. I do not intend to be understood as holding that every option contract for the delivery of grain or stock, or that every "put," is necessarily void, but only that all these contracts, in the light of the testimony before the court, were in their essential features gambling contracts. The parties when they made them did not intend to deliver the grain, but only at the utmost to settle the differences. They knew they could not obtain the grain to deliver if Chandler sustained his "corner," and their action in buying a "put" was virtually a bet on their part that he could not accomplish what they all knew he was endeavoring to do, that is, keep up the price through June to his own figures, and virtually a bet on his part that he could do so.

It is shown in the proof, and urged in the argument, that the "put" is in itself a very harmless contract—that dealers frequently resort to it as a method of insuring prices. It is answer enough to this to say that the proof fails to show that such was the object of any of these claimants. Chandler was taking all the cash oats offered at the price named in the "puts" and upward, and none, with the exception of Bensley, claim that they had any oats to fill the "puts" at the time they bought, or bought for that purpose till after Chandler's failure. It is perhaps possible to imagine a dealer with a stock of grain on hand which he wishes to hold for an advance, who may take a privilege of this kind to insure himself against a decline while waiting for an advance. But the very act of offering to sell a "put" either implies that the seller has control of the market so that he expects to make his own price, or else it is a mere reckless assertion of the seller's opinion that the price will be maintained, either of which partakes of the character of a bet. "A wager," says Bouvier, "is a contract by which two parties or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event." To say that these contracts were taken for the purposes of insurance is too far-fetched an excuse, and evidently an after-thought.

§ 730. *Under the Illinois statute money paid on gaming contracts may be recovered back.*

In what I have said I do not intend to vindicate Chandler. His conduct was as reprehensible as that of the claimants. All were engaged in an immoral and illegal transaction, and this court ought not to allow its powers to be prostituted to the enforcement of these contracts for either party. Money lost at play or in gaming cannot be recovered except where an action is given by statute, but, as I have already intimated my opinion that these cases are within the statute of this state on the subject of gaming, under which money paid may be recovered back, I shall allow the claimants to prove their claims for the amounts actually paid by them respectively, which is a half cent per bushel on the grain named on their tickets.

GILBERT v. GAUGAR.

(Circuit Court for Illinois: 8 Bissell, 214-219. 1878.)

STATEMENT OF FACTS.—Action by plaintiffs, being commission merchants, to recover from their principals commissions earned and losses paid by plaintiffs in settlement of time contracts for sale of grain on account of defendants. The case was submitted upon agreed facts, as follows: Prior to August, 1874, plaintiffs had done business for Gaugar, some of the contracts for future delivery being filled by shipments from Gaugar, and others settled by adjusting the differences with the purchasers. The transactions in this case were to the effect that Gaugar directed plaintiffs to sell some corn for future delivery, stating that defendant Holmes would take a half interest. Holmes, on August 3d, ordered plaintiffs to sell, for himself and Gaugar, ten thousand bushels of corn, the seller having the option to deliver at any time during September, and the plaintiffs did, on the same day, sell the amount directed to Hurlbut & Co., at sixty-three and one-eighth cents per bushel. The contract was afterwards changed for a delivery in October, the written memoranda of the agreement specifying that Hurlbut & Co. had bought, and that Gilbert & Co. had sold, ten thousand bushels of No. 2 corn, in store, at sixty-three and one-eighth cents per bushel, to be delivered at seller's option during October; also that the contract was subject to the rules of the board of trade.

In September plaintiffs sold another ten thousand bushels to another purchaser for October delivery, and, the market continuing to advance, plaintiffs, by order of defendants, closed the transaction by buying ten thousand bushels from Hurlbut & Co., and five thousand bushels from each of two other parties, and with these purchases the previous contracts were filled. No corn was delivered or changed hands in any of the transactions. Plaintiffs sue for a balance due on account of differences paid and commissions.

Opinion by BLODGETT, J.

The fair conclusion from the admitted facts, I think, is that one transaction was made to settle and adjust the other. In other words, the differences between the prices at which the sales were made and the prices of the purchases were settled, and the plaintiffs paid the losses to the buyers.

§ 731. *Kinds of time contracts forbidden by Illinois statutes.*

The sole defense made is, that the transaction falls within the option contract law of this state (R. S., ch. 38, sec. 130), and is void as a gaming contract. The language of the statute is: "Whoever contracts to have or give to himself or another *the option to sell or buy* at a future time any grain," etc., shall

be fined. "And all contracts made in violation of this section shall be considered gambling contracts, and shall be void." This statute has been several times before the supreme court of this state for construction, and the uniform ruling, so far as I have been able to learn from adjudged cases brought to my notice, has been that the statute was not intended to prohibit sales of grain or other commodities for future delivery. The statute prohibits "*options to sell or buy*"—not sales where the seller reserves to himself a simple option as to the time of delivery within certain limits. *Wolcott v. Heath*, 78 Ill., 433; *Pixley v. Boynton*, 79 Ill., 351; *Logan v. Musick*, 81 Ill., 415; *Corbett v. Underwood*, 83 Ill., 324.

Rumsey v. Berry, 65 Me., 570, gives the same construction to a statute similar to ours, by the supreme court of Maine. *Lyon v. Culbertson*, 83 Ill., 33, and *Pickering v. Cease*, 79 Ill., 328, would seem at first to hold a different doctrine, but a careful examination of those cases shows that the court proceeded upon the fact found, that neither party expected, at the time the contracts were made, to deliver any wheat, but only to adjust or settle differences. These two cases also differ from this in other important features. In both those cases the suits were directly between the parties to the contracts, and the court held them to be gaming contracts, because it was found as a fact that neither party intended to sell or buy the wheat, but only to speculate in differences, transactions which the court held were contrary to public policy, and therefore void. And while it may be well, as a matter of public policy, to prevent parties from gambling by refusing to enforce gambling contracts between them, yet it is at least doubtful whether they should be allowed to gamble at the expense of others, and not pay those whom they employ to do the work, and who advance money for them.

The obvious intent of the Illinois statute is to prohibit dealing in what are familiarly called "puts" and "calls," which are mere options to sell or buy; a class of contracts which the district court of this district had held void before the statute was enacted. *Ex parte Young*, 6 Biss., 53 (§§ 727-730, *supra*). But in that case the court took pains to say, page 66: "I do not intend to be understood as holding that every option contract for the delivery of grain or stock, or that every 'put' is necessarily void, but only that all these contracts, in the light of the testimony before the court, were, in their essential features, gambling contracts. The parties, when they made them, did not intend to deliver the grain, but only at the utmost to settle the differences," thus clearly distinguishing that case from this. But even under the English acts for the prevention of stock-jobbing, it was held that when a broker had paid money on defendant's account, to compromise or settle differences for not delivering stocks, the broker could recover from the principal. *Faikney v. Reynous*, 4 Burr., 2069; *Petrie v. Hannay*, 3 Term R., 418; *Knight v. Cambers*, 15 Com. B., 563; 80 Eng. Com. L., 561; *Jessopp v. Lutwyche*, 10 Exch., 624; *Rosewarne v. Billing*, 15 Com. B. (N. S.), 316; 109 Eng. Com. L., 316.

§ 732. *A contract to deliver grain at a stipulated price during a future month is a valid contract, and the vendor is liable to his broker for money expended in satisfying the vendee.*

As early as 1857 the learned circuit judge of this circuit held that a contract substantially like the ones under consideration was valid. *Porter v. Viets*, 1 Biss., 177 (§§ 724, 725, *supra*). So in *Lehman v. Strassberger*, 2 Woods, 554, Judge Woods, of the fifth circuit, sustained a cause of action almost identical with this. But the most full and exhaustive discussion of the question which

I have met is found in the case of *Clarke v. Foss*, 7 Biss., 540 (§§ 738-742, *infra*), by the learned district judge of the western district of Wisconsin, and the doctrine of that case fully sustains the plaintiff's right of recovery in this case. To further discuss the questions raised here, after the full examination they have received in the two cases last cited, seems to me unnecessary. I therefore conclude that the contracts made by plaintiffs, in defendant's behalf, were not options to sell or buy, but lawful contracts to deliver corn at a future day, upon which defendants might have been liable for the difference between the price at the time at which they sold and agreed to deliver, and the market price at the maturity of their contract. And if, by reason of the adverse aspect of the market, they directed the plaintiff to settle with the purchasers before the maturity of the contract, they are liable for the differences paid by the plaintiffs in their behalf, as well as for plaintiffs' commissions.

WANN v. KELLY.

(Circuit Court for Minnesota: 2 McCrary, 628-631. 1891.)

Opinion by NELSON, D. J.

STATEMENT OF FACTS.—This action is brought by the plaintiff, Wann, against defendant, Kelly, to recover money paid to the latter for the plaintiff's use. The facts developed are these: The plaintiff and defendant, and E. B. Gibbs agreed to engage in a speculation by the sale and purchase, or purchase and sale—it is immaterial which—of three hundred shares of Northern Pacific Railroad stock on their joint account, each to be interested to the extent of one hundred shares. The transaction was determined upon and agreed to by the parties in the belief that the stock would depreciate in the market, and by "selling short" they would be able in the future to purchase so as to make a profit upon the whole transaction, called by stock-jobbers "the deal." The plaintiff alleges it was agreed that Kelly should manage the speculation, and through his broker in New York sell three hundred shares Northern Pacific Railroad stock, which was done November 8 and 11, 1879, and afterwards, when a depreciation in the price of the stock reached two points, or \$2 per share, he should order the broker to purchase three hundred shares of the stock, and thus close the venture, and pay over to each his proportion of the profits.

§ 733. *A joint owner is liable to account to his associates for money paid under an illegal but completed contract.*

The evidence shows very clearly that the arrangement contemplated, in fact, no contract of actual sale or purchase; but, on the contrary, the intention and design was that, as between themselves and the party with whom they dealt, all differences in the price of the stock, at the time of the supposed contracts, should be paid by one party to the other as performance and satisfaction thereof. There were no actual bargains for the sale of the actual stock, but mere bets or wagers on the future price—gambling transactions on the chance of future rise or fall. Kelly claims the deal closed November 19, 1879, when there was a depreciation of two or more points, showing a profit of \$647, and that he has paid the plaintiff his portion, one-third of that amount. Wann admits the receipt of \$215.66, but claims that the "deal" was not closed until November 22, 1879, when Kelly actually realized and received a profit of \$2,000, and that he is entitled to one-third of this amount, which Kelly received for him. The broker in New York did not close up the speculation until November 22d, as appears by his statement rendered Kelly, for whom he acted, and the only

person known to him in the business, at which time the profit realized was the sum before stated. Kelly further claims that he was authorized by his arrangement, which was agreed to by Gibbs and plaintiff, to carry the "deal" on his own account, if he desired to, after a decline of two points, by paying each of them the profits resulting from such decline, and could close them out in that way. This is not the arrangement disclosed by the evidence. It was not possible to close up the transaction with Wann and Gibbs, unless by their consent, until he notified the New York broker to close the "deal," and that he would take the profit which resulted from the speculation at the time, whether the decline was two or more points. As the broker did not close the "deal" until November 22, 1879, if the plaintiff is entitled to recover anything it will be upon the basis of the profit paid Kelly then. The testimony of Kelly shows that the three parties were interested to the extent of one-third each in the venture, and the statement rendered Wann purports to be based upon the close of the "deal" by the New York broker, November 19th. Kelly thought he could carry the speculation for his own benefit, and at his own risk, after a profit of two points was reached, but the arrangement, as testified to by all the parties to it, would not permit him to do so.

It is urged by Kelly that the business in which the parties engaged was contrary to public policy and illegal, and therefore he can retain all the profit which resulted therefrom without recognizing his associates jointly interested, and that a court will not enforce the plaintiff's claim. Such is not the law. The agreement between the parties related to a single transaction, and when the business closed, and Kelly received the profits, he was in duty bound to pay over to the plaintiff his part of it. If the speculation was contrary to public policy and illegal, it had been closed, wound up, and the illegal object of it had been accomplished. It is settled by the United States supreme court (*McBlair v. Gibbs*, 17 How., 237; §§ 457, 458, *supra*; *Brooks v. Martin*, 2 Wall., 70, and authorities cited) that when the illegal contract is completed, and money has been received by a joint owner by force of the illegal contract, he will not be permitted to retain it, and cannot protect himself by setting up the illegality of the transaction in which it was paid him, but must account to his associates.

§ 734. *An action at law is the proper remedy in the case at bar.*

It is also urged by the defendant that plaintiff, if entitled to a share of the profit, can only enforce his claim in equity. I think an action at law gives adequate relief. The parties were engaged in a single venture, and the defendant, having appropriated the proceeds to his own use, made himself a debtor to the plaintiff. Judgment will be entered in favor of the plaintiff for \$451, and interest from November 22, 1879. The amount being less than \$500, costs must be paid by the plaintiff.

JACKSON v. FOOTE.

(Circuit Court for Illinois: 12 Federal Reporter, 87-42. 1882)

Opinion by BLODGETT, D. J.

STATEMENT OF FACTS.—This is a suit on a guaranty of payment by defendant of two promissory notes of \$5,000 each, made by the trustees of the estate of Ira Couch, both dated July 1, 1876, and made payable to defendant,—one on July 1 and the other on October 1, 1877, with interest at the rate of eight per cent. per annum. The plaintiff is receiver of the Third National Bank of this city, and the notes in question were delivered to the bank with the guaranty of de-

defendant written thereon about December 30, 1876, with other notes, as collateral security for the payment of a note of S. G. Hooker & Co. to the bank for the sum of \$13,900 due from that firm to the bank, for money loaned on the note of Hooker & Co., being dated December 30, 1876, payable to the bank in ninety days after date, with interest at ten per cent. per annum. The defense insisted on at the trial is that the two notes in question were transferred by the defendant to the firm of S. G. Hooker & Co. in settlement of a claim or indebtedness due from the defendant to said firm for certain gambling dealings conducted by the firm for the defendant, on the Chicago board of trade.

The facts as developed by the proof appear to be, that in the fall of 1874, and for about two years thereafter, the firm of S. G. Hooker & Co. were brokers and commission merchants, dealing in grain and provisions on the board of trade in this city, were members of the board and transacted business for their customers under its rules and regulations; that Foote had some dealings on the board through another broker, in which his broker had taken and paid for a large quantity of oats which had been bought on an order of the defendant, but the expenses of storing, interest, etc., had been so large that the defendant had become dissatisfied and some difficulty occurred in effecting a settlement with his broker. Mr. Hooker, of the firm of S. G. Hooker & Co., was applied to and counseled with by the defendant in securing this settlement, and Hooker, being an old friend of the defendant, advised him that if he wished to speculate or deal any more on the board of trade he had better do it with his, Hooker's, firm. The defendant assented to this provided he could only trade or deal in differences; that is, Hooker's firm was not to take in or carry any commodities bought, but defendant was only to pay or receive the differences between the selling and buying, or buying and selling, prices of the commodities dealt in.

In pursuance of this arrangement the defendant from time to time gave orders to Hooker & Co. to buy or sell commodities on the board for his account, and they executed these orders by buying or selling as directed on the board, in the usual form of such transactions, where the seller had the option to deliver within a certain time,—as, for illustration, during the whole of the next month, or during the first half or last half of the next month, or of the month in which the transaction took place,—the only option in the transaction being as to the time within which the seller was allowed to make delivery. These dealings continued until some time in May or June, 1876, Hooker & Co. buying or selling grain, pork or lard as directed by the defendant, and settling the differences; paying the money when the market was against the defendant, and receiving it for him when the market was in his favor; charging to him whatever sums were paid in settling differences when they were against him, and giving him credit when they received differences in his favor. In two or three transactions the firm seems to have taken in and paid for grain and provisions bought for defendant and held them for a short time, and then sold them, charging the defendant with the interest, storage, etc., incident to such transactions. The defendant was also debited on the books of the firm with commissions for transacting the business, and with divers sums of money paid him from time to time, so that, at the time the dealings of the firm for the defendant closed, he stood debited to them on their books in the sum of about \$22,000. In payment of this indebtedness the defendant transferred and delivered to Hooker & Co. four notes of \$5,000 each held by him against the Couch estate, the payment of which notes he guaranteed, and two of which are the notes in question, and

the firm of Hooker & Co. transferred the two notes now before the court, with the defendant's guaranty of payment thereon, to the Third National Bank of Chicago to secure their own indebtedness to the bank for money borrowed.

§ 735. *Circumstances under which a broker may, for his customers, deal in time contracts and settle differences, and not violate the statute of Illinois.*

The testimony in the case fully satisfies me that Mr. Hooker, when he assumed for his firm to act as the defendant's broker in his dealings on the board of trade, did not contemplate or intend to make any different transactions for the defendant than for his other customers. He undoubtedly intended to make purchases or sales where the buyer had an option as to the time within which to make delivery, and he intended to so conduct the defendant's transactions as to avoid taking and paying for any article bought, and he seems to have explained to the defendant how, by reason of his many customers, some of whom were sellers and others buyers on the market, he could so manage the defendant's deals that he need not take any commodity bought, but could settle simply the difference between the purchase price and the market price when the seller had the right of delivery. Hooker did not, I am satisfied from the proof, intend to deal in "options to buy or sell at a future time," such as are prohibited by the Illinois statutes (Rev. St. Ill., ch. 38, § 130), but intended, as I have said, to deal in time contracts, and to settle the differences so as to avoid paying for and carrying the commodities bought. I am also satisfied that, while the defendant may have known but little, when he commenced with this firm, as to the mode in which the business was to be transacted by them for him, yet he did not contemplate dealing in "puts and calls," or "options to buy and sell at a future time," and that he was very soon aware of the forms and modes in which the business was done for him by the firm. He intended without doubt that his brokers should so manage his trades that differences should be paid or collected, instead of his taking or holding the article dealt in, or having his broker do it for him and at his expense. He may have contemplated dealing wholly in differences to such an extent as to make the transactions such as have been construed by the courts of this state to be wager contracts or gambling contracts at common law; but he did not, I am satisfied, intend that his brokers should make for him such contracts as are expressly made illegal by the Illinois statutes, but, at most, they were to be transactions where it was not intended that any commodity should be actually received or delivered, but that he was to deal in differences only, coming perhaps within the rule laid down by the supreme court of this state in *Lyon v. Culbertson*, 83 Ill., 33, where the court said:

"The fact that no wheat was offered and demanded shows that neither party expected the delivery of any wheat, but in case of default in keeping margins good, or even as to the time of delivery, they only expected to settle the contract on the basis of differences, without even performing or offering to perform his part of the agreement, and if this was the agreement it was only gambling on the price of wheat. If such gambling transactions shall be permitted it must eventually lead to what are called 'corners,' which engulf hundreds in utter ruin, derange and unsettle prices, and operate injuriously on the fair and legitimate trader in grain as well as the producer, and are pernicious and highly demoralizing to the trade. A contract to be thus settled is no more than a bet on the price of grain during or at the end of a limited period. If the one party is not to deliver or the other to receive the grain, it is in all but name a

gambling on the price of the commodity, and the change of names never changes the quality or nature of things."

In other words, as I understand the court in this case, where there is an intention to deal only in differences, the transaction is held to be a wager contract at common law.

§ 736. *Contracts that are valid and binding and not within the Illinois prohibitory statute.*

It is equally evident from the proof that the indebtedness which accrued from the defendant to S. G. Hooker & Co. was for commissions earned by the firm in making trades for the defendant, duly authorized by him, and for moneys actually paid by the firm in the settlement of differences in such trades, and that none of these differences were paid upon "options to buy or sell grain or other commodities at a future day," but upon sales or purchases of grain or other commodities where the seller had only an option as to the time of delivery,—contracts which have been held not to be within the Illinois statutes, and to be valid and binding upon the parties. *Pixley v. Boynton*, 79 Ill., 351; *Wolcott v. Heath*, 78 Ill., 433; *Cole v. Milmine*, 83 Ill., 349; *Porter v. Viets*, 1 Biss., 177 (§§ 724, 725, *supra*); *Clarke v. Foss*, 7 Biss., 540 (§§ 738-742, *infra*); 14 Bush (Ky.), 727; *Gilbert v. Gaugar*, 10 Leg. N., 340 (§§ 731, 732, *supra*).

Assuming, then, that the defendant, by his agreement with Hooker & Co., intended to deal only in differences, and that the bulk of the debit against him on the books of the firm accrued for differences paid by the firm on trades made for him in pursuance of this agreement, the only question is, Do these facts so taint this paper as to make this guaranty of payment void in the hands of this bank? There is no dispute but what the bank is a *bona fide* holder of these notes, with defendant's guaranty thereon, taken for value before due and without notice of any defense. The statute of Illinois makes notes and other securities given in payment of gambling contracts to "sell or buy grain or other commodities at a future time" void in the hands of any assignee or holder; but the transactions out of which this indebtedness between Hooker & Co. and the defendant arose were not "options to buy or sell at a future time," but were contracts of sale, in which the seller was bound to deliver at a future time within certain limits. They were not, therefore, gambling contracts within the Illinois statutes. They may have been, as I have already said, gambling or wager contracts at common law to such an extent as that, if Hooker & Co. had sued the defendant, he could have successfully defended; but the common law will not help either party to a gambling contract; it simply leaves them where it finds them. If one, having lost money by gambling or on a wager, pays it, the law will not aid him to recover it back from the owner. 2 Smith, Lead. Cas., 307; *Gregory v. King*, 58 Ill., 169.

§ 737. *Guaranty valid in the hands of a bona fide holder.*

It seems to me to follow, then, as a necessary conclusion, that the defendant, having delivered these notes with his guaranty upon them to Hooker & Co. in settlement of their demand against him, even though their demand was tainted as a gambling claim at common law, he cannot be allowed to set up the illegality of the dealings between himself and Hooker & Co. as a defense to these guaranties in the hands of a *bona fide* holder. He has put this paper, with his guaranty affixed to it, afloat upon the market. Unless a clear case of violation of the statute is made out, and the burden of making such a case is upon the

defendant, this guaranty, in the hands of a *bona fide* holder, is valid, and not tainted by any of the defenses between the original parties. I may say further that it seems, from the defendant's own testimony, and from the accounts rendered—a transcript of S. G. Hooker & Co.'s books,—that the settlement in question, and upon which these notes and guaranties were given, was for an account into which cash paid, commissions and other elements entered which were not of a gambling nature; and it is extremely doubtful in my mind, even if suit had been brought by S. G. Hooker & Co. against the defendant, he could, upon the showing now made upon this trial, have successfully defended against their claim. The issues are found for the plaintiff.

CLARKE v. FOSS.

(District Court, Western District of Wisconsin: 7 Bissell, 540-553; 17 National Bankruptcy Register, 261. 1878.)

Opinion by BURN, J.

STATEMENT OF FACTS.—This is a suit in equity begun by the assignee of C. B. Stevens & Sons, bankrupts, to set aside and cancel six certain promissory notes for the sum of \$1,231.10 each, aggregating \$7,386.60, and a mortgage upon real estate in De Soto, in Vernon county, Wisconsin, to secure the same, executed by C. B. Stevens & Sons, to the defendants, December 1, 1874, on the ground that the same are void as being given to secure a consideration arising out of certain option contracts for the sale and delivery of grain, which it is claimed were wagering contracts, under the laws of Illinois in force at that time.

The bankrupts were, and for many years prior to the fall of 1874, when these transactions occurred, had been, merchants and dealers in grain and produce upon the Mississippi river at De Soto, Wisconsin, and, as such, had for several years purchased and shipped wheat and other grain to the defendants, who were commission merchants at Chicago, and members of the board of trade for twenty years or more, doing business under the firm name of S. D. Foss & Co., and had also, from time to time, speculated in grain in the Milwaukee market, and also in the Chicago market, through the defendants, acting as their factors and commission men at that place. They were then in good financial circumstances, though with small capital; had a running account, and were in good credit and standing with S. D. Foss & Co. In October, 1874, the bankrupts ordered defendants at different times, by telegraph, to make sales of grain for them upon the Chicago market for November delivery, amounting in the aggregate to seventy thousand bushels of corn and five or ten thousand bushels of wheat. The defendants, upon receiving these orders, went upon the market in Chicago and executed them, by making, as was the custom, contracts, generally in writing, and in their own name, with different parties, for the sale of the grain for November delivery, in lots of five thousand, or multiples of five thousand, bushels, and immediately, and from time to time, notified bankrupts, by telegram and by letter, of what they had done, and their acts were fully ratified and approved by the bankrupts. No "margins" were required to be put up by C. B. Stevens & Co., as they had an account with defendants, and were accounted by them responsible.

At about the time or a little before these contracts matured, as they did on the last day of November, the defendants performed a part of them on the behalf of C. B. Stevens & Sons, by a purchase and actual delivery of the grain

to the parties to whom the sales were made. The evidence shows that, as to twenty thousand bushels of corn, there was an actual delivery of the grain, and as to ten thousand more, a delivery of warehouse receipts for that amount. As to the balance of the grain contracted to be sold, the defendants went upon the market and purchased it of different parties and had it ready for delivery; and then finding other parties who had similar deals for November purchases and sales, formed rings, or temporary clearing houses, through which, by means of a system of mutual offsets and cancellations that had grown up on the board, the contracts were settled by an adjustment of differences, saving an actual delivery and change of possession. It so happened that there was a considerable rise in the market price of corn during the month of November; and it was found that, after these transactions were closed out, there had been a loss to C. B. Stevens & Sons of something over \$10,000, and which the defendants, having paid in cash for them on the purchase of the grain, debited to their account, according to the previous course of dealing between the parties.

The notes and mortgage in suit were soon afterwards given by the bankrupts to secure a portion of these sums so advanced by the defendants for them, including also about \$375, charged by S. D. Foss & Co. as their commissions. Unsecured notes were also given for \$3,000, balance of the \$10,386.60 indebtedness, which were afterwards paid by C. B. Stevens & Sons. Two years afterwards, on November 19, 1876, C. B. Stevens & Sons filed their petition in bankruptcy in this court, and were on the same day adjudged bankrupts. The assignee in bankruptcy brings this suit to set aside the notes and mortgage, and in substance claims that C. B. Stevens & Sons, at the time the orders for the sale of grain were made and executed in October, 1874, had no corn to sell, and no expectation of having any, with which to fill these contracts. That these facts were known to both parties, that is, to the bankrupts and to the defendants S. D. Foss & Co., and that it was understood by and between them at the time, that no grain was in fact to be delivered by C. B. Stevens & Sons, but that the contracts were to be settled by the payment or receipt of differences, according as the market should rise or fall in the month of November, and that they were thus mere wagers upon the November market, and, as such, contrary to law, and void, and that the notes and mortgage confessedly given to secure cash advances made by defendants, as the factors of the bankrupts, and with their approval, to pay the losses sustained upon these sales, should be canceled and delivered up.

The question is whether this should be done. The question is, of course, a mixed question of fact and law. But I regard it as more a question of fact than of law; and I cannot help thinking, in looking through the cases on the subject, that more confusion and discrepancy have crept into them, from a failure to determine precisely the facts, than from any essential difference of opinion upon the abstract propositions of law applicable to them. This seems to be notably the case in *Rumsey v. Barry*, 65 Me., 570, where, in the trial court, instead of submitting the question of fact as to what the contract really was, it not being in writing, to the jury, instructions were asked, that, as a matter of law, the contract was a wagering contract. This instruction was properly refused, but there was a total failure to fairly submit the question of fact to the jury. It is not to be wondered at, that on an appeal to the supreme court, the facts not being fairly determined, the opinion sustaining the transaction as legal should have been given by a divided court, four judges concurring in the decision of the court, one judge delivering a dissenting opinion, one judge

concurring in the dissenting opinion, and still another judge "inclined to concur" in it. If there had been an eighth judge it might not be improbable that he would have been "inclined to concur" in both opinions. And all this simply because the facts themselves not having been determined, there was no tangible, well-defined question of law before the court.

The testimony in the case at bar is quite exhaustive and voluminous. It is confined, however, to a few points, and, though somewhat conflicting, I have had no great difficulty in determining the facts to my satisfaction. It is proven that, at the time these contracts were made, C. B. Stevens & Sons had not the grain on hand at De Soto, where they purchased grain, or elsewhere, nor any expectation of having it, with which to fill the contracts. Chas. B. Stevens, the active member of the bankrupt firm, testifies that, at the time he telegraphed to defendants to purchase the corn, they had not a bushel on hand, and did not expect to have any to deliver on the orders; that they were not then dealing in corn at De Soto or anywhere else, and never did except "scalping" in it at Chicago; that they had no agreement with defendants to ship corn to fill the orders, and that the understanding was that they were merely "scalping" or option deals, and were to be settled by paying or receiving the difference at the maturity of the contract or before; that they never did deliver any corn on these sales; that defendants claimed that they bought in the options at different times and charged the difference to C. B. Stevens & Sons.

He says, also, that he had no conversation with defendants until after the transactions were closed up; that he then had a talk with both of them in relation to these deals; that it was on the board of trade at Chicago; that he asked M. H. Foss how they settled these options or "scalps," and if there was any wheat or corn delivered, and he said no; that it was done generally by forning rings among members of the board by clerks that they employed; that these clerks settled the deals between parties in the ring whom they may have sold to or bought of, and by paying or receiving differences, as the case may be; that he thinks he asked him about the delivery of grain, and he said no grain ever passed. Witness says this was the kind of transaction he was operating in, as he understood it, and that no grain was to be delivered or received on these contracts, and that he understood them to be mere wagers on the future price of grain, and that defendants regarded them in the same light. That they continued this kind of deal with defendants until the fall of 1876.

On cross-examination he says he commenced sending orders to defendants before he had any conversation with them; that it was a month after these transactions that he had the talk with them in Chicago; that defendants were their agents and commission merchants in Chicago; that he understood that Foss & Co. were liable for the damages for the non-fulfillment of the contracts they made for C. B. Stevens & Sons, and that they expected to make good to them the losses which they might incur in their behalf; and that, if defendants failed to comply with the contracts they made for the bankrupts, they would be deprived of their privileges on the board of trade; that Foss and he never talked about their agreement with one another in respect to these transactions, and that their conversation only related to the general course of business on the board of trade; that he (witness) understands that all contracts where wheat is sold, and not actually delivered, are wagering or betting contracts; and that all option contracts are betting contracts. The other Stevenses testify substantially in the same way as to their understanding

of the transaction, but not as to the conversation with defendants in Chicago. And this is the substance of the testimony for the complainant. The defendants positively deny the conversation testified to by C. B. Stevens. They swear (in substance) that they had no understanding about these contracts, different from what might be inferred from what appears on the face of the transaction itself; that they were executed in their usual course of business in the same manner that all the business on the board of trade relating to option contracts for future delivery of grain is transacted; that instead of understanding that no wheat or corn was to be delivered, their understanding was just the contrary; that the grain must be delivered according to the terms of the contract in all cases; that there was no option in the matter except as to the day in November on which the delivery was to be made; that if not delivered before, it must at all events be delivered on the last day of the month; they did not know whether Stevens & Sons had the grain to ship from De Soto, and did not stop to inquire, but supposed they might have it; that if they did not ship it, they (Foss & Co.) were bound to deliver the grain for them; that the contracts, according to universal custom on the board of trade, were made in the name of S. D. Foss & Co.; the name of their customer not being disclosed to the other party, or even inquired after. They testify that they have never dealt in what are called "puts" and "calls," such as are described in *Ex parte* Young, 6 Biss., 53 (§§ 727-730, *supra*), and that such contracts, which give the option to deliver or receive, or not, are prohibited by the board of trade as well as by the laws of Illinois; that they made these contracts with various members of the board of trade, for and on behalf of the bankrupts, at their request and for their benefit, in entire good faith, without any understanding that they were not to be performed, and that Stevens & Sons not shipping the grain, they performed their contracts by going upon the market and purchasing the wheat and corn; that as to thirty thousand bushels of corn they made a delivery, and as to the balance they closed out the deal in the manner before indicated by mutual offset and adjustment of differences; that this adjustment of differences is a mere matter of convenience to the members of the board and to their customers; that no person is under the least obligation to settle in that way, and that dealers may and often do insist upon an actual delivery of the grain, and that settlement frequently saves to their customers the cost of insurance and storage. That the object of forming these rings or clearing-houses is to close out the transactions and get them off their books; and this is what they call "ringing it out." But that it frequently cannot be done in that way; as if, for any reason, one whose assistance is essential to complete the circle, prefers an actual delivery, in which case the ring is "burst;" and then each must perform his contract by actual delivery of the grain. Their testimony is full, and fair and intelligent, upon the questions at issue, and they are corroborated by several other witnesses, ex-president, ex-directors, ex-commissioners of appeals and present members of the board of trade, and some of the persons with whom these contracts were made. The testimony is conclusive that this business was done much in the same manner that all the other business on the board of trade is done respecting contracts for the future delivery of grain. They all agree that there is no option except the option to deliver on any day of the month; and that the seller is bound, not only by the contract but by the rules of the board, to which it is made subject, to perform his contract by an actual delivery, unless excused from the performance by the act of the other party, and for a violation of this rule he is

subject to the discipline of the board, and to be dismissed therefrom if he insists upon the violation of his contract.

§ 738. *The secret intentions of one party, contrary to what appears on the face of the contract, and of which the other party has no notice, cannot prevail to invalidate a contract otherwise legal and valid.*

Now, which party is best corroborated in their understanding of the contract by the admitted facts of the case? It is clear to me, by all odds, that the defendants are best corroborated. It is very easy for either party to swear to what his own understanding of the contract was, but that standing alone is manifestly immaterial. The secret intentions of one party, contrary to what appears on the face of the contract, and not communicated to the other party, cannot prevail to make a contract illegal which is otherwise valid. The real question is, what was the contract? and that implies an inquiry as to the mutual understanding and meeting of the minds of the parties. What was that? It is easy for a party to swear what his own understanding and intentions were, but when he comes to swear to the intentions and understanding of the other party, the consideration due to his testimony stands on an entirely different footing. He may be presumed to know his own intentions, but the evidence of the intentions of the other party should not be of a merely subjective character, but should consist of tangible facts and circumstances outside of his own consciousness, and a knowledge of which would be capable of satisfying other minds.

The conversation with the defendants testified to by Stevens, besides being denied by them, if proven, is not very strong evidence, for Stevens admits that this was a month after these transactions occurred, and was a general conversation relating to the general manner of doing business upon the board, and not to the transactions in question. But aside from the testimony as to this conversation, what is there in the case to show that S. D. Foss & Co. had any intention in regard to these contracts different from what is fairly evidenced by the contracts and transactions themselves, as they appear upon their face? The telegrams were orders in writing, and gave positive directions to sell grain; not to sell a privilege to deliver or not. The evidence shows at the time they were made there had been no previous communications or understandings in regard to these purchases. When received, Foss & Co. went upon the market and executed the orders by making written contracts, of which the following is a blank copy, or verbal contracts to the same effect:

"GRAIN CONTRACT.

CHICAGO, —, 1874.

"We have this day sold A. B. & Co. ten thousand bushels of No. 2 corn, in store, at — cents per bushel, to be delivered at seller's option during the month of November, 1874, — in lots of five thousand bushels each. This contract is subject, in all respects, to the rules and regulations of the board of trade of the city of Chicago.

"M — at — cts.

"S. D. Foss & Co.

"Per —."

When these contracts matured, the defendants performed them by a delivery of the grain, except when, by the mutual arrangement of the parties concerned, the contracts were taken up and canceled, and then they invariably paid in cash the damages which the law would have obliged them to pay upon a failure to perform their agreement; that is to say, the difference between the contract price and the market price on the day when delivery should have been made. Now, in the absence of more convincing testimony, what the parties actually

did is pretty good evidence of what they intended to do; and I must conclude that upon the face of the transaction, as shown by the acts and conduct of the parties, the evidence is very strong that these sales were *bona fide* sales, and not made with any intent, mutual between the parties, to violate the law.

The notes and mortgage sought to be set aside (as well as the original contracts for the sale of the grain, both as between the bankrupts and S. D. Foss & Co., and between S. D. Foss & Co. and the parties with whom they contracted), being in writing and perfectly fair on their face, and given for a full money consideration without any pretense of fraud or unfair dealing, the burden of making a clear case for setting them aside for illegality lies with the complainant. There should be in his favor a clear preponderance in the weight of the evidence. *Pixley v. Boynton*, 79 Ill., 351. Contracts made and so deliberately entered into upon adequate consideration, without fraud, should not be set aside for light or transient reasons, or mere suspicion of being contrary to law. But instead of there being a preponderance of proofs in favor of the complainants, I am obliged to believe that the weight of evidence is the other way, and I must find as facts:

1. That C. B. Stevens & Sons, when they gave the orders for the sale of the grain, had no grain to deliver, no contracts made by which they expected to obtain it, and no expectation of ever having it delivered, by shipping it to the defendants. They did expect and intend, however, that S. D. Foss & Co. would make these contracts much as they did, in fact, make them, and that they would, at their maturity, take care of them for C. B. Stevens & Sons in about the same manner they did take care of them, by a delivery of the grain, or by a settlement and adjustment of differences according to circumstances; and that whatever the profits were, they were to be credited with them, and if there were losses, such losses were to be borne by them.

2. That the defendants did not know that C. B. Stevens & Sons had not the grain, but had no reason to expect that they had or would obtain it to ship to Chicago in sufficient amounts to fill the orders, but intended that if C. B. S. & Sons did not ship the grain, they (defendants) would perform their contracts with the parties with whom they were severally made in C. B. Stevens & Sons' behalf, in good faith, by a delivery of the grain, unless delivery was dispensed with by the parties who had a right to insist upon a fulfillment of the contracts, and that there was no mutual understanding that the contracts were mere wagers on the price of grain for the November market, or that there was to be, in fact, no delivery, but only an adjustment of differences.

3. The understanding of the other parties to these contracts, to whom sales were made, as to their being performed, was the same as that of the defendants.

§ 739. *Though contracts are written, it may be shown by parol evidence what the real intent and meaning of the parties were.*

Having determined the facts, the law applicable to the case is not difficult.

1. The contracts sought to be set aside are written contracts, and the mortgage is under seal. Nevertheless, the weight of authority, and I think that of doctrine, is, that you may go behind the writing and show what the real intent and meaning of the parties were; and if it appears that the writing does not express the real intent of the parties, but is merely colorable, and used as a cloak to cover a gambling transaction, the court will not lend its aid to enforce the contract, however fair on its face; or if securities are given, as in this case, will interfere on grounds of public policy and for the public good, rather than

for the purpose of relieving a party who is himself *particeps criminis*, in an inhibited transaction, to set aside such securities. *In re Green*, 7 Biss., 338 (§§ 743, 744, *infra*), and the cases there cited.

§ 740. *A contract for the future delivery of personal property, which the seller has not at the time nor any means of getting, is not void for illegality.*

2. A contract for the future delivery of personal property, which the seller has not got when the contract is made, nor any means of getting it, is not void for illegality. That was held in *Porter v. Viets*, 1 Biss., 177 (§§ 724, 725, *supra*), and is the settled law. See *Logan v. Musick*, 81 Ill., 415; *Hibblewhite v. McMorrino*, 5 Mees. & W., 462. The seller is bound by the contract to deliver the goods, and if he fails he must pay damages. Such contracts, though entered into for pure purposes of speculation, however censurable when made by those engaged in ordinary mercantile pursuits, and who have creditors depending for the payment of their just claims upon their prudent management in business, are nevertheless not prohibited by law. As said in *Porter v. Viets*, *supra*, "People might differ about the propriety of making such a contract by one who did not know certainly where he was to acquire the property, but, having made it, the courts will compel him to abide by it." That case was on demurrer, and was in many essential respects similar to the one at bar.

§ 741. — *the intent that it should be a gambling contract, in order to invalidate it, must be mutual.*

The substance of the contract itself is what must control. The secret intention of one of the parties, uncommunicated to the other party, not to fulfill his contract, is not enough to make the transaction illegal. The intent that it should be a mere betting upon the market, without any expectation of actual performance, must be mutual, and constitute an integral part of the real contract, in order to vitiate it. Furthermore, supposing it had been the mutual intention of S. D. Foss & Co. and the bankrupts, that these contracts were not to be performed, I do not see that that would make them illegal, so long as the other parties to the contract did not participate in that illegal intention. S. D. Foss & Co. and C. B. Stevens & Sons did not constitute the parties to the contract. There was no contract for the sale and delivery of grain made between them. As between them the relation existed of principal and agent. S. D. Foss & Co. made the contract in their own name, but for and in behalf of C. B. Stevens & Sons; and S. D. Foss & Co. and C. B. Stevens & Sons constitute but one party to the contract, whether it be considered as a contract between S. D. Foss & Co. and the parties in Chicago with whom they dealt, or as a contract between C. B. Stevens & Sons and those same parties; and there is no evidence whatever to show that those other parties had any notice or knowledge of this gambling intent. On the contrary, they knew that Foss & Co., as the evidence shows, and some of these same parties testify, were men of high standing and responsibility on the board of trade, and would perform their agreements. *Lehman v. Strassberger*, 2 Woods, 554, and *Wolcott v. Heath*, 78 Ill., 433, are directly in point.

4. If the original contracts for the sale of grain were liable to the taint of illegality, as charged, it does not necessarily follow that the notes and mortgage executed by one of the principals in the transaction, to secure the payment of moneys previously advanced by their agent to pay losses springing out of and resulting from those original transactions, are contaminated with the same vice. This question is fairly presented by this record, though the decision of the point is not necessary to the case, and I do not care to decide it. I shall,

therefore, content myself with reference to some few high authorities, which hold such a contract valid. The leading English case, decided by Lord Mansfield, in *Faikney v. Reynous*, 4 Burr., 2069. Following this are *Petrie v. Hannay*, 3 Term R., 418; *Farmer v. Russell*, 1 Bos. & Pull., 296. The first case cited is a strong case, and though seemingly questioned by Lord Kenyon in *Petrie v. Hannay*, *supra*, has never been overruled, I believe, in England. Marshall, C. J., cites it approvingly in *Armstrong v. Toler*, 11 Wheat., 258 (§§ 581-586, *supra*). See, also, *Owen v. Davis*, 1 Bailey, 315, and the recent case before cited of *Lehman v. Strassberger*, 2 Woods, 554, which is very much in point I think. This, I believe, is undoubtedly the result of the English cases. How far the rule has been changed by statute, or by decisions in the several states, I do not care to inquire.

5. Whatever might be the judgment of discreet men as to the propriety of such purely speculative transactions as are disclosed by this record, undertaken by men in mercantile pursuits, I am unable to see, on general principles, any objection to them in point of law. The law does not undertake to prevent speculation. It does not undertake the Quixotic task of nicely governing men in all the relations of life, and compelling them to do, under all circumstances, what is prudent and reasonable. The truth is, men are speculative creatures as certainly as they are eating and sleeping ones. And, although it is undoubtedly true that much harm comes to the community from over speculation, it is more than doubtful if the world would be better off without speculators; or, if it would be, that the law can do much in the way of abolishing them.

As a common thing, business men are prone to regard their own judgment of the market as a part of their capital, and to a certain extent they have a right so to do. It is only with the more manifest abuses of the privilege of citizens in their dealings with one another, and when the evil touches and infects the public welfare, that the law assumes to interfere. In the main commercial transactions must be left to be regulated by the higher and more inexorable laws which govern the trading world. If the transactions disclosed by this case are illegal, then, undoubtedly, a great part of the banking and clearing-house transactions in our great commercial centers are illegal also. I am persuaded that to hold them so would be trenching too severely upon the business of the commercial world without any corresponding benefit to be expected from it.

It might be a difficult task to lay down any single rule or draw a straight line which should define or divide all merely speculative from all pure gambling transactions, for it must be admitted that the same prime element of risk is common to both. But it has seemed to me, that, according to any reasonable rule which it would be practicable to enforce, these transactions must fall on the side of legal speculations. They were carried on in good faith and in the usual and ordinary course of business upon the board of trade, which it seems undertakes to exercise a salutary control over its members, it appearing in evidence that if any member fails or refuses to perform his contract by delivery or receiving grain which he has agreed to deliver or receive, he is subject to the discipline of that body, and if the offending member is still refractory or contumacious, he is suspended or finally dismissed from the board, thus adding to the penalties which the law attaches to a violation of contracts the sanction of a wholesome family discipline. The witnesses agree that what are called "puts" and "calls" are not allowed to members of the board, and that "scalpers" cannot live in that atmosphere, they bearing the same relation to

that fraternity of commercial gentlemen that shysters do to full-bred lawyers. If that be so, certainly they are far enough asunder.

Then again, if we look at the equities of this case, aside from the special head of equity, under which the court, in the interest of the public good, will interfere to set aside and cancel securities given upon a gambling consideration, the general equities and intrinsic justice of the case are largely with the defendants. The whole business was originated and carried on at the instance and for the benefit of the bankrupts. Whatever of legal turpitude attaches to these transactions, it is evident that C. B. Stevens & Sons were not merely *particeps criminis*, but the principal offenders. When profits ensued, as they frequently did, they put them down in their own pockets. On one occasion it is in evidence that they represented to defendants that they made quite large amounts, something like \$10,000, out of these deals. Why then, if it was their deal and they enjoyed the profits when there were profits, should they not bear the losses when the market turned against them and these fell to their lot, and not shuffle them off upon their agents, who, it is not denied, had acted fairly and honorably with them?

Foss & Co. had no interest in these transactions except their commissions, and instead of leading the bankrupts on in this business the evidence of the bankrupts is that they discouraged them on every occasion. Their letters, introduced in evidence by the complainant, show that S. D. Foss & Co., from time to time, dissuaded the bankrupts from these speculating deals — told them they were taking too much risk both in respect to wheat and corn; that there was a small stock of old corn in the market; that the new crop had not yet been moved; that there was danger of a "corner" being run and sending prices up, and on one occasion protested that if they insisted upon taking such risks they must employ other commission men. These letters were relied upon to show that the defendants understood these deals to be gambling transactions, but to my mind they simply show a proper appreciation, on the part of the defendants, of the risks which men in the circumstances and business of the bankrupts were taking on themselves, and a due consideration for the interests of their principals in that behalf. But C. B. Stevens & Sons, relying confidently on their own judgment and sources of knowledge, as men are inclined to do, continued the business until the tide turned against them. Under these circumstances one would say that the commonest kind of honesty that passes current among men should require C. B. Stevens & Sons to pay these losses, and not shift them off upon their factors. Of course the assignee stands, as far as legal right goes, in no better case than the bankrupts; and it is due to the bankrupts to say that, as far as they are personally concerned, they have never objected to the payment of these claims, though they are now the main witnesses for the complainant, and in their testimony say they want him to succeed. The assignee, of course, in the interest of the creditors, has only done his duty in bringing these matters before the court for adjudication.

I have not undertaken to review the decisions upon this subject. I have not thought it essential. Those of the highest tribunal in Illinois, though not perhaps entirely reconcilable, I think are so in the main, and go to support the transaction disclosed by the case at bar. Whatever discrepancy there is, as I have before remarked, arises more from the facts than from the law. The most that can be said is, that different courts have come to different conclusions upon different states of facts. This cannot be wondered at, and is unavoidable. How far the judgment of the court, in a given case upon the facts, may be in-

fluenced by its opinion of the law and the essential justice of the case, cannot always be known. I confess I have a strong predilection in favor of holding men of full age and right mind to their contracts deliberately entered into upon full and adequate money considerations, without deceit or imposition, and when the consequences of their contracts, however ill-advised, are mainly personal to themselves.

I think the cases cited of *Wolcott v. Heath*, 78 Ill., 433; *Pixley v. Boynton*, 79 Ill., 351; and *Logan v. Musick*, 81 Ill., 426, express the law of that state on the subject, and are authorities in the case at bar. The case of *Lyon v. Culbertson*, 83 Ill., 33, in which Justice Dickey delivers a rigorous dissenting opinion, I am told was decided before the cases in the 79th and 81st Illinois reports. However that may be, and whether the decision be good law or not, I do not see that it is necessarily at variance with the other cases, nor that it attempts to overrule or qualify them in the least. That seemed to turn on a question that is not presented in this case. There is no failure to perform or of offer to perform on the part of S. D. Foss & Co., on any of the contracts which they made, nor anything in the contracts dispensing with an offer to perform.

§ 742. *Contracts originally valid are not made void by a subsequent mutual settlement of the differences in price, instead of an actual delivery.*

Again, it must be incontestable, that if the contracts were valid in their inception, and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, which took the place of actual performance, cannot have the retroactive effect of making them void for illegality. If the contracts were void at all, they must have been void when made. The subsequent conduct of the parties may and should be considered as evidence tending to show what the real contracts were when entered into; but if they were originally valid, no subsequent act of the parties can have the effect to render them obnoxious to the taint of illegality as being gambling contracts. I have not overlooked the case of *In re Green*, *supra*, decided by my learned and lamented predecessor, 7 Biss., 338 (§§ 743, 744, *infra*). I have not had occasion to review the evidence from which the conclusions of fact in that case were drawn; and it is enough to say that, upon the findings of fact made, the law is undoubtedly correctly stated. Bill dismissed.

IN RE GREEN.

(District Court, Western District of Wisconsin: 7 Bissell, 338-346. 1877.)

Opinion by HOPKINS, J.

STATEMENT OF FACTS.—Richard Green proved a claim of \$7,715.16 against the bankrupt's estate, and James Norris of \$1,877.23. The assignee moves to expunge Norris' claim and to reduce Green's. The grounds upon which the motion is made are, that the contracts upon which the claims were based were void, first, by the statute of frauds, and second, that they were gaming contracts. In the view I have taken of the case, it is only necessary to consider the latter.

§ 743. *Where the parties to a contract of sale do not intend delivery of the article, but only to pay differences, according to the rise and fall of the market, such contract is a gaming contract and void.*

There has been considerable testimony taken, and it is in some respects quite contradictory, but I think the conflict is more apparent than real. The proof shows that the part of the claim of Richard Green which is objected to, and all of Norris' claim, arose out of losses on wheat contracts, and it is claimed

that no wheat was in fact bought or intended to be bought, but the transactions were only purchases of options,—wagers on the price of wheat at a future day, and void under the statute of this state on the subject of betting and gaming. 2 vol. Taylor's Statutes, p. 188, sec. 16. If the contract for the purchase and sale of wheat was only colorable, and neither party intended to deliver or accept the wheat, but only to pay differences according to the rise and fall of the market price, it would be a gaming contract and void. The form of the contract would not be conclusive. Courts would look into the matter and determine whether the parties really meant to purchase and sell, or whether the transaction was but a mere bet upon the future price of the article. This must be determined by the evidence and circumstances attending the making of the contract and the conduct of the parties in reference to it. The form of the contract would not control or be very material if the transaction itself was illegal. Addison on Cont., p. 209; Pickering v. Cease, 8 Ch. Leg. N., 340; Kirkpatrick v. Bonsall, 72 Penn. St., 155; Cassard v. Hinman, 1 Bosw. (N. Y.), 107; Grizewood v. Blane, 73 Eng. Com. L. Rep., 526; S. C., 20 Eng. L. & Eq., 290; Rourke v. Short, 25 Law Journal, Q. B., 196; Enderby v. Gilpin, 5 Moore, 571.

The court in 72 Penn. St., 155, after stating that gambling must not be confounded with mercantile speculation, for that is proper, says, "merchants speculate upon the future price of articles in which they deal, and buy and sell accordingly. They forecast the future and buy and sell in a *bona fide* way, which is unobjectionable. But," the court says, "when ventures are made upon the turn of price only, with no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and fall at a future time, the case is changed. No money or capital is invested in the purchase, but so much only is required as will cover the difference or margin, as it is figuratively termed. The bargain represents not a transfer of property, but a mere stake or wager upon its future price. . . . Such transactions are destructive of good morals and fair dealings, and of the best interests of the community."

Against such transactions the statute is aimed, and, when they are proven, the parties must, in this state, be left without remedy. They are unlawful and void, as contravening a sound public policy as well as the statute of the state. Our statute has gone further than the English statutes on this question; ours makes void all agreements and contracts to pay money lost on a wager, either to the party winning or to a party who advances it to aid in the enterprise. It is unlawful to bet and equally so to lend money for that purpose. No cause of action arises in favor of a party to an illegal transaction, nor will the law lend its aid to enforce any contract which is in conflict with the terms of a statute or a sound public policy or good morals. Ruckman v. Bryan, 3 Denio, 340; Armstrong v. Toler, 11 Wheat., 258 (§§ 581-586, *supra*); Hooker v. Knab, 26 Wis., 511. It has also been held that where a stake-holder pays over the money to a winner by the direction of the loser after the bet is decided, it will not prevent a recovery back of him by the loser. Ruckman v. Pitcher, 1 N. Y., 392.

Having ascertained the law applicable to such transactions, the question recurs upon the evidence: Did the bankrupt intend or mean to deal in the property, or only pay the difference in price at a future day? If the latter, the contract within the decisions above referred to is void.

It is insisted that both the claimants acted as agents only for the bankrupt in buying, and were not the parties selling, so that, conceding the rule of law

to be as above stated, they do not fall within it; that they paid the money to the parties selling to the bankrupt, and although the purchase was made through them as agents of the bankrupt in the usual way of trade, and with knowledge of the illegal nature of the contract, still the bankrupt is liable to them for money paid to third parties for the differences, and that it is in the nature of a claim for money paid at his request, and is not within the prohibition of the act. Reliance was placed upon the case of *Rosewarne v. Billing*, 109 Eng. Com. L. Rep., 316, to sustain this claim. That was an action by a broker to recover of his principal money paid by him for differences on illegal contracts for the purchase of shares of railroad stock made by the broker for the principal. The court say that no action could be maintained to recover the differences on such time contracts, but that when such losses were paid by a party at the request of the defendant, such party could recover. The court hold that such contracts are void, but not illegal, and, not being illegal, a party paying at the request of the defendant could recover. But this is not the doctrine of the courts of this country. They hold them to be illegal; they say they are unlawful as in conflict with sound morals and public policy as well as inhibited by the statute. But this is not all. Our statute is broader than the English statute. The statute of this state declares all contracts, notes or agreements for reimbursing or repaying any money knowingly advanced for any betting or gaming at the time or place of the gaming or betting to be void. These parties, it seems to me, fall within that statute. They advanced the margins at the time to make the gaming contract, and without their aid in that respect the contracts would not have been made. So if these contracts are gaming contracts, they must be held to have advanced the money for margins to make them, and their claim for repayment falls within the prohibited class mentioned in the act. They made the illegal contracts and advanced the money required to give them colorable validity. To take their case out of the statute would be establishing a most flagrant evasion of its provisions.

If the bankrupt had requested a party to pay the difference for him after the loss, and such party had not been an actor, nor aided or assisted in the unlawful dealings out of which the loss grew, there would be some reason in allowing him to recover. He would be an innocent party. *Jessop v. Latwyche*, 10 Exch., 614. In such a case the consideration would not, as to him, be illegal; he would not be chargeable with the act declared to be illegal. But here the statute, as before stated, declares all promises or notes to repay money advanced at the time and place, void. The money here was advanced at the time and place. The contracts of purchase were in the names of these claimants. Their claims are not for money loaned to bankrupt to pay differences, but for money paid by them for differences, and for which the bankrupt was not liable.

The case of *Steers v. Lashley*, 6 Term R., 61, very closely resembles this. That was an action on a bill of exchange by an indorsee with knowledge of the consideration. In that case the defendant had engaged in several stock-jobbing transactions in which Wilson was employed as his broker and had paid the differences. Wilson drew the bill for a part of those differences, which defendant accepted; it was then indorsed to the plaintiff, but with knowledge of the facts. Lord Kenyon, before whom the case was tried, ordered non-suit. A motion to set it aside was made on the ground that as the broker had paid the difference for his employer, which was the consideration, the bill was not vitiated by the original transaction, citing *Faikney v. Reynous*, 3 Term R., 418, and *Petrie v. Hannay*, 4 Burr., 2609. Lord Kenyon denied the motion,

and said that, in the cases referred to, the money had been loaned to pay the difference, and afterwards the securities were given for the money so loaned. "But here (he said) the bill on which the action is brought was given for the very differences, which Wilson could not enforce payment of himself," and as the plaintiff took the bill with knowledge, he occupies no better position.

If the law was correctly stated in that case, it settles the question that a broker who transacts the illegal business, and pays the differences, cannot recover of the principal the money thus paid; a proposition so clear to my mind that it would hardly seem necessary to quote authority to sustain it. But plain as it appears, the case of *Rosewarne v. Billing*, *supra*, cited by the claimant's counsel, seems to sanction a different doctrine. But I do not think that case can be regarded as the law upon this point in England. There are cases in conflict with it; so I think it may be safely asserted that the weight of English authorities is with *Steers v. Lasbley*, *supra*. If transactions like these are illegal, I know of no reason why the broker should be favored, or exempted from the usual consequences that attach to other parties aiding or assisting in the commission of unlawful acts. It makes their business quite hazardous, but that grows out of its illegal character. They can refuse to aid in transactions of such a character, and if they would do so, a great deal of that kind of gambling would stop. Parties like this bankrupt, living in the country, without means or privileges upon the exchange boards, could not embark in such gambling business without their aid. Through brokers and commission men they get access to the exchange boards, and by reason of such facilities are enabled to engage in these gaming contracts, which generally end like this, in ruin and bankruptcy.

To their complaint of hardship it is a sufficient answer that they should not aid and assist parties in transactions condemned both by the law and the principles of sound morality. If they do, they must take the consequences like other transgressors.

Having ascertained that contracts of sale that do not contemplate the actual *bona fide* delivery of the property by the seller, nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are held to be gambling contracts, and that the broker stands in no better position than the seller to recover differences, it only remains to examine the testimony and see whether the contracts in this case were such. And upon this point I do not intend to go over the testimony in detail. It is self-evident from the testimony and the condition of the parties that these sales were not *bona fide*. The bankrupt was not a dealer in grain. He was a country merchant of little or no means; had no money to invest in wheat, that is to pay for wheat, which fact both Richard Green, his brother, and Norris knew. The idea that they bought for him several thousand bushels of wheat with the expectation that he was to pay for it is preposterous. He swears they did not, and it is apparent that he could not, and they knew it.

He did not put up any money even for margins, or but a small amount, if any, and made no arrangements with them to do so. Norris says the wheat was bought for him in their firm name. That probably may have been so in the sense that term is used "on change," but that there was a *bona fide* purchase, with the intention that he would take and pay for such large quantities of wheat, I do not believe. The purchase, it is claimed, was made in the name of Norris & Spencer, the brokers, not the bankrupts; and that they had a number of contracts, and perhaps some warehouse receipts for grain, is quite probable;

and that they might have considered such contracts as the property of the bankrupt, and charged the wheat to him on their books on receiving his order to buy, so as to make a colorable sale, is not improbable; but that they expected payment for the whole the testimony completely negatives. The fact that the parties charged the bankrupt with the price of the grain when he ordered it purchased, and credited him with the price sold for, when sold, does not prove what the real transaction was. That only represents the form, not the nature of the transaction. It was as well to keep the account in that way, when the real intention was to speculate in and pay only the differences, as when the sale was of the article itself. The books would show the differences if it was to pay them, and the profit or loss if it was a genuine sale. The books were properly kept in either case, and do not therefore furnish any evidence as to what the contract was.

§ 744. — *promissory notes given in settlement of such gaming contracts are void for want of consideration.*

But it is said that the bankrupt settled with Norris and gave him notes, and that these notes are good if the account was not. That is not so. If there was no legal liability on the part of the bankrupt to pay the claim, the notes given therefor are void for want of consideration. This point is expressly ruled by the supreme court in *Hooker v. Knab*, 26 Wis., 511. See, also, *Steers v. Lashley*, 6 Term R., 61, *supra*. The question whether the bankrupt could have defended on this ground, as against a *bona fide* holder of the notes, does not arise here, as the original parties are alone before the court. The claim of Norris is therefore invalid, and his proof is rejected. As to Richard Green's claim, the pretended contracts of purchase were made in his name, and not in the name of the bankrupt, and the testimony shows that, as between them, all that either ever contemplated was the payment of differences. Under the evidence this is too plain to admit of question or discussion. His claim, so far as such differences on grain contracts are included, is disallowed and the proof is rejected. But as there are some other items of account that are proper and should be allowed, it will be referred to the register to take and admit proof of such other items. The motion of the assignee to expunge the proof of such parties is therefore granted.

§ 745. *Contract for the future delivery of goods which the seller does not own.*—It is not material, in a contract for the future delivery of goods, that the party has no such goods at the time of the contract. *Dodge v. Van Lear*,* 5 Cr. C. C., 278.

§ 746. *Corner in oats — "Puts" — Intention as to delivery.*—C., wishing to make a corner in oats for the month of June, bought all the cash oats in the market, and contracted for the delivery of oats to a large amount during that month. He also sold "puts," which were privileges of delivering oats at any time during the month at a certain price. The buyer of the "put" paid one-half a cent per bushel for the number of bushels represented in his put, and the seller promised to take that number of bushels at a certain price if delivered within a certain time. *Held*, that the transaction was a gambling contract, and void; that it was a mere bet on the future price of oats, and that obviously the parties did not contemplate an actual delivery of the grain, at least not unless the market price was below the price fixed. *Held*, also, that, although there was no statute making such contracts void, yet if the parties did not intend on one side to buy, and on the other to sell, but merely to adjust differences, such contracts were void, and the money paid thereon may be recovered back. *In re Chandler*,* 6 Ch. Leg. N., 230.

§ 747. *Wager upon the market — No intention to deliver.*—To make a contract void as a mere wager upon the market it must appear that neither party intended to deliver the goods contracted for. *Lehman v. Strassberger*, 2 Woods, 554.

§ 748. *Option deal — Missouri statute — Note — Innocent holder.*—An option deal is not a "game or gambling device," within the meaning of the statute of Missouri, and a note

given for a balance due on such a deal may be enforced in the hands of an innocent holder for value without notice, if indorsed to him before maturity. *Third National Bank v. Harrison*, 3 McC., 321 (BILLS AND NOTES, §§ 1314-18).

§ 749. *Wager contract by agent — Note given by principal for advances made by agent.*— A factor who takes his principal's note for his advances and commissions on a contract made for the principal with a third person for the future delivery of cotton, which contract is void as a mere wager upon the market, may recover thereon. And especially will the note be valid, if it is not proved that the third person with whom the contract was made agreed that there should be no delivery. *Lehman v. Strassberger*, 2 Woods, 554.

8. *Fraud.*

SUMMARY — *Waiver of fraud, a question of fact, § 750. — Money may be recovered back, § 751.*

§ 750. Whether there has been a waiver of fraud is a question of fact. The party defrauded must have actual knowledge of the fraud before he can be held to have waived his right to rescind, but when once fully informed he must act with reasonable dispatch. *Pence v. Langdon*, §§ 752-755.

§ 751. Money paid on a contract into which plaintiff was induced by defendant's fraud to enter may be recovered back, although a statute forbade plaintiff to make such contracts. And the action is not upon an implied contract growing out of the express illegal one; but upon a contract implied by law to refund money obtained by fraud. *Northwestern Mutual Life Ins. Co. v. Elliott*, §§ 756-760.

[NOTES. — See §§ 761-769.]

PENCE v. LANGDON.

(9 Otto, 578-582. 1878.)

ERROR to U. S. Circuit Court, District of Minnesota.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.— A brief statement of the facts disclosed in the record will be sufficient for the purposes of this opinion, and a few remarks will suffice to dispose of the case.

Langdon lived in Minnesota. Pence lived in California, and was engaged in mining operations. On the 10th of December, 1874, Langdon, by a letter of that date, advised Pence that he had seen Watson, and inquired about their mining interests. He concluded by saying: "If anything can be done that will be satisfactory to all parties, let me know." Pence replied by letter of the 17th of that month. Speaking of the mine in which he and Watson were concerned, he said, amongst other things: "There is an eighth, that is, seven thousand five hundred shares, that can be bought if taken at once, at the same I paid and the same Watson paid, after looking and prospecting for five weeks." "The price is . . . \$8,368.75, gold." . . . "Should you conclude to buy, you must telegraph me here on receipt of this letter. You can pay," etc. "This will put you on the ground-floor with us, or better than I am, as I have spent about \$600 to find this mine, prospect it, and have title looked up, etc. Our title is O. K." Langdon bought and paid the price demanded. On the 28th of January, 1875, Pence addressed Langdon another letter from San Francisco, in which he said: "There have been not less than half a dozen after the seven thousand five hundred shares of stock I sold you, and all were astonished to find themselves too late; and still more astonished when I told them there was no more to be had at present, as we have the controlling interest, and propose to run the mine as we think best." . . . "The stock I have deposited in the Nat. Gold Bank and Trust Co. of this city." . . . "I would like to have you come out after the roads get good and weather pleasant

in the spring." This letter inclosed a bill commencing "Hon. R. B. Langdon, Mina., to J. W. Pence, dr." The stock was charged and the amount paid was credited. No person other than Pence was named as the seller. Linton and Shepherd were interested with Langdon in the purchase. On the 20th of June, 1875, all of them visited the mine with Pence. They claimed then to have learned for the first time that Pence had sold them his own stock, and to have learned also that the stock was worth much less than they had paid for it. They arrived on Saturday, and on the next day notified Pence that they rescinded the contract, and required what they had paid to be refunded. Shepherd and Linton transferred their interest to Langdon, and he thereupon brought this suit. The code of Minnesota authorized it to be in his name.

§ 752. *When a jury can properly be told to find for the defendant.*

Upon the trial in the court below six exceptions were taken by Pence. Two of them were to the admission of testimony. Both of them are so clearly without merit, that we deem it unnecessary to say more about them. He also excepted to the refusal of the court to direct the jury to find a verdict in his favor. Such direction can be properly given only when the state of the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly. This case was certainly not within that category.

§ 753. *In Nevada notice of the rescission of a contract may lawfully be given on Sunday.*

The objection that the notice of rescission was void because given on Sunday is without force. It was given at the mine, which is in Nevada. The result claimed could be produced only by a statutory provision to that effect. The statute of Nevada relating to the Sabbath in no wise affects the subject. See "An act for the better observance of the Lord's day," of November 1, 1861, 1 Compiled Laws of Nevada, p. 2, ch. 3. The stock certificate left at the Gold Bank for Langdon was never in his possession. The affirmance of this judgment will extinguish his claim to it, and Pence can reclaim it whenever he may choose to do so. Langdon was not bound to receive it and tender it back to Pence before bringing suit.

The remaining exceptions relate to instructions given to the jury, which are as follows: "1. In deciding this question of fact, you must take the letters and telegrams and all of them, and looking at them in the light of the previous relations of the parties, and of what each of the writers knew, placing yourselves in the writers' place and situation in order better to ascertain their meaning and purpose, and in the light shed upon this question of fact by these letters and telegrams, and by the history of the whole transaction, you must determine whether the defendant did undertake to act as the plaintiff's agent for the purchase of the stock from others." Admitting that the court was wrong in not giving a construction to the letters one way or the other, touching the main point in the controversy, as is insisted, a concession, perhaps, not necessary to be made, it cannot avail the plaintiff in error that it was not done. Properly construed, we think the letters show clearly the agency of Pence as claimed by Langdon. The jury found accordingly. No harm was, therefore, done by the omission of the court; and if it were erroneous, the error is one of which Pence certainly has no right to complain. With respect to the duty of the court as to construing the letters, see *Etting v. Bank of United States*, 11 Wheat., 59; *Barreda v. Silsbee*, 21 How., 146.

"2. It was not enough to charge the plaintiff with knowledge of the malcharacter of the transaction, that the language used was such as might have

caused some persons to suspect it. He might, in view of previous friendly relations, have no suspicion of bad faith, and might naturally regard expressions as inaccurately used rather than put upon them a construction which would show bad faith on the part of the defendant, which he had no reason to anticipate." This, under the circumstances, we think, was exactly right.

§ 754. *What is necessary to authorize rescission of a contract.*

"3. Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach." The preceding remark is applicable also to this instruction.

"4. If the jury believe that the plaintiff had no actual knowledge or belief that defendant had put his own stock upon them, until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient." There can be no doubt as to the soundness of this proposition.

§ 755. *Doctrine of acquiescence and waiver.*

Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong, while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he will not wilfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch. He cannot rest until the rights of third persons are involved and the situation of the wrong-doer is materially changed. Under such circumstances he loses the right to rescind, and must seek compensation in damages. But the wrong-doer cannot make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay unaccompanied by acts of ownership, and by which he has not been affected. The election to rescind or not to rescind, once made, is final and conclusive.

The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant. Here Langdon was lulled into security by his relations to Pence, and by Pence's letters. There is no proof that he had the slightest knowledge or even suspicion of any foul play until he visited the mine. His action, then, was prompt and decided. The instructions of the court as to the law upon the subject were clear, accurate and well expressed. The rest was for the jury. With what they did we have nothing to do. We find no error in the record.

Judgment affirmed.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY v. ELLIOTT.

(Circuit Court for Oregon: 7 Sawyer, 17-30. 1880.)

STATEMENT OF FACTS.—Action to recover back money obtained by the holder of a life insurance policy upon the false representation that the insured, Moses Elliott, was dead. The policy had been issued to the insured and assigned by him to his father, Jeremiah Elliott, the defendant in this case.

Opinion by DEADY, J.

On September 30, 1879, this suit was brought to recover this money, as having been obtained from the plaintiff by means of the false and fraudulent representations of the father, that the son was dead, when in truth and in fact

he was living; and, to that end, to subject certain property alleged to have been purchased by the former with the money so obtained of the plaintiff to the satisfaction of any decree which may be herein obtained against him, to wit: A band of sheep containing several hundred head, and now in the possession of the defendants, Jeremiah, James Madison and Albert Elliott, and Frank Williams, *alias* Moses Elliott; and donation claims, situate in Jackson county, and numbered sixty-two and eighty-three, and containing three hundred and twenty and ten one-hundredths and three hundred and nineteen and ninety-eight one-hundredths acres, respectively, and by said Jeremiah, on November 11 and December 22, 1873, procured to be conveyed to the defendant Arty Mesy, his wife, with intent to hinder and defraud the plaintiff—one hundred acres of which was afterwards conveyed to the defendant, Albert Elliott, without consideration and with the like intent.

The bill states that the defendants, except Deardoff, are citizens of Oregon, and that he has gone to parts unknown, and prays that, if he comes within the jurisdiction, he may be made a party, if necessary; that the defendant, Frank Williams, is in fact Moses Elliott, and that the plaintiff did not discover the alleged fraud until within eighteen months prior to the commencement of this suit. Only Jeremiah Elliott and wife and James Madison Elliott were found within the jurisdiction and served with a subpoena to answer. The defendant, James Madison Elliott, answers, disclaiming any interest in the sheep or real property, except a leasehold interest, which will terminate on October 31, 1881, in donation No. 82, jointly with his brother, Marion Elliott, for which they pay Arty Mesy one-third of the crop.

The defendants, Jeremiah and his wife, answer jointly, admitting that in 1870 the plaintiff, by its agent, resident in Oregon, O. B. Gibson, insured the life of their son, Moses Elliott, for \$8,000, and that said Moses soon after assigned and transferred the policy therefor to the defendant Jeremiah, but aver that said policy was null and void, because the plaintiff was not then authorized or qualified to do business in Oregon; that on June 24, 1871, said Moses was drowned in the Columbia river, and that in consequence of the claim and representations to that effect, contained in the affidavits of said Jeremiah and Deardoff, the plaintiff, at Portland, Oregon, on October 1, 1873, paid said Jeremiah, as the assignee of said Moses, on account of his policy and death, \$7,931.97; that no part of the property aforesaid was purchased with said money, but that said real property was purchased with the funds of said Arty Mesy, derived from the father's estate twenty-five years ago, and the interest thereon, amounting to \$2,300, and that said Albert Elliott paid about \$800 for the one hundred acres thereof subsequently conveyed to him.

§ 756. *The contract of insurance was invalid in the courts of Oregon.*

The defense that the contract and policy of insurance is void is founded upon the statute of Oregon (Or. Laws, 617, Oct. 24, 1864), providing that "a foreign corporation, before transacting business in this state, must duly" appoint an attorney resident here, upon whom service of process may be made, in all proceedings brought against it within the state. In *In re Comstock*, 3 Saw., 218, and in *Semple v. Bank of British Columbia*, 5 id., 88, this court held that a foreign corporation before complying with this act is not authorized to transact business in Oregon, and that any act done therein by such corporation before the appointment of such resident attorney is null and void; and to the same effect is the decision of the supreme court of the state in *Bank of British Columbia v. Page*, 6 Or., 431.

In reply to this, the plaintiff contends that the contract of insurance was not made in Oregon, but in Wisconsin, and is therefore valid, notwithstanding the Oregon statute. The facts bearing upon this question appear to be, that the application for the policy was made at Portland, Oregon, on September 22, 1870, to O. B. Gibson, the agent of the plaintiff, then resident here, who then stated thereon that the "renewals" were to be made at the Portland agency; and was by him forwarded to the plaintiff, who, on October 19, 1870, at Milwaukee, Wisconsin, forwarded the policy, signed by its president and secretary, to said Gibson at Portland, Oregon, who then delivered the same to the insured, and received from him the first quarterly premium of \$26 cash and \$39.28 in his note. The policy contains this clause: "7. This policy shall not take effect and become binding on the company until the premium shall be actually paid, during the life-time of the person whose life is assured, to the company or some person authorized to receive it, who shall countersign the policy on receipt of the premium."

The policy is "countersigned by O. B. Gibson, agent."

§ 757. *The contract in the case at bar was made in Oregon.*

Generally speaking, the validity of a contract is to be decided by the law of the place where it is made; and if valid or void there, it is valid or void everywhere. The few exceptions to this rule need not be mentioned in the application of it to this case. Story's Con. Laws, sec. 242 (1) *et seq.*; Cooley's Const. Lim., 286; Cox v. United States, 6 Pet., 203; Hyde v. Goodnow, 3 N. Y., 269; *In re* Pittock, 2 Saw., 428. Where, then, was this contract made? in Wisconsin or Oregon? The answer to this question involves the inquiry, where did the final act take place which made the transaction a contract, binding upon the parties? The premium was paid to the agent of the plaintiff at Portland, who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed. And until it was binding upon the company it was not binding on the applicant—in short, it was not yet a contract, but only a proposition. Pomeroy v. Manhattan L. Ins. Co., 40 Ill., 400; Thwing v. Great Western Ins. Co., 111 Mass., 109; Wood, F. Ins., 189 and n. 2; Hardie v. St. Louis M. L. Ins. Co., 26 La. Ann., 242; St. Louis M. L. Ins. Co. v. Kennedy, 6 Bush, 450.

The case of Hyde v. Goodnow, *supra*, cited by counsel for plaintiff, is not contrary to this conclusion. There the assured, living in Ohio, applied to a company in New York, through its local agent and surveyor, for insurance, sending with his application a premium note and the report of the surveyor thereon. The company accepted the application in New York, and mailed the policy direct to the applicant in Ohio, which, in accordance with its by-law, contained the stipulation that it should not be binding until the application and premium note were deposited in the office of the company and approved by its directors. The contract, if made in Ohio, was illegal and void, because the company was not authorized to transact business there, but, in a suit upon the premium note against the maker in New York, the court held that the contract was made in the latter state, and therefore valid, because when the application was approved and the policy deposited in the mail at New York, addressed to the defendant, the contract was then and thereby executed, and became binding on the parties thereto. An offer by mail to insure certain property, and an acceptance by letter of the proposition, constitute a valid con-

tract at and from the place and date of mailing such letter of acceptance. *Taylor v. Merchants' F. Ins. Co.*, 9 How., 398 (§§ 167–174, *supra*).

§ 758. *Where a party, by means of false and fraudulent representations, secures the payment of money, in pursuance of an illegal contract, such money can be recovered back.*

But admitting that the contract of insurance in this case was made in Oregon, and is therefore illegal and void, the plaintiff contends that it is entitled to the relief sought upon the ground that the defendant Jeremiah obtained money from it, to which he was not entitled, by means of the false and fraudulent representations concerning the death of Moses Elliott. In answer to this proposition the defendant insists that this suit, if not brought directly upon the illegal contract of insurance, is brought upon an implied one, to the effect that the defendant would return the money thus obtained from the plaintiff; and that such implied contract arises immediately out of, and is connected with, the original illegal one, and is therefore illegal itself, citing *McCausland v. Ralston*, 12 Nev., 195; *McBlair v. Gibbes*, 17 How., 233 (§§ 457, 458, *supra*); *Armstrong v. Toler*, 11 Wheat., 258 (§§ 581–586, *supra*); *Dillon v. Allen*, 46 Ia., 299. But it is a mistake to suppose this suit is brought upon a contract actually made or attempted to be made by the parties, and within the purview or operation of the prohibition of the statute, or at all. On the contrary, it is a suit brought to recover money obtained by the defendant from the plaintiff, not upon the void contract of insurance, but by the fraud of the defendant. True, the plaintiff might at common law, upon the facts, have maintained *assumpsit* for money had and received by the defendant to the plaintiff's use, and the law, in the interest of justice and by way of promoting the remedy, which was in form *ex contractu*, would have implied a promise on the part of the defendant to pay. But this would not have been a contract arising out of the void and illegal one, nor in any respect an affirmation of its validity, but only an implication or fiction of law, that upon the facts—the plaintiff being entitled *ex æquo et bono* to recover the money which the defendant had wrongfully obtained from it—he promised to repay the same.

The case of *Catts v. Phalen*, 2 How., 378, is directly in point and decisive of the one at bar upon this question. In it the supreme court held that when a person was employed to draw an illegal lottery, and secretly procured a ticket therein to be purchased in the name of another for himself, and thereafter fraudulently pretended that such ticket drew a prize of \$15,000, which was paid by the proprietors in ignorance of the fraud, they might maintain an action against the drawer to recover the amount so fraudulently obtained. In delivering the opinion of the court, Mr. Justice Baldwin said: "The facts of the case present a scene of deeply concocted, deliberate, gross and most wicked fraud, which the defendant neither attempted to disprove nor mitigate at the trial, the consequence of which is that he has not, and cannot have, any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned, the law annuls the pretended drawing of the prize he claimed, and in point of law he did not draw the lottery; his fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact, and he had claimed and received the money of the plaintiffs by means of any other false pretense, and he is estopped from avowing that the lottery was in fact drawn. . . . The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to draw the

prize; it was paid and received on the false assertion of the fact; the contract which the law raises between them is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place. To state is to decide such a case."

So here, assuming, as this defense admits, that this money was obtained from the plaintiff as alleged in the bill, the trust or contract which the law raises or implies between the parties is not founded on the illegal contract of insurance, but on the obligation of the defendant to refund the money which he obtained from the plaintiff by falsehood and fraud — by the assertion and representation of a death which never took place. To state such a case is to decide it also. Indeed, it appears to me that if the defendant had robbed the agent of the plaintiff in this state of this money on the highway, he might with as good grace defend an action to recover the stolen property on the ground that the plaintiff was not authorized to do business in this state, as in the present case. Although the defendant was not authorized to do an insurance business in this state, this fact did not license the defendant to rob or defraud it under pretense of doing such business with it.

§ 759. *A Wisconsin corporation may sue in the federal courts in Oregon, although forbidden by statutes of Oregon to do business in that state.*

The answer also makes the objection that the plaintiff is not capable of suing in this state, because, as alleged, it has not yet properly complied with the laws of this state authorizing it to do business here. But without stopping to consider whether this objection should not have been taken by plea in abatement, or what is the effect of the proof upon the point, it is sufficient to say that the plaintiff, being a citizen of Wisconsin, may sue in this court whether it is authorized to do business in the state or not. The state cannot deprive a citizen of another state of the right to sue in the national court, nor has it attempted to do so. The "business" which a foreign insurance company is prohibited from doing in this state before complying with its laws is the business of insurance, and not the mere bringing or maintaining of a suit in this court.

§ 760. *Payment of the insurance policy was obtained by fraud.*

It only remains to dispose of the question of fact — did Jeremiah Elliott obtain this money from the plaintiff by means of false representations as to the death of Moses, as alleged in the bill? The joint answer of Jeremiah and Arty Mesy, his wife, denies the allegations of the bill in this respect, but while Jeremiah was examined as a witness on his own behalf, before the examiner, the wife was not produced. The reason for this omission is left to be inferred from the circumstances, but it is not improbable that the wife might verify an answer before a notary with her husband, that she could not or would not support in detail upon a cross-examination by counsel before the examiner. Besides, there are three sons of the defendant Jeremiah — Madison, Marion and Andrew; and one daughter, Mary Ann — who ought to be material witnesses in this case, and have not been called or examined by him; and the first of these, Madison, is a defendant in this suit, who has answered, simply denying the fraud "as to himself."

The evidence taken is quite voluminous and in some material particulars conflicting and unsatisfactory. But the weight and direction of all the evident and controlling circumstances in the case tend strongly to the conclusion that the money was obtained from the plaintiff by fraud — that Moses Elliott was

not drowned in the Columbia, but, at the commencement of this suit, was still alive, and practically living with the Elliotts under the assumed name of Frank Williams.

It is admitted, or satisfactorily appears from the evidence, that, in September, 1869, Moses Elliott came from Iowa to the Pacific coast, and that, in June, 1870, the father and mother, with their children, Madison, Marion, Andrew, Eldora and Mary Ann, came to Portland direct from Iowa, and that Moses was either here at the time or came with them from Nevada. The father and sons got employment at the Eagle Cliff cannery, on the lower Columbia, and in the fall the family moved to Columbia county, Oregon, near Westport, where Jeremiah took up a quarter section of land under the pre-emption law, upon which he lived until his removal to Jackson county, in the fall of 1873. W. H. Deardoff, a half-brother of Arty Mesy's, and who came to Oregon some time before the Elliotts, lived with them. The house was a small cabin of two rooms, built of old, round logs, and contained very little furniture, and that of no value. Neither the father nor the sons appear to have had any special trade or vocation. Moses worked some in the cannery and getting out piles and stave timber, but preferred hunting, to which he was much addicted. The mother took in washing; and, to all appearances, they were very poor—living from hand to mouth,—and so represented themselves to the neighbors.

At the time the insurance was effected with the plaintiff on the life of Moses he was a poor, illiterate youth of eighteen or twenty years of age, without any one specially dependent upon him or interested in his life, and without any particular means of making money enough to support himself and pay a yearly cash premium of \$104, which he might reasonably expect to do for the next forty years, and for the benefit of he knew not whom. At the same time he had a ten-year endowment policy in the Union Mutual of Maine, upon which the yearly premium was \$217, and which was countersigned and probably delivered at Chicago, Illinois, on August 30, 1869, thus making the yearly premiums which Moses undertook to pay \$324.

It is also morally certain that this insurance upon the life of Moses, although obtained in his own name, and apparently for his benefit, was really procured and carried by the father, and intended for his use and benefit. It appears he was present when the application was made to Gibson, and evidently conducted the negotiation, and, within a short time after the policy was received, without any consideration or excuse therefor, assigned it to himself, "for his sole use and benefit"—signing the name of the assured to the assignment, as if the instrument was his own, and the boy's name had been merely used in the transaction as a convenience or make-believe. The defendant Jeremiah alleges that, on June 24, 1871, Moses Elliott, while assisting his uncle, W. H. Deardoff, with a raft on the Columbia river, a few miles below Westport, fell into the river and was drowned; that no person witnessed the circumstance except said Deardoff, and he reported the fact to the defendant, who searched for his body, but was unable to find it. The plaintiff alleges that this story is a falsehood, devised by the defendant to enable him to fraudulently collect the insurance on Moses' life.

It appears from the evidence that Jeremiah, after procuring the payment of the insurance on Moses' life in the fall of 1873, went to Jackson county, Oregon, where he purchased the real property and sheep mentioned in the bill with a portion of said money, and before the close of the year removed his family there, where he has ever since resided; that, soon after, Moses Elliott made his

appearance in that country under the assumed name of Frank Williams, where at first he kept in the mountains and followed hunting, but after a time herded sheep with and for the Elliots in the mountain ranges, and lived with them in the settlement much of the time, claiming to be a cousin of the Elliott boys, and was at the house of Jeremiah on the night of October 20, 1879, when the process in this case was served on the latter; that he left the neighborhood the next day with the knowledge of Jeremiah, and has not been seen or heard of since.

There is conflicting evidence as to the identity of Moses Elliott and Frank Williams, but that which denies it is from some of the Elliots and persons who never saw Moses before he was said to have been drowned. The circumstance most relied upon to disprove the identity is a difference in height and beard. But between 1870 and 1875 or 1879, there was probably a marked change in both the height and beard of a youth of the age of Moses. And nothing is more unreliable than the guess of the average person as to the height of another — particularly when that other is absent or out of sight. It is probable that a person's ordinary acquaintances will, particularly in his absence, differ as much as two inches in estimating his height. From the evidence I conclude that Frank Williams is very near five feet eleven inches high — not to exceed that. The defendant Jeremiah, in his affidavit of October 11, 1872, says he thinks that Moses was five feet nine inches high "at the time of his insurance" — in the fall of 1870. Between then and 1879 or 1875 it is probable that he grew an inch, and the other inch, or part of one, may be fairly accounted for by the ordinary difference in estimates of height.

But there is a circumstance in favor of the identity of the persons about which there is no doubt, that outweighs all such supposed differences in height and beard. Moses Elliott had lost the two middle fingers of his right hand just below the middle joint, and so has Williams. Those of the former were cut off when he was a mere child by a hatchet in the hands of his brother, and the appearance of Williams' hand shows plainly that he lost his in early life. It may be possible to find two men in the world thus similarly marked, but barely so; and the fact is sufficient, in the absence of any well-established and controlling circumstance to the contrary, to establish identity. If, notwithstanding the similar loss of the fingers, it satisfactorily appeared that Frank had coal-black hair and eyes, while Moses had bright red hair and blue eyes, then the evidence of identity from this fact would be overcome, for it is even more probable that two men should be so similarly wounded in the hand than that the same person should have red hair and blue eyes in 1870, and black hair and eyes in 1875 or 1879. But there is no such contradictory and controlling circumstance in this case. On the contrary, every particle of the evidence entitled to credence points with more or less directness and certainty to the conclusion that Moses Elliott and Frank Williams are one and the same person.

Again, there is the direct and positive testimony of John Dunn. He is a disinterested witness, and his position and employment indicate that he is reliable. He worked in the Eagle Cliff cannery in 1870, when Moses Elliott was there, and has been foreman of the establishment for the past four years. He says he worked in the same cannery with Moses for a month or more, and during that time ate at the same table and slept in the same house with him. In October, 1879, at the request of the agent of the plaintiff, he went with Mr. Neill, the prosecuting attorney of Jackson county, to the cabin on the sheep ranch, where Frank Williams was staying — saw him, and heard Neill talk with him,

and he swears unqualifiedly that he is the Moses Elliott whom he knew at the cannery. But the failure of Jeremiah to produce the best evidence upon this point, or to account for not doing so, is a circumstance that warrants the inference that such evidence would have been in favor of the identity. W. H. Deardoff is the half-brother of Arty Mesy, and is the only witness of the alleged drowning of Moses. He came to Oregon two years before the Elliotts, and lived with them in Columbia county—at least until 1872. He was present when Gibson was applied to for the insurance on Moses' life, and seems to have taken some interest in the transaction. He knows, if any one does, whether Moses was drowned or not, and whether Frank Williams is his *alias* or not. Frank Williams lived with and about the defendant for years before the commencement of this suit. His testimony upon the subject of his identity, and particularly an inspection of his person, would be very material in this case.

Why are not these persons examined as witnesses, or the failure to do so accounted for? They are the relatives and friends of the defendant, and may reasonably be supposed to be within his control or knowledge, and willing to assist him if they could. The reasonable inference is that the defendant dared not call them, and that in the case of Williams he sent the witness out of the country as soon as he was aware of the commencement of the suit. Neither is Madison Elliott called. He is the son of the defendant, and lives near him, and ought to be able to state whether Frank Williams is Moses Elliott or not, and the inference is that the defendant knew or thought he would not testify against their identity, and therefore did not examine him. So with the mother, Arty Mesy Elliott; she knows whether Frank Williams is the child she bore and "called his name Moses" or not. And although she has in the joint answer of herself and husband affirmed in effect that they are not identical, I cannot but think that if such was the fact she would have been examined as a witness upon that point, and given an opportunity to say so explicitly, subject to cross-examination.

By way of preventing the real property mentioned in the bill from being taken to satisfy any decree which the plaintiff may obtain in this case, the defendant, Jeremiah, has set up and testified to a story to the effect that this property was bought with the separate funds of his wife. In brief it is this: That Jeremiah and Arty Mesy were married in Ohio in 1843, and in 1857 the latter received from her father's estate \$1,500, which, in 1858, they converted into gold and carried with them to Iowa, where they kept it until the advent of greenbacks, when they exchanged the gold for the latter and then invested these in 5-20's, so as to swell the amount to \$2,500; that in 1870 they brought \$2,300 of these bonds to San Francisco, where they exchanged them at par for gold and brought the gold to Oregon, where they kept it "under lock and key, in an elk-skin purse," until the fall of 1873, when the defendant purchased this property with \$2,025 of this money, and took the conveyances therefor to his wife.

In the light of the established circumstances of the case, the story is a very improbable one, and the contradictions and absurdities with which Jeremiah Elliott has filled his testimony, in the attempt to support it, make it utterly unworthy of belief. When the plaintiff paid him with a check on New York, he gave the same to the national bank of this city for collection, but apparently he was in such urgent need of money that he could not wait from the 1st to the 18th of the month, when the collection was telegraphed, but got \$600

on interest from the bank on the security of the check, and yet he testifies that at that very time his wife had \$2,300 in gold lying idle, and he had \$950 of his own in bonds. In the language of the court in *Catts v. Phelan*, *supra*, this transaction seems to have been, on the part of Jeremiah Elliott, "a deeply concocted, deliberate, gross and most wicked fraud." There must be a decree that the plaintiff recover of the defendant, Jeremiah, the sum of \$7,931.97, with legal interest from October 1, 1873, together with costs, and that the property mentioned in the bill be held by the parties claiming it in trust for the plaintiff, and that the same be sold to satisfy this decree.

§ 761. Voidable for fraud, not void.—A contract is not rendered void for fraud, but voidable only, at the option of the party defrauded. This is the rule both in law and in equity, whether the fraud was committed by one of the contracting parties upon the other, or by both upon persons not parties to the transaction. If perpetrated by one party on the other, the contract remains operative and in force until it is disaffirmed by the injured party. *Foreman v. Bigelow*, 4 Cliff., 541.

§ 762. Receiving of benefits of contract by defrauded party.—Although a party was deceived and overreached by a contract for the use of a patented machine in a certain locality, on the payment of a certain sum per week, yet, if he continues to use the machine, he must conform to the terms of the contract as to payment. *Brooks v. Stolley*, 8 McL., 527.

§ 763. Property acquired under fraudulent contract—Executed.—Though a contract contains clauses which would authorize its rescission on the ground that it was a fraud on one of the parties thereto, yet neither party can appropriate to his own use the joint property of both acquired under the contract without paying therefor. So far as the contract has been executed, both parties are bound, and the right of each in the property acquired under the contract must be respected. *Western Union Tel. Co. v. Kansas Pac. R'y Co.*, 4 Fed. R., 292.

§ 764. Agreement to prevent competition at sale of public lands.—It seems that an agreement to combine and prevent competition at a sale of public land is fraudulent and void, and vitiates all contracts based thereon. *Walworth v. Kneeland*, 15 How., 353.

§ 764a. Fraudulent contract by public officer—Surrounding circumstances.—Though an officer may have full power to enter into a contract, yet the contract may be void for fraud as having been made by the collusion of the officer, and all negotiations and circumstances surrounding the contract, as well as its terms, may be examined to prove the fraud. *Hitchcock v. City of Galveston*, 3 Woods, 292.

§ 764b. Contract by government agent—Fraud on government—Action thereon.—Three persons, one of them the government agent who had charge of letting the contract, entered into an agreement by which two were to do the work and each was to have one-third the profits. *Held*, that such a contract was a fraud on the government, and that an action founded thereon by one partner against the other could not be maintained. *Bartle v. Coleman*, 3 Cr. C. C., 238.

§ 765. Misrepresentation as to legal effect—Ignorance of the terms.—A misrepresentation as to the legal effect of a written contract has no effect on the binding force of the contract where the facts were known; and where a party entering into a written contract does not read it or take any pains to acquaint himself with the terms thereof, he will not be heard to say that he was ignorant of and mistaken as to its terms and obligations. *Upton v. Tribilcock*, 1 Otto, 49.

§ 766. Misrepresentation as to future act.—Misrepresentations at the time of making a contract as to what would be done thereafter, and not as to a present or then existing fact, are insufficient to avoid the contract. *Hale v. Continental Life Ins. Co.*, 12 Fed. R., 860.

§ 767. Forgery—Note—Mortgage.—A wife signed a mortgage of her land to secure a note given by her husband for the benefit of a firm of which her husband was a member, and, in order to give the note greater negotiability, the wife's name was forged to the note. *Held*, that this forgery invalidated both the note and the mortgage in the hands of an innocent purchaser. *Mersman v. Werges*, 1 McC., 531 (Conv., §§ 407, 408).

§ 768. Action on sealed instrument—Fraud in consideration and in execution.—Fraud in the consideration of a sealed instrument cannot be set up in an action at law between the parties; but fraud in the execution of the instrument may be. *Hartshorn v. Day*, 19 How., 211 (§§ 1585-88).

§ 769. Action for damages for breach of contract—Fraud.—The question of fraud cannot be considered in an action for damages for breach of contract. And if the jury should be disposed to infer it from the evidence, it ought not to influence their verdict. *Willings v. Consequa*, *Pet. C. C., 801.

V. CONSTRUCTION AND INTERPRETATION.

1. *In General.*

SUMMARY — *Ordinary terms taken in ordinary sense; expert testimony, § 770.*

§ 770. Ordinary terms must be taken in their ordinary meanings. So where the language of certain guaranties of indemnity was plain, it was held that expert testimony was inadmissible to show that certain expressions used in them had a technical meaning. *Moran v. Prather*, §§ 771-776.

[NOTES.— See §§ 777-891.]

MORAN v. PRATHER.

(23 Wallace, 492-503. 1874.)

ERROR to U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—Prather, defendant in error, with one Thoregan and two others, was owner of the steamboat "Bartable," which was liable to debts of large amount for expenses incurred in building and navigating her. Thoregan sold his interest to Prather, September 25, 1868; and Prather bound himself to hold Thoregan harmless from all debts of the boat and owners then existing. On September 21, 1869, Prather, being then owner of seventeen thirty-seconds of the steamboat, sold his interest to one Mary Barker, who agreed to save him harmless from all debts then existing on the steamboat. Certain creditors of the steamboat had given to Prather the following instrument:

"NEW ORLEANS, September 20, 1869.

"We, the undersigned creditors of the steamboat Bartable, do hereby agree to release J. G. Prather of St. Louis from all indebtedness due us by the said steamboat so far as the said Prather is concerned.

"MORAN & NOBLE,

BRADY & PALMER,

"McCLOSKEY & MASON,

J. S. SIMONDS,

"T. R. MEDLEY,

D. C. McCAN."

Moran & Noble also gave to Prather the following instrument:

"NEW ORLEANS, September 20, 1869.

"We, the undersigned, of the city and state aforesaid, do hereby bind ourselves and our heirs, *in solido*, to defend and save the said J. G. Prather of St. Louis, state of Missouri, seventeen thirty-seconds owner of the steamboat Bartable, free and harmless of any and all claims and demands that *may arise or be brought against said steamboat*, excepting those above signed.

"MORAN & NOBLE."

Mrs. Barker did not pay the debts according to her contract, but two different suits for debts existing prior to September 20, 1869, were instituted against the former owners, and the judgments obtained in these suits Prather was ultimately obliged to satisfy. Prather brought suit in the court below against Moran & Noble upon their contract of indemnity, and obtained a verdict for the amount of the judgments he had been obliged to pay. The defendants excepted to the admission of certain evidence and the rejection of certain other evidence as appears in the opinion, and brought the case to this court.

Opinion by MR. JUSTICE CLIFFORD.

The errors assigned are: (1) That the circuit court erred in excluding the evidence offered by the defendants that the words "steamboat debts" mean such debts as constitute a lien or privilege on the steamboat for necessary sup-

plies, materials, repairs and wages; that they do not include debts which cannot be enforced against the steamboat by any of the conservatory laws of the state. (2) That the court erred in admitting the testimony offered by the plaintiff that the steamboat, at the time of the sale, was a very valuable vessel, that the interest of the plaintiff was worth much more than the amount for which it was sold, and that it was understood at the time of the sale that the purchaser should assume and protect the plaintiff from all existing debts of the steamboat, and that the purchaser should give a bond to that effect. (3) That the instructions given to the jury were erroneous. (4) That the court erred in refusing to instruct the jury as requested by the defendants.

§ 771. *Experts may be called usually to explain technical phrases.*

1. Cases arise undoubtedly in which the testimony of expert witnesses is admissible to explain terms of art and technical words or phrases, and it may be admitted that a written instrument may be so interspersed with such technical terms that it would be error in the court to exclude the testimony of persons skilled in such matters, if duly offered by the proper party in the litigation. *Seymour v. Osborne*, 11 Wall., 546. Terms of art, in the absence of parol testimony, must be understood in their primary sense, unless the context evidently shows that they were used in the particular case in some other and peculiar sense, in which case the testimony of persons skilled in the art or science may be admitted to aid the court in ascertaining the true intent and meaning of that part of the instrument; but the words of the instrument which have reference to the usual transactions of life must be interpreted according to their plain, ordinary and popular meaning; and the rule is that parol evidence is not admissible to contradict or vary such an instrument. 1 Greenl. on Ev., 12th ed., § 285; 1 Taylor on Ev., 6th ed., § 367.

§ 772. *The guaranties given in the case at bar are to be interpreted according to their ordinary meaning.*

Difficulty will sometimes arise in determining whether the particular term or phrase in question is used in a technical or in a popular sense, but the court is of the opinion that no such difficulty is presented in this investigation. Instead of that it is quite clear that neither the words of the guaranty given by the plaintiff to his vendor when he made his second purchase, nor the words used in the guaranty given by the defendants to the plaintiff, are either doubtful or ambiguous, nor are the words of either of those contracts of a character to afford the slightest support to the proposition that parol testimony of any kind would be admissible to contradict, vary or to unfold or expound their ordinary signification and meaning.

By the allegation of the petition it appears that the plaintiff, when he made his second purchase, bound and obligated himself to hold his vendor free and harmless of all debts of the steamboat and owners, existing against the steamboat at the date of the sale, and to reimburse him for any and all debts then existing that he should be compelled to pay on account of his having been an owner of the same. Language equally clear, comprehensive and decisive is employed in the guaranty given by the defendants to the plaintiff when he transferred his entire interest to the person in whose behalf the defendants executed the guaranty which is the foundation of the present suit. Subject to the exception before stated, they bound themselves and their heirs *in solido* to defend the plaintiff, and save him free and harmless of any and all claims and demands that may arise or be brought against the steamboat, which language is neither technical nor ambiguous, and it certainly falls within that class of ex-

pressions which by all the authorities must be interpreted according to their plain, ordinary and popular meaning. 2 Taylor on Ev., 6th ed., § 1034; *Robertson v. French*, 4 East, 135.

Where the words of any written instrument are free from ambiguity in themselves, and where the external circumstances do not create any doubt or difficulty as to the proper application of the words to the claimants under the instrument, or the subject-matter to which the instrument relates, such an instrument, said Tindal, C. J., is always to be construed according to the strict, plain, common meaning of the words themselves, and that in such cases evidence *dehors* the instrument for the purpose of explaining it, according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. *Shore v. Wilson*, 9 Clark & F., 355; *Mallan v. May*, 13 Mees. & Wels., 517.

All the facts and circumstances may be taken into consideration, if the language be doubtful, to enable the court to arrive at the real intention of the parties, and to make a correct application of the words of the contract to the subject-matter and the objects professed to be described, for the law concedes to the court the same light and information that the parties enjoyed, so far as the same can be collected from the language employed, the subject-matter, and the surrounding facts and circumstances. Addison on Contracts, 6th ed., 918. Ambiguous words or phrases may be reasonably construed to effect the intention of the parties, but the province of construction, except when technical terms are employed, can never extend beyond the language employed, the subject-matter, and the surrounding circumstances. *Nash v. Towne*, 5 Wall., 689 (§§ 1039-42, *infra*). Apply that rule to the case and it is clear that the evidence offered by the defendants was properly excluded, and that the exception under consideration must be overruled.

§ 773. *Evidence that an article was sold at much less than its market value is admissible as throwing light on the circumstances of the sale.*

2. Evidence was introduced by the plaintiff at the trial that his interest in the steamboat was worth much more than the amount for which the same was sold, and that it was understood at the time of the sale that the purchaser should assume and protect the plaintiff from all existing debts of the vessel and give a bond to that effect. Exception was taken by the defendants to the ruling of the court in admitting that testimony, which ruling is the foundation of the next assignment of errors.

Parol evidence is certainly not admissible to contradict, vary or control a written contract, but the evidence in question in this case is not subject to any such objection, whether applied to the guaranty given by the plaintiff to his vendor or to the bill of sale given to the plaintiff by the purchaser of his interest in the steamboat. Much less was paid for that interest than its market value, the evidence of which was properly admissible as showing the surrounding circumstances at the time the bill of sale was executed, and also to show the circumstances which induced the purchaser to give the guaranty executed by the defendants.

§ 774. *Instructions given in the case at bar were not erroneous.*

3. Specifications of error under the third assignment involve the same question, or some phase of the same question, as that contained in one or the other of the two preceding assignments. The defendants insisted in the court below, and still insist, that the phrase "steamboat debts" is a technical phrase, and that it did not include any debts except such as constitute a lien on the steam-

boat. Attempt is made to set up that theory by exceptions to the charge as well as by exceptions to the rulings of the court, but several answers may be given to the theory, either of which is sufficient to show that the exceptions are not well founded: (1) That the language of the guaranty is not correctly reproduced. (2) That the phrase referred to is not a technical phrase within the meaning of the rules of evidence applicable in such cases. (3) That by the true construction of the guaranty it includes all existing debts contracted for repairs, supplies and running expenses for and on account of the steamboat, for which the plaintiff, as owner, was liable at the time of the sale and purchase. Evidently the object of the agreement of guaranty was to secure the plaintiff against all liability arising from his part ownership of the steamboat. It was his liability and not that of the steamboat which was to be protected from "all claims and demands that may arise or be brought against the steamboat."

4. Certain requests for instruction were also presented by the defendants, which were refused by the presiding justice, and the court here is of the opinion that all of them were properly refused.

§ 775. *Partnership may be proved by parol evidence.*

Partnership may be proved by parol as well as by written evidence, which is sufficient to show that the ruling of the circuit judge in refusing the first request is correct, and enough has already been remarked in response to the first exception to show that the other requests for instruction were properly refused, for the plain reason that every one of them sets up an erroneous theory of the guaranty which is the foundation of the suit. Evidence of usage was offered by the defendants to limit the legitimate scope and operation of the instrument of guaranty, but it was excluded by the court for reasons so manifestly proper that no argument is necessary to vindicate the action of the court. *Thompson v. Riggs*, 5 Wall., 679; *Bliven v. New England Screw Co.*, 23 How., 481 (§§ 1306-1308, *infra*); *Addison on Contracts*, 6th ed., 935.

§ 776. *Usage cannot affect a contract in which the terms are plain.*

Usage cannot be incorporated into a contract which is inconsistent with the terms of the contract; or, in other words, where the terms of a contract are plain, usage cannot be permitted to affect materially the construction to be placed upon it, but when the terms are ambiguous, usage may influence the judgment of the court in ascertaining what the parties meant when they employed those terms. Apply those rules to the case, and it is clear that the theory of the controversy assumed by the circuit judge in all his rulings and in the instructions which he gave to the jury is correct. Conclusive proof of that proposition is found in the language of the guaranty, by which the defendants covenanted to save the plaintiff free and harmless of any and all claims and demands that may arise or be brought against the steamboat, except such as were relinquished by the instrument in writing executed on the same day.

Judgment affirmed.

§ 777. *Construction for court or jury.*—It is the duty of the court to construe a written contract. But if the agreement is not in writing, it is a question of fact for the jury to determine, from all the evidence in the case, what the contract was between the parties. *Dawes v. Peebles*,* 6 Fed. R., 836.

§ 778. While it is true that as a general rule the interpretation of written contracts belongs to the court and not to the jury, yet there are cases in which, from the different senses in which the words are used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. *Brown v. McGraw*, 14 Pet., 493.

§ 779. Where a writing is indefinite the court should, if requested, construe it, taking into consideration for that purpose the relations and circumstances of the interested parties. *Ward v. United States*, 14 Wall., 39.

§ 780. If the evidence tends to prove a contract relied on by a party, the court should either submit such evidence to the consideration of the jury, or if, in the opinion of the court, there are no material extraneous facts bearing on the question, and the contract relied on must be determined by commercial correspondence alone, interpret this correspondence, and inform the jury whether it proves the contract to be of the character contended. *Drakely v. Gregg*,* 8 Wall., 242.

§ 781. Court cannot make a contract for the parties.—A court has no power over a transaction to make it other than or different from what the parties themselves made it. *Dean v. Nelson*, 10 Wall., 171.

§ 782. There may be a valid warranty by the parties to a contract against the occurrence of a future event, but a court will not interpolate such a warranty into a contract. The duty of the court is not to make contracts for parties, but to interpret the contracts of parties as it finds them. Parties must take the consequences, both of what is stipulated and what is omitted; and a court can neither add to the one nor detract from the other. *Osborn v. Nicholson*, 13 Wall., 634.

§ 783. Intention.—The intention of the parties is to govern in all contracts. *Evans v. Cleveland & Pittsburg R'y Co.*,* 5 Phil., 514.

§ 784. In the interpretation of written contracts, the courts are bound to ascertain and declare the intention of the parties to them. *The Propeller S. C. Ives*, Newb., 210.

§ 785. It is a rule that the intention of the parties is to govern; and where some technical rule of law imports to the parties an intent contrary to what they plainly intended, to justify such technical construction, the rule must be positive and well settled. *Garnett v. Macon*, 2 Marsh., 217.

§ 786. Where the language of a covenant in a contract is broader than the recitals, the intent is to be ascertained from the whole instrument. *Lamb v. Davenport*, 1 Saw., 624.

§ 787. The rule that a thing which is within the intention of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers, applies as well to written instruments as to statutes. *Insurance Co. v. Gridley*, 10 Otto, 615.

§ 788. A warranty obviously contradictory to the evident intention of the parties to a contract will not be implied. *Gray v. Sims*, 8 Wash., 230.

§ 789. — how ascertained.—Every contract is morally binding on the parties in the sense in which it is understood by them at the time it was made; and it is to the same extent, and no further, binding on them in law when this can be clearly ascertained. All rules for the interpretation of contracts have for their object to ascertain what this common understanding of the parties is, and when it is discovered the law comes forward and applies itself to their mutual and common intention, and holds the parties bound by their agreement thus far and no further. While it is true, as a rule, that the intention of the parties is to be collected from the words in which the contract is expressed, yet it is the intention that is to be sought. The language may be ambiguous and susceptible of two interpretations, or it may have a peculiar sense in local usage, or in its application to the subject-matter of the particular contract, which makes the words more or less comprehensive than the words naturally import when taken by themselves. In such cases courts are obliged to look beyond the words. *The Ada*, Dav., 411.

§ 790. Parties have a right to make their own contracts; and when they are fairly made and do not contravene any positive law or rule of public policy, they must be carried into effect according to the intention of the parties, to be derived from the language employed, the surrounding circumstances, and the subject-matter. *Donahoe v. Kettel*, 1 Cliff., 141.

§ 791. Where the language of a contract is plain and clear it must be understood that the parties mean what they have plainly expressed, and in such case there is nothing left for construction. But if, from a view of the whole instrument, the evident intention of the parties is different from the literal import of the terms employed to express their intention in a particular part of the instrument, that intention should prevail, notwithstanding it may appear to be inconsistent with such particular part, for the reason that the construction of the contract in the case supposed ought not to depend on any formal arrangement of the words, but should be collected from every part of the same as applied to the subject-matter to which it relates. Words are to be taken in their popular and ordinary meaning, unless some good reason appears to show that they were used in a different sense, and the whole instrument is to be viewed and compared in all its parts, so that every part of it may be consistent and effectual. *Ibid.*

§ 792. In ascertaining the meaning of a contract construction must be resorted to when the

words employed are indefinite and undefined, and where, also, if the words are taken in their strict primary sense, the contract could not be carried into effect. In the latter case the rule is that the intention of the parties must govern as it is collected from the words of the contract and the subject-matter to which it relates. *Rich v. Parrott*, 1 Cliff., 58.

§ 792. Every contract is to be interpreted according to the intention of the parties. In seeking that intention it must be given every reasonable construction, for it is not to be presumed that the parties intended anything either senseless or absurd. *Buckingham v. Jackson*, * 4 Biss., 295.

§ 794. In the construction of a contract the question is one of intention rather than of grammatical arrangement; but where there is nothing on the face of a note which goes to show that the intention of the parties was different from that naturally imported by the grammatical arrangement, then only that construction can be given which the words require. So where a note was payable to A., B., C. or D., it was held that it was payable to either of the four individually, and not either to the first three or the fourth. *Samuels v. Evans*, 1 McL., 474. See, also, *Spaulding v. Evans*, 2 McL., 189.

§ 795. In order to give an agreement a fair and just construction, and to ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all contracts, the court will look carefully to its substance rather than its mere form. *Canal Co. v. Hill*, * 15 Wall., 94.

§ 796. In the construction of a written contract the intention of the parties is to govern, and this is to be ascertained from the contract. Where parties have made an express contract none can be implied. The meaning and intention of the parties is to be ascertained from the face of the instrument and by the application of common sense to the particular case. The court will not confine itself to particular expressions, but will collect the intention from the whole instrument. Every part must have its effect. Where there are mutual covenants or acts they are to be construed to be dependent, unless a contrary intention appears. *Green v. Town of Dyersburg*, 2 Flip., 496.

§ 797. While it is true that the intention of the parties to a written contract is to be carried out, yet the only safe rule is to ascertain that intention from the language used by the parties. *Peckham v. Lyon*, 4 McL., 50.

§ 798. In the case of a contract, the purpose of construction is to ascertain the intention of the parties contracting. But if the intention of the parties cannot be determined from the language of the instrument itself, it is to be sought for in the situation of the parties, and the subject-matter of the contract, aided by certain rules of construction which are presumed to be in accordance with the intention of the parties. *Howenstein v. Barnes*, 5 Dill., 488.

§ 799. An agreement in a charter-party that the carrier shall receive a certain freight, and, if freights shall advance, then an additional sum, is one which should receive a liberal construction. Where a contract is fairly made, it must receive a reasonable construction, so as to carry into effect the intention of the parties, and in general that intention must be gathered from the language employed, the subject-matter and the surrounding circumstances. *Barreda v. Silsbee*, 21 How., 161.

§ 800. In case of a latent ambiguity in a written instrument, the real intention of the parties is to govern; and this is to be gathered from the words of the instrument taken altogether, rejecting such as are inconsistent with that intention, or are properly to be deemed subordinate, as accidents and not as incidents thereto. This doctrine is to be applied to all instruments where the intention is to be sought for and executed. *Cleaveland v. Smith*, 2 Story, 237.

§ 801. All contracts are to have a rational construction, and one consistent with the principles of common sense and humanity. Therefore a contract which bound a ship to carry "all such lawful passengers" as the agent of the other party might think proper to ship, it was held that the word "all" meant a reasonable number, and no more. The ship was bound to carry no more than could be carried by her with reasonable comfort and safety. *The Ship Hound*, * 27 Law Rep. (17 N. S.), 34.

§ 802. Language must govern.—The meaning of a contract can only be understood by the language which the parties have used, and that must govern the construction unless decisions have been made by which a fixed meaning has been given to the expressions used. *Watson v. Insurance Co. of North America*, 2 Wash., 153.

§ 803. The evident understanding of the parties to a contract at the time it was entered into cannot control its plain terms. *Maryland v. Railroad Co.*, 22 Wall., 118.

§ 804. Words must be understood in their ordinary sense.—Contracts created by or entered into under the authority of a statute are to be interpreted according to the language used in each particular case to express the obligation assumed. In this, as in other cases of contracts, the language is to be given its customary and usual meaning if this can be done.

§§ 805-819. CONTRACTS.—CONSTRUCTION AND INTERPRETATION.

The object is to find out from the words used what the parties intended to do. *Railroad Companies v. Schutte*, 18 Otto, 140 (BONDS, §§ 1890-37).

§ 805. The meaning of doubtful expressions in a contract may be ascertained in three ways: by common acceptance, by technical definition, and by a reference to the subject of the contract and the general usage in the like kind of contracts. *Hodgson v. Dexter*, 1 Cr. C. C., 111.

§ 806. Meaning of term at place of contract.—The description of goods in a contract of sale must be interpreted according to the understanding of the term used at the place where the contract is entered into. *Pope v. Filley*, * 8 McC., 190.

§ 807. Effect is to be given to all words and provisions.—In arriving at the meaning of a contract a court cannot reject any words which are sensible in the connection in which they are used. *Thayer v. Wendell*, 1 Gall., 40.

§ 808. If one part of a contract is not repugnant to another, effect must be given to every part of it. *Pulte v. Darby*, 5 McL., 333.

§ 809. In searching for the true interpretation of a written instrument such effect must be given to each of its provisions as the objects and designs of the instrument require, without precisely weighing the effect of single words. There is no magic in particular words, but they must be understood as they stand and are used in the particular instrument. *Washburn v. Gould*, 3 Story, 162.

§ 810. An instrument in writing should be interpreted by the context so as if possible to give a sensible meaning and effect to all its provisions, and so as to avoid rendering portions of it contradictory and inoperative by giving effect to some clauses to the exclusion of others. *Ladd v. Ladd*, 8 How., 28.

§ 811. Written contract — Extrinsic evidence.—Where parol negotiations have taken place between parties, and afterwards a written contract is entered into by them in reference to the same subject-matter, such written contract, so far as it agrees with the previous parol agreement, merely reduces it to writing, and, in the absence of fraud, ignorance, mistake or latent ambiguity, cannot be varied, impaired or explained by parol evidence, and if it differs from the original conversation the writing is the declaration of a change of intentions, and an agreement to alter and rescind them. *Tilghman v. Tilghman*, Bald., 488.

§ 812. Where a contract is duly entered into and reduced to writing, the terms of the writing are conclusive. *Calhoun v. Vechio*, 3 Wash., 167.

§ 813. A parol agreement, made at the time of entering into a note and policy of insurance, cannot be set up to vary the terms of the note or policy. *Thompson v. Insurance Co.*, 14 Otto, 259.

§ 814. Where, after preliminary negotiations, parties enter into a written contract, all previous verbal arrangements are merged therein, and the entire engagement of the parties, and all conditions upon which its fulfillment could be claimed, must be presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended to be inserted, or stipulated provisions, are omitted, the parties can have recourse, for correction, to a court of equity, which is competent to give the necessary relief; but till that is done the contract must be taken as expressing the final understanding of the parties. *Insurance Co. v. Mowry*, 6 Otto, 546.

§ 815. A writing which contains a statement that a thing is sold, a description of it, and the terms upon which it is sold, is a written contract of sale, and it is presumed that the writing contains the whole contract, and representations previously made and not incorporated in the writing must be excluded from consideration and will not be considered to be a warranty. *Randall v. Rhodes*, 1 Curt., 92.

§ 816. A written contract which in its terms is free from ambiguity must be taken to be the exponent of the intention of the parties thereto, and cannot be varied or contradicted by extrinsic evidence. *McNamara v. Gaylord*, * 1 Bond, 302.

§ 817. Where the intention of the parties is evident from a written contract, and there is no ambiguity, latent or patent, it is inadmissible to give parol evidence in explanation or contradiction of the agreement. *Scott v. Steamboat Dick Keyes*, * 1 Bond, 164, 169.

§ 818. Evidence of the understanding of the parties in interest in a transaction is inadmissible, but parol evidence is admissible for the purpose of connecting several written instruments, and showing that they were all parts of one transaction. *Bailey v. Railroad Co.*, 17 Wall., 105.

§ 819. A party is not permitted to control a written agreement by parol testimony of declarations or conversations at or before the time it was completed, which would contradict, add to or alter the written agreement, either in the case of a latent or patent ambiguity, though in either case, collateral facts, or the circumstances in which the parties were placed when the agreement was made, may be given in evidence. *Troy Iron and Nail Factory v. Corning*, 14 How., 217.

§ 820. Paper money in Virginia having become depreciated, the legislature enacted that where debts had been contracted in such depreciated currency they should be discharged by the payment of such a sum in specie as equaled the value of the debt in specie at the time it was contracted. A certain ground rent having been contracted for in such depreciated currency, it was held, in an action therefor, that to show its actual specie value was not to vary the terms of a written contract. *Faw v. Marsteller*, 2 Cr., 29.

§ 821. What is the true intent and meaning of a written instrument is not a matter of extrinsic averment, but in cases where there is no latent ambiguity, it depends on the instrument itself. *United States v. Thompson*, 1 Gall., 391.

§ 822. A latent ambiguity exists when the words used apply equally to two different things or subjects-matter, and its solution depends not upon what was the meaning of the grantor but what was his meaning by the words used. If the words used are clear, unambiguous and determinate to describe one person or one subject-matter, there can be no latent ambiguity unless they describe another equally well. *Babcock v. Pettibone*, 12 Blatch., 357.

§ 823. Surrounding circumstances.—The state of things existing at the time, and the circumstances under which a contract or lease was made, may be considered by the court in aid of its construction, and particularly as to the subject-matter thereof. *Canal Co. v. Hill*,* 15 Wall., 94.

§ 824. When the language of a contract is such that, while the words are all sensible and have a settled meaning, they consistently admit of two interpretations according to the subject-matter in contemplation of the parties, then it seems that parol evidence should be admitted to show the circumstances under which the contract was made, and the subject-matter to which the parties referred. *Peisch v. Dickson*, 1 Mason, 11.

§ 825. When a contract fails to supply within itself the means of a clear and satisfactory interpretation, extraneous considerations may be brought to bear to point out and determine the true intention of the parties. *The Isaac Newton*,* Abb. Adm., 11.

§ 826. In construing a contract the court has a right to ascertain what the surrounding facts and circumstances were, in order to determine the intention of the parties, and the full legal purport of the contract made. *Myrick v. Michigan Central R'y Co.*, 9 Biss., 48.

§ 827. Conversations had between the parties to a contract at the time of entering into it are competent to show in what sense a word was used which is capable of a larger or narrower construction according to the subject-matter and the circumstances of the particular case. Those conversations may be deemed a part of the *res gestæ*, and thus may be referred to as explanatory of the real intentions of the parties in the use of the word. *Gray v. Harper*, 1 Story, 538.

§ 828. Parties may make their own contracts, but the courts, in all cases except where the language employed is so explicit and unambiguous that it must be understood that the words express their own interpretation, may give the language a reasonable construction to effect the intention of the parties as collected from the whole instrument, the subject-matter, and the surrounding circumstances. The province of construction is limited to the language employed as applied to the subject-matter and the surrounding circumstances contemporaneous with the instrument, but courts are not denied the same light and information the parties enjoyed when the contract was executed, and for that purpose may acquaint themselves with the persons and circumstances that are the subjects of the written instrument, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *James v. Locomotive Ins. Co.*, 4 Cliff., 278.

§ 829. Contracts and conveyances must be construed in the light of the condition of things existing at the time, and with reference to which they were executed. *Lamb v. Davenport*, 1 Saw., 619.

§ 830. In giving effect to a written contract by applying it to its proper subject-matter, extrinsic evidence may be given to show the circumstances under which it was made, whenever, without the aid of such evidence, such application could not be made in the particular case. *Bradley v. Washington, etc., Steam Packet Co.*, 13 Pet., 99.

§ 831. Where letters are offered in support of a contract alleged to have been made thereby, in their construction the language used is one element, and only one, to be considered in arriving at the intention of the writers. In determining the sense in which the words were used, they should be considered in connection with the subject-matter of the correspondence, the situation of the parties, the thing to be done, and the surrounding circumstances. *Hendrick v. Lindsay*, 8 Otto, 147.

§ 832. In case of a written contract evidence of surrounding circumstances is allowed for the purpose of ascertaining the subject-matter of the contract or the explanation of the

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terms used, but not for the purpose of adding a new and distinct undertaking. *Maryland v. Railroad Co.*, 23 Wall., 113.

§ 833. — **contract of insurance.**—While it is true that whatever was said at the time a contract was entered into is merged in the contract, and cannot be received to control, enlarge or restrict the contract, yet evidence of representations at the time of the making of a contract of insurance, as to the previous use and occupation of the premises, is admissible in helping the court to arrive at the intention of the parties and the true interpretation of the contract. *Poor v. Hudson Ins. Co.*, 2 Fed. R., 439.

§ 834. **Construction given the contract by the parties.**—Where the meaning of a contract is not clear, it is to be construed in the light of the circumstances surrounding the parties at the time it was made, and the practical interpretation which they, by their conduct, have given to the provisions in controversy. *P., C. & St. L. R'y Co. v. C., C. & I. C. R'y Co.*, 8 Biss., 488.

§ 835. When doubt exists as to the proper construction of an instrument, the practical construction of the instrument by the parties is entitled to great consideration. But where its meaning is clear to the eye of the law, the error of the parties cannot control its effect. *Railroad Co. v. Trimble*, 10 Wall., 377.

§ 836. In construing written contracts, they must be considered in the light of the circumstances and conditions in which they originated, and of the subsequent acts of the parties tending to show the construction which they put upon them. *Starr v. Stark*, * 3 Saw., 603.

§ 837. In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. In an executory contract, where its execution involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one. *Chicago v. Sheldon*, 9 Wall., 54.

§ 838. Where some doubt might exist as to the proper construction of a contract, a practical construction of it, acquiesced in by the parties for sixteen years, will be held to be conclusive. *Irwin v. United States*, 16 How., 523.

§ 839. Where a contract is silent as to the time of payment, it may be inferred from other evidence, as usage, or the course adopted and pursued by the parties under the contract. Such evidence does not contradict any of the terms of the contract, but is mere supplementary matter showing the understanding and intention of the parties, or rather the practical construction put by them upon it. *Boody v. Rutland & Burlington R'y Co.*, 24 Vt., 633.

§ 840. If the meaning of a contract is at all doubtful, and the parties to it have adopted a particular construction of it by their acts, and have acquiesced in such construction for some years, a court will presume that the construction thus given to it by the parties is the proper one. *Nickerson v. Atchison, etc., R'y Co.*, 3 McC., 460.

§ 841. **Contracts construed together.**—Successive contracts, executed by the same parties with reference to the same subject-matter, are *in pari materia*, and must be read in connection with each other and in the light of surrounding circumstances. *Lamb v. Davenport*, 1 Saw., 624.

§ 842. Where two contracts between substantially the same parties are made at the same time and form a part of the same transaction, they will explain and control each other, though not in terms referring to each other. *Rutland & Burlington R'y Co. v. Crocker*, * 20 Vt., 541.

§ 843. Where there are several instruments relating to the same subject-matter they are to be construed as one instrument, and if there be an incongruity in one part of an instrument it may be explained by others, so as to enable the court to give a consistent construction to the whole. *Atlantic Insurance Co. v. Conrad*, 4 Wash., 672.

§ 844. Where two contracts relating to the same subject-matter are made at the same time and between the same parties, they must be construed together. *Gregory v. Marks*, 8 Biss., 45; *Livingston v. Story*, 11 Pet., 386.

§ 845. Under the civil code of Louisiana, all "clauses of agreements are to be interpreted the one by the other, giving to each the sense that results from the entire act;" and it can make no difference whether the clauses be on one piece of paper or on two pieces, or whether there be two separate instruments, or one contains the substance of two. *Livingston v. Story*, 11 Pet., 386.

§ 846. **Implication.**—Where a party promises to slaughter and cure a certain number of hogs, for a certain sum per pound of meat produced, the fair implication of the contract is that the hogs are to be furnished by the party for whom the slaughtering, etc., is to be done. *Floyd v. United States*, * 2 Ct. Cl., 440.

§ 847. Necessary implication is as much a part of an instrument as if that which is so im-

plied was plainly expressed; but omissions or defects in written instruments cannot be supplied by virtue of that rule, unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect; as, where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party. If the contract is so framed that it binds the party contracting to do the act, the law will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfil his contract. *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall., 283 (§§ 902, 933).

§ 848. What the law looks to, in the case of an implied contract, is not the agreement of the parties, but their circumstances and acts, and from the circumstances or acts the law raises the duty, and implies the promise by which the party will be bound. While in the case of an express contract the law measures the extent of each party's duty by the terms which he has expressly agreed upon, yet in the case of an implied contract the terms are such as reason and justice dictate in the particular case, and which, therefore, the law presumes every man undertakes to perform. *Huston v. United States*,* Dev., 56 (171).

§ 849. The law a part of a contract.—The execution laws of a state in force at the time a contract is made become a part of the contract, and land must be sold under execution pursuant to the laws in force when the contract was made. *Bue v. Decker*, 3 McL., 573.

§ 850. The parties to a contract must be understood as making their contracts with reference to existing laws, and impliedly assenting that such contracts are to be construed, governed and controlled by such laws: and contracts absolute and unconditional upon their face may be considered subject to implied conditions established by the law applicable to such cases. *Ogden v. Saunders*, 12 Wheat., 297 (CONST., §§ 1940-2003).

§ 851. Operation of contract settled by law.—Where the operation of a contract is clearly settled by the general principles of the law, it is conclusively presumed that such is the true sense of the contracting parties. *Brown v. Wiley*, 20 How., 447.

§ 852. Contract in reference to the laws of another state.—Where a party in one state makes a contract with direct reference to the laws of another state, he must be held to know the laws of that state. So where parties performed services for a county under a promise of a reward by the county board of supervisors, it was held that such parties were bound to know that the supervisors could not bind the county by such contract; also, that when the parties found that they could not recover against the county, they could not recover against members of the board on the ground of fraud and deceit. *Huthsing v. Bosquet*, 3 McC., 560.

§ 853. Agreement may control operation of the law.—The agreement of parties may vary and control the general operation of law, but an agreement to do that must, however, be clear and incapable of doubtful import. *Johnson v. The Brigantine Lady Waltersoff*, 1 Pet. Adm., 216.

§ 854. If in any instance the laws, or the decisions under them, shall be found or deemed severe, or not suited to a particular exigency or course of trade, parties may mould their contracts at their will, according to circumstances, by mutual agreement and consent. Let the law be what it may, the maxim *modus et conventio vincunt legem* prevails in all contracts which are not radically against common justice, or moral and political obligations, or those principles which the law will not suffer to be destroyed or perverted for private purposes. *Thompson v. The Ship Catharina*, 1 Pet. Adm., 118.

§ 855. Intention to waive a provision of law must be clear.—All laws in existence are necessarily referred to in all contracts made under such laws, and no contract can change the law. But where no principle of public policy is concerned, a party is at liberty to waive a statutory provision intended for his benefit. But the intention to waive must be clear. So, where a party accepted a life insurance policy which contained stipulations that it should be void if containing any misrepresentations, and a state statute made such misrepresentations unavailing to avoid the policy unless directly contributing to the contingency on which the policy was to become due and payable, it was held that to hold that the statutory provision was waived by the parties would be to defeat the very end the legislature had in view. *White v. Connecticut Mutual Ins. Co.*, 4 Dill., 183.

§ 856. Construction consistent with law favored.—If a contract with the government is susceptible of two constructions, one consistent and the other inconsistent with an act of congress authorizing such contract, the construction will be adopted which will support it. *Gibbons v. United States*,* Dev., 46 (136); S. C., 54 (159).

§ 857. Construction in favor of justice favored.—Where an instrument is susceptible of two constructions, the one working injustice and the other consistent with the right of the case, that one should be adopted which standeth with the right. *Noonan v. Bradley*, 9 Wall., 407.

§ 858. Punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail, but the court will first take the instrument by its four corners in order to ascertain its true meaning. If that is judicially apparent on inspecting the whole, the punctuation will not be suffered to change it. *Ewing v. Burnet*, 11 Pet., 54.

§ 859. Written words control printed ones.—It seems that, where a part of a contract is written and part printed, and there arises any reasonable doubt as to its meaning, the greater effect is to be attributed to the written words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula adapted equally to the case in contest and that of all other contracting parties in respect to similar subjects-matter. So where a license to use a thing is given by implication from the written words of a contract, and a subsequent written clause forbids the thing licensed in express terms, the written words will govern. *James v. Lycoming Ins. Co.*, 4 Cliff., 299.

§ 860. Construction not to be nice and critical.—*Bona fide* contractors should not be prejudiced by a nice and critical construction of the advertisement under which they make their proposals. *Hitchcock v. City of Galveston*, 8 Woods, 296.

§ 861. Rule of construction — Different kinds of contracts.—Different kinds of contracts should be interpreted by rules specially applicable to each. It is not safe to interpret the same words in different kinds of contracts in the same way. Words, in whatever form of contract they occur, should be construed according to their natural and fair import in the connection in which they stand, the office they were designed to perform, and the obligations which belong to the relation in which the parties stood to each other under the contract. *Airey v. Merrill*, 2 Curt., 9.

§ 862. Construction most strongly against maker of the instrument.—Where a contract is signed by one party only, and all the promises are by one party only, if the language requires construction it shall be most strongly construed against the party making the instrument. *Insurance Companies v. Wright*, 1 Wall., 468.

§ 863. Where a doubt exists as to the proper construction of an instrument prepared by one party, on the faith of which another has incurred obligations, that construction should be adopted which favors the latter rather than the former. *Noonan v. Bradley*, 9 Wall., 407.

§ 864. Provisos and exceptions — Language taken against party using it.—In the construction of provisos and exceptions to general contracts, where the language is capable of two meanings, that meaning will be taken which is most strongly against the party using the language. *Boon v. Aetna Fire Ins. Co.*, 12 Blatch., 34.

§ 865. Grant — Construction against grantor.—In case of a well founded doubt as to the construction of a grant, the conclusion should be against the grantor, for it is he who is chargeable with any obscurity in respect to the agreement. *Smith v. Selden*, 1 Blatch., 479.

§ 866. Forfeiture strictly construed.—The law does not favor forfeitures, and provisions for forfeitures in contracts must be strictly construed. This rule applies also to policies of insurance. Provisions for forfeitures are inserted for the benefit of the company, and are to be strictly construed. They may be waived by the company, and courts will find a waiver on slight evidence. *Young v. Mutual Life Ins. Co.*, 2 Saw., 330.

§ 867. Contract construed liberally.—A contract with an inventor, by which advances are made to free him from embarrassment, and by which he assigns future inventions, is to be construed liberally, for they are a benefit both to the inventor and the public. *Nesmith v. Calvert*, 1 Woodb. & M., 41.

§ 868. Maritime contracts being usually framed without precision, courts of justice are obliged to resort to such reasons as the nature, object and terms of the contract present, to determine the precise extent of the obligation of the parties. *Maryland Ins. Co. v. Le Roy*, 7 Cr., 81.

§ 869. Maritime contracts will be construed more liberally by courts of admiralty than by the strict rules of the common law. *Ellison v. Ship Bellona*, Bee, 108.

§ 870. Charter-party — Liberal construction.—Charter-parties being usually informal instruments should be liberally construed. *Raymond v. Tyson*, 17 How., 59.

§ 871. The words "or" and "and."—The word "or" in a contract is never construed to mean "and," when such is obviously not the intention of the parties. *Dumont v. United States*, 8 Otto, 143.

§ 872. The word "or," when used in a contract, is a disjunctive particle, and corresponds to "either," meaning one or the other of two. It cannot be properly said that "or" means "and," though it is true that for strong reasons and conformity with clear intention "or" has been removed, and "and" substituted in its place. *Douglass v. Eyre*, Gilp., 143.

§ 873. The word "cattle" may include hogs as well as horned cattle. *Decatur Bank v. St. Louis Bank*, 21 Wall., 294 (§§ 255, 256).

§ 874. **Meaning of void and voidable.**—As to “void” and “voidable,” as applied to an agreement creating a trust in land, the distinction is this: An act is void which, when done, was bad or against the law in respect to the whole community, and nobody is bound by it. But it is voidable if only bad as to a particular person who may or may not avoid it. When void it may be so treated by any person, and without a special plea or motion, but when voidable it is generally otherwise if it has been executed. *Tufts v. Tufts*, 8 Woodb. & M., 487.

§ 875. **Meaning of “writing obligatory.”**—It seems that the words “writing obligatory,” as applied to a written contract, import that it is under seal. *Clark v. Phillips*, Hemp., 295.

§ 876. **Contracts to which a state is a party.**—Contracts embraced in statutes, though a state is party thereto, should be construed according to those well established principles which regulate contracts generally. *Huidekoper v. Douglass*, 3 Cr., 70.

§ 877. **Charters construed most favorably toward the state.**—All contracts are to be construed to accomplish the intention of the parties, and in determining their different provisions a liberal construction is to be given to the words, either singly or in connection with the subject-matter. But charters, however, are to be construed most favorably to the state, and in grants by the public nothing passes by implication. If, on a fair reading of the instrument, reasonable doubts exist as to the interpretation to be given to it, these doubts are to be resolved in favor of the state. *The Binghamton Bridge*, 8 Wall., 74.

§ 878. **Bargaining away its taxing power by state.**—In order that a state law may be construed as being a contract between a corporation and a state that no other taxes shall be assessed than those mentioned in the law, it must be clear that the state has thus bargained away its taxing power, and such contract cannot be made out by dubious implication. *New Jersey v. Yard*, 5 Otto, 116.

§ 879. **Construction of authority to draw.**—An authority to draw on A. B., Portland, or me at New York, does not authorize a bill drawn on A. B. and payable in New York. *Lanusse v. Barker*, 8 Wheat., 146.

§ 880. **Refers to actual state of things at its inception.**—A contract must be supposed to refer to the actual state of things at its inception. *United States v. Wilkins*, 6 Wheat., 141.

§ 881. **The belief or understanding of one party to a contract is not the criterion by which the rights of the parties are to be governed, unless the other party, by his conduct or declarations, induced the belief.** *Bank v. Kennedy*, 17 Wall., 28.

§ 882. **Terms inferred from correspondence and circumstances.**—The terms of the contract may be inferred from the correspondence and circumstances of the parties. *Tabb v. Gist*, 6 Call, 234; S. C., 1 Marsh., 48.

§ 883. **Extra work.**—Where the parties to a contract for the construction of bridges deviate from the original plan agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contracted for, it is undoubtedly to be regarded as extra work, outside the scope of the contract, and treated as such. But it is otherwise if the original terms are applicable, and there is evidence from which it may be inferred that it was the intention of the parties that the new work should be subject to these terms. *Boody v. Rutland & Burlington R'y Co.*,* 24 Vt., 665.

§ 884. **Alternative contract.**—A contract by which two things are promised in the alternative, and one of the things promised belongs to the person to whom it is promised, is not an alternative contract. *Dorsey v. Packwood*, 12 How., 187.

§ 885. **A provision stamped on the back of a bill of lading by the owner of the ship cannot be considered a stipulation in the legal meaning of that word as applied to maritime contracts.** *The Ship Albani*, 21 How., 586.

§ 886. **An agreement between railways for the aid of a connecting transportation line construed.** *Ogdensburg & Lake Champlain R'y Co. v. Boston & Lowell R'y Co.*,* 4 Fed. R., 64.

§ 887. **Sale of so many acres, more or less.**—If a contract for the sale of land states the quantity to be so many acres, more or less, this shows that neither party contemplated the precise number of acres as being of the essence of the contract, but as matter of description. *Stebbins v. Eddy*, 4 Mason, 421.

§ 888. **Acceptance of draft—Implied condition—Parol evidence.**—A draft was “accepted on condition that his (the drawer’s) contracts be complied with.” *Held*, that this expression referred to future and not to past breaches. In the acceptance of commercial paper that which can be a distinct condition must be expressed, nor can anything out of the condition be inferred unless it be in a case where the words used are so ambiguous as to make it necessary that parol evidence be resorted to to explain them. *United States v. Bank of Metropolis*, 15 Pet., 394.

§ 889. **New security for old debt—Novation.**—Where a new security is taken for an old debt, the natural and legal presumption is that it is taken as collateral, unless it is expressly agreed or is clearly to be inferred from the circumstances to have been the intention of the

parties to cancel and annul the original cause of action and substitute a new one in its place. So, unless it expressly appears to have been the intention of the person taking a note to waive a lien which he had against a vessel, the taking of such note cannot be considered a waiver, unless it is accompanied by some increased advantage. A novation can never be inferred from presumptive evidence; it can stand only on the express agreement of parties. *The Betsy and Rhoda, Dav.*, 114.

§ 890. *Contract of exchange—Law of Louisiana.*—A notarial contract executed in Louisiana, which commences, "I. A. B.," in the first person, and is in the first person all the way through, and ends "In testimony whereof I," etc., is not a contract of exchange within the meaning of the law of Louisiana, though it recites that the person making it grants a certain tract to C. in consideration of a tract owned by C., and though the contract is signed by both parties. *Preston v. Keene*, 14 Pet., 136.

§ 891. *Date—Delivery.*—It will be presumed that an instrument under seal was delivered on the day on which it bears date. But this presumption may be removed by evidence that it was delivered on some subsequent day; and when delivery on such subsequent day is shown, the instrument speaks on such subsequent date, and not on the day of its date. *United States v. Le Baron*, 19 How., 75.

2. *Dependent and Independent Stipulations.*

SUMMARY—*Performance in case of mutual covenants; waiver as to time*, § 892.—*Conditions precedent to right to recover instalments*, § 893.—*Stipulations construed as independent, when*, § 894.—*Completion of work a condition precedent to right to receive pay*, § 895.

§ 892. Where mutual covenants exist a party whose duty it is to perform first must show a performance on his part before he has a right of action, unless the right to require such performance has been waived by the other party. So where plaintiff contracted to build several sections of road for defendant, each section to be completed at certain agreed dates, and part payment for each section to be made at the same dates, and no section was completed at the agreed time, but defendants made the part payments and urged plaintiffs to proceed with the work, it was held that defendants had waived a strict performance as to time, and that plaintiffs could recover for work actually done. *Phillips, etc., Construction Co. v. Seymour*, §§ 896-903. See § 918.

§ 893. Jones made a written contract with Dermott to erect for her certain buildings, a part of them to be ready for occupation by October 1st, and the rest by December 1st following. Dermott agreed to pay in instalments in July, October and January. In a suit to recover the second instalment it was held that the performance of the agreed portion of the work by October 1st was a condition precedent to the right to demand the second instalment. *Dermott v. Jones*, §§ 904-909.

§ 894. It is a general rule that where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other. But this rule is subject to the intention of the parties, as signified in the language of the contract. *Slater v. Emerson*, §§ 910-912. See § 915.

§ 895. Where a contractor agreed to complete a railroad bridge by a certain date, in consideration of which the company agreed to pay him a certain sum within two days, and, when the bridge was completed and the track laid, deliver to him certain notes, it was held, under the circumstances of the case, and considering the intention of the parties, that these covenants were dependent upon each other, and that a completion on the day named was a condition precedent to the right to recover for the work. *Ibid.*

[NOTES.—See §§ 913-937.]

PHILLIPS & COLBY CONSTRUCTION COMPANY v. SEYMOUR.

(1 Otto, 646-653. 1875.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The plaintiff in error, who was defendant in the circuit court, is a corporation organized under the laws of Wisconsin. It had undertaken to build the whole or a large part of the Wisconsin Central Railroad, and had made contracts with the defendants in error, whom we shall

hereafter call plaintiffs, as they were in the circuit court, for the construction of a part of this road. These contracts were drawn with the minuteness of detail usual in such cases, and provided, among other things, that payments should be made by defendant, as the work progressed, on estimates made monthly by the engineer of the railroad company, on the 15th day of each month, for all the work done the previous month, except fifteen per cent. retained by defendant as security for performance on the part of plaintiffs until the work was completed.

The plaintiffs brought their action of covenant on these contracts, alleging that they had commenced the work in the month of July, 1872, shortly after the contracts were signed, and prosecuted it vigorously until some time in December; that defendant had failed to pay the large sums due by the estimates for work done in October and November; and, seeing no prospects of payments, plaintiffs were compelled to abandon the work and bring this suit. They assert a claim for all the work done as estimated, and for various items of damage suffered by them in consequence of this failure of defendant to comply with its covenant to pay as agreed. A demurrer to this declaration having been overruled, defendant filed fifteen pleas in bar; also an amended plea; and, on these, numerous issues of fact were finally joined. A verdict and judgment were rendered in favor of plaintiffs for \$119,061.46, to reverse which this writ of error is brought.

§ 896. *Only a limited number of assignments of error ought to be made.*

In this court, plaintiff in error, by one counsel, files forty-five assignments of error, and by another seven more, making fifty-two in all. The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points. This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on. We can only try to respond to such points made by counsel as seem to be material to the judgment which we must render.

Before we proceed to this examination, however, it may be as well to say that, in addition to a general verdict in favor of plaintiffs for \$107,353.44, the jury made three special findings on matters suggested by the court. These are: 1. That, at the time of the alleged breach of covenant by defendant, it had waived or excused the failure of plaintiffs up to that time to complete certain parts of their work within the times stipulated in the contract; and that plaintiffs were, at the time of said breach, engaged in the performance of said work, with the consent of defendant. 2. That defendant, at the time plaintiffs stopped the work, had given plaintiffs to understand that defendant was financially unable to pay the estimates for work then done, and would probably be unable for a time to pay future monthly instalments. 3. That defendant had agreed to pay plaintiffs the extra cost of doing the earth-work by train on certain sections, and that the amount of this extra cost was \$11,708.

These findings must be presumed to be in accordance with the facts, and must stand as foundations for the judgment of the court, unless it can be shown that they are affected by some erroneous ruling of the court in regard to the admission of evidence or instructions to the jury.

§ 897. *The declaration in the case at bar is sufficient.*

We now proceed to notice such objections to the rulings of the circuit court

as we deem of sufficient importance to require it. 1. It is said that the declaration is fatally defective because it does not aver that the plaintiffs were ready, willing and able to perform the covenants on their part to be performed by the contract. It is true that this might have been alleged in more formal and apt terms than it is. But they do aver that from the time they entered upon the work in July until the 15th day of December,—the day of the alleged breach on the part of defendant,—they prosecuted the same with all the energy and skill they possessed, having men in large numbers,—to wit, more than one thousand,—with suitable teams and other equipments, along the whole line of the road of one hundred and sixty miles; and that defendant had expressed entire satisfaction with the manner in which plaintiffs were doing the work. We are inclined to think that, coupled with the allegation that defendant was in default for non-payment for work actually done, this was sufficient. It is not like a case where a plaintiff has done nothing, but is required to put a defendant in default by offering to perform, or showing a readiness to perform. Plaintiffs here had already performed, and the defendant failed to do its corresponding duty under the contract; and, defendant having defaulted on a payment due, plaintiffs are not required to go on at the hazard of further loss.

§ 898. *Strict performance as to time was waived. Plaintiffs can recover for work done.*

2. By the terms of the contract plaintiffs bound themselves to complete the first section, of forty miles, by the 1st day of September; the third section, of twenty miles, by the 15th day of the same month; the fourth section, of twenty miles, by the 15th day of November, and so on; and it is conceded that no one of these sections was completed within the time prescribed. It was also agreed, that, if plaintiffs failed in this respect, or failed, in the opinion of the engineer-in-chief of the railroad company, to prosecute the work with sufficient vigor to completion according to the terms of the contract, the defendant might declare it abandoned, and the amount retained out of the monthly estimates forfeited. This was fifteen per cent. of each monthly estimate, which, by the agreement, was retained by defendant as security for the due progress of the work.

§ 899. *Covenants to perform and to pay, when mutual.*

The main proposition, underlying the whole argument of the defense on the general merits, is that these covenants to complete certain sections within a definite time, and the covenant to pay, are mutual and dependent covenants; and that time is so far of the essence of this covenant of plaintiffs that they can recover nothing, because they completed nothing within the specified time. Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done or tendered before that party can sustain a suit against the other. There is no doubt that, in this class of contracts, if a day is fixed for performance, the party whose duty it is to perform or tender performance first must do it on that day, or show his readiness and willingness to do it, or he cannot recover in an action at law for non-performance by the other party.

But both at common law and in chancery there are exceptions to this rule, growing out of the nature of the thing to be done and the conduct of the par-

ties. The familiar case of part performance, possession, etc., in chancery, where time is not of the essence of the contract, or has been waived by the acquiescence of the party, is an example of the latter; and the case of contracts for building houses, railroads, or other large and expensive constructions, in which the means of the builder and his labor become combined and affixed to the soil, or mixed with materials and money of the owner, often afford examples at law. If A. contract to deliver a horse to B. on Monday next, for which B. agrees to pay \$100, A. cannot recover by an offer to deliver on Tuesday; but if A. agree to deliver a horse, buggy and harness on Monday, and B. accepts delivery of the horse and buggy, can he refuse to pay anything, though he accepts delivery of the harness on Tuesday? This is absurd. He waives, by this acceptance, the point of time as to the harness, at least so far as A.'s right to recover the agreed sum is concerned. If B. have suffered any damage by the delay he can recover it by an action on A.'s covenant to deliver on Monday; or, if he wait to be sued, he may recoup by setting it up in that action as a cross-demand growing out of the same contract.

Such we understand to be especially the law applicable to building contracts. If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make or prove the necessary allegation of performance on his own part. What remedy he may have in *assumpsit* for work and labor done, materials furnished, etc., we need not inquire here; but if the other party says to him, "I prefer you should finish your work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed. For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to perform within time; or, if he wait to be sued, he may recoup the damages thus sustained in reduction of the sum due by contract price for the completed work.

It is said on the other side in this case, that the right of the defendant to abandon the contract, and retain in its hands the fifteen per cent., is its only remedy, and that that has been waived. We need not decide this point here, for we are only answering the argument that plaintiffs have lost *all* right to sue on the contract by their failure to complete the sections in the times named. As it is perfectly clear from the testimony that defendant, at the time these several sections should have been completed, made no point of the failure to do so, but urged the plaintiffs to go on, expressed satisfaction at the manner in which the work was progressing, and paid the estimate after such failure, the verdict of the jury that defendant had waived strict performance as to time was so far well founded as to enable plaintiffs to recover for work actually done.

§ 900. *An erroneous charge which causes no injury is not ground for reversal.*

3. This is an appropriate place to dispose of another objection. Defendant set up in its pleas and offered evidence to prove the damage sustained by those delays. But the court instructed the jury that, under this covenant, time was not of the essence of the contract; that on that point it was flexible, and defendant could not recover for the delay. As we have stated above, we are inclined to the opinion that defendant did not, by any of the acts proved in

this case, waive its right to damages arising from this failure of the plaintiffs to complete the sections in time, but only waived the forfeiture, if it may be so called, of all right on the part of plaintiffs to sue. But an attentive examination of the testimony offered, and of the charge of the court on that subject, shows that no legal evidence of any damage was offered. The attempt was to show that, by the use of the road at an earlier day, much profit would have resulted. But the witness stated that the road ran through a wild, uninhabited country; that he expected that saw-mills would have been established along the line of the road, and the transportation of lumber incident to the use of such mills would have made the defendant a profit of \$20,000.

The whole basis of this calculation is conjectural, uncertain and vague. It is manifestly no safe basis on which it can be assumed that any business would have been done in the few days of the delay, or that, if done, it would have been done at a profit. There was nothing on which a jury could have done anything but conjecture and speculate, at the hazard of sacrificing truth and justice. There was, therefore, no error to defendant's prejudice in this part of the case.

4. It is said that the court erred in admitting evidence on the part of plaintiffs of the profits they would have made on the remaining part of the road if defendant had paid, so that they could go on. Whether the evidence which was given on this subject was admissible or not was rendered immaterial by the subsequent ruling of the judge, who instructed the jury to disregard it, and to allow plaintiffs nothing on the ground of such supposed profits; and it is manifest from the record that nothing was allowed for this in the verdict.

§ 901. *After breach of contract by their own default defendants cannot retain, as against plaintiffs, money reserved simply as security for performance by them.*

5. The foregoing are the material objections, which are of a general character, to the rulings of the court. The items for which the general verdict (\$107,353.44) was had may be divided into three classes:

I. An agreed sum of \$15,000, which was to be paid on the completion of the first sixty miles of the road by the terms of the contract, and which was exclusive of the estimates for work done. Defendant resisted this, on the ground that plaintiffs, not having finished the sixty miles, could not recover it in this action, and also because they had abandoned the work. In the view we have already expressed, neither of these objections is sound. If, by defendant's breach, plaintiffs were justified in abandoning the work, then they were entitled to all they had earned under that contract, including the \$15,000; because the \$30,000, of which this \$15,000 was part, was a liquidated sum agreed upon as compensation for extra work on the first forty miles of the road which had been completed, and was only withheld, like the fifteen per cent., as security for the future performance by plaintiffs. Defendant, having by its default terminated the work, had no longer any right to retain either of these sums.

II. The next class consisted of the estimates under the contract, which were unpaid. This is by far the largest item of the verdict; and no serious contest is made except as to \$19,937.55, which constituted the reserved fifteen per cent. already mentioned. As in the case of the \$15,000, we are of opinion that since the work was abandoned, and the contract, by reason of the breach thereof by the defendant, ended, it can have no right to retain any part of the estimates for work actually performed. This was to be retained as a security

against failure or default of *plaintiffs*, and cannot be held by *defendant* after its own default has caused the abandonment of the work.

III. The third class is composed of a large number of items of damages incidental to the abrupt cessation of the work by reason of defendant's failure to pay,—such as loss of material, supply road, shanties, travel of hands, depreciation in value of tools, materials, etc. We cannot go into all these. After mature consideration of the very full briefs and arguments on these matters, we see no error in any ruling of the court in regard to them, and so dismiss their further consideration.

6. A more difficult point remains to be considered. The plaintiffs were allowed to introduce evidence to prove that the defendant had made a verbal promise to pay the extra cost of doing by train the earth-work of the sections between 40 and 46; and the jury found a special and separate verdict, that it had so promised, and that this extra cost was \$11,708. There is no allegation of this promise in the declaration, which is an action of covenant on the sealed agreement. There is no allusion to it, or provision for it, in that instrument. It is found by the special verdict to be a promise, and the record shows that it was by parol. Defendant objected to the admission of the evidence of this contract on the specific ground that, if valid, it could be enforced by *assumpsit* only, and not in an action founded solely on the specialty. The work done under the written contract could be estimated by the engineer, because a price was fixed by it for everything. He had only to ascertain quantities, apply the prices, and ascertain the amount to be paid. For this extra cost of a special mode of doing part of the work, he had no elements out of which to make an estimate.

§ 902. *Covenant and assumpsit cannot, under the common law system of pleadings, be joined in one declaration.*

It is certainly opposed to the common law system of pleading which prevails in the Illinois circuit to join the actions of covenant and *assumpsit*. If this had been done in the declaration, the defendant could have successfully demurred. It is equally clear that covenant cannot be sustained on a verbal promise. Can the plaintiffs be allowed to prove a cause of action, which, if alleged in the declaration, would have been fatal to it on demurrer? and can they recover in an action of covenant on a special parol promise? The judge below said he would not hazard the general verdict by permitting this matter to be embraced in it. He took the special verdict, and, notwithstanding his doubts, embraced the amount of it in the final judgment.

This matter grows immediately out of, and is intimately connected with, the work done under the written contract. It is merely a verbal agreement, that, if the plaintiffs would do the work in a manner different from their obligation, more advantageous to defendant, and more expensive, defendant would pay this difference in expenso. It seems reasonable that the claim for this extra cost should be decided in the suit in which the other compensation for the same work is recovered; that plaintiffs, having proved their case and recovered a verdict, should not be compelled to resort to a new suit in which this verdict would stand for nothing. Only a rule of pleading stands in the way, in this court, of doing what the very right of the case requires. We can give the plaintiffs their judgment for the amount of the general verdict, and reject this; or we can do complete justice, and affirm the judgment of the circuit court in full.

§ 903. *In an action of covenant evidence of a verbal promise is inadmissible.*

But the state of Illinois has adhered to the system of pleading which recognizes the lines that separate the forms of action at common law, and the act of congress requires the circuit courts to conform to the mode of pleading of the state in which the court sits. Undoubtedly there was error under that system in admitting proof of a parol contract of this kind in an action of covenant; and as the defendant made this precise objection, and took an exception when overruled, we do not see how we can refuse to give it the benefit of its objection. In those states where the distinction between forms of action have been abolished, the declaration could have been amended, and the two matters joined in the same action. In that case, we might, under the statute of jeofails, disregard the error as one capable of removal by amendment below, and as cured by verdict and judgment when it comes here. But section 954 of the Revised Statutes, which was section 32 of the judiciary act of 1789, was founded on the English statute of 32 Henry VIII., and is no broader. This act of congress has been frequently construed by this court in such a manner as to forbid its application to the case before us. *Garland v. Davis*, 4 How., 131; *Stockton v. Bishop*, id., 155; *Jackson v. Ashton*, 10 Pet., 480.

There is no room here for amendment. There could have been none in the court below. To allow a verdict to stand which is responsive to no issue made by the pleadings, or which could have been made by any pleading in that action, is farther than we can go in the promotion of abstract justice. The judgment of the circuit court must be reversed, with direction to the court below to set aside the special verdict of the jury for the \$11,708, and to enter a judgment in favor of plaintiffs on the general verdict of \$107,353.44, with interest from the day it was rendered; and the plaintiff in error is to recover costs in this court. If, however, the defendants in error shall, within a reasonable time during the present term of this court, file in the circuit court a *remittitur* of so much of the judgment of that court in their favor as is based on the special verdict, and produce here a certified copy of the *remittitur*, the judgment of that court will be affirmed.

DERMOTT v. JONES.

(23 Howard, 220-235. 1859.)

ERROR to the Circuit Court of the District of Columbia.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This record shows that the plaintiff and the defendant entered into a building contract, under seal, with specifications annexed, on the 22d April, 1851. It was agreed between them that Jones, the plaintiff, should do in a good, substantial and workmanlike manner, the houses, buildings and work of every sort and kind described in a schedule annexed to the contract of which it was a part; that he should procure and supply all the materials, implements and fixtures requisite for executing the work in all its parts and details; and that the stores fronting on Market Space, and the warehouse on Seventh street, should be finished and ready for use and occupation, and be delivered over to the defendant, on the 1st day of October after the date of the contract, and all the rest of the work on the 1st day of December afterward. The defendant agreed, upon her part, to pay the plaintiff for the performance of the work, and for the materials furnished, \$24,000 by instalments; \$5,000 on the 1st day of July, 1851; \$5,000 on the 1st day of October following; it

being expressed in their contract, *that the stores and warehouse were then to be delivered to the defendant ready for use and occupation*; and that the residue of the \$24,000 was to be paid to the plaintiff on the 1st day of January, 1860, with interest upon four thousand of it from the 1st day of May, 1851, and with interest on \$10,000 from the 1st day of December, 1851. We do not deem it necessary to notice the other covenants of the contract, as they have no bearing upon the case as we shall treat it.

The suit as originally brought is an action of debt for the recovery from the defendant of the second instalment of \$5,000, and for the value of certain extra work done and materials furnished by the plaintiff for the defendant's use. The original declaration contains four counts: first, charges the defendant in the sum of \$5,000 for work and labor done, and materials furnished and used by her in the erection and finishing certain stores and buildings in the city of Washington; second, for a like sum paid by the plaintiff for the defendant; third, for a like sum had and received; and fourth, for a like sum paid, laid out and expended by the plaintiff for defendant at her request. The defendant pleaded to the declaration four pleas: first, that she was not indebted as alleged; second, a special plea setting out in detail a contract under seal, with the plaintiff, for the erection of such buildings as are mentioned in it, and for the completion of them — protesting that the plaintiff had not complied with the terms of the same, and declaring that the sum of \$5,000 claimed by the plaintiff was the second instalment, which, by the contract, was to be due and payable to the plaintiff on the 1st day of October, 1851, and denying that the buildings were done by that day, or that any claim for the \$5,000 had accrued before the bringing of the suit, by reason of any contract or agreement different from the special contract, or for any consideration other than the \$5,000 claimed in the declaration. In the third plea, the identity of the sum sued for with the second instalment is reaffirmed, payable on the 1st of October, 1851, upon condition that the buildings and stores should be completed and ready for use by that day — averring performance on her part of the conditions and covenants of the contract, and non-performance on the part of the plaintiff, especially his failure to complete and have ready for use the warehouse and stores by the time specified. The fourth plea refers to the special contract, avers performance on her part, non-performance on the part of the plaintiff, and especially that he had not finished and completed the buildings and stores by the day specified in the contract, or at any time, either before or after that day. At this point of the pleading the plaintiff applied to be permitted to amend his declaration, and added to it four counts. The first sets out in detail the special contract referred to in the defendant's second, third and fourth pleas; avers performance generally, on his part, and non-performance on the part of the defendant. The second count is the same as the first, down to the averment of performance by plaintiff, inclusive, and then it avers that the defendant departed from the stipulations of the contract, and required the plaintiff to do additional work, and to furnish additional materials, whereby the defendant delayed the plaintiff, and prevented him from completing the buildings by the time agreed, which the plaintiff would otherwise have done. It is then averred that, notwithstanding the additional labor, the plaintiff had completed the work in a reasonable time after the 1st day of October, 1851, to wit, on the 4th December following, and that the defendant then accepted the same, whereby the second instalment of \$5,000 became payable. The third count is substantially a repetition of the original declaration, and the fourth claims

\$10,000 for work and labor done, and for a like sum laid out by the plaintiff for the defendant, from all of which his right of action had accrued before it was instituted.

The defendant filed three pleas to the first count of the amended declaration: 1st, that she was not indebted as was alleged; 2d, that the plaintiff had not performed the special agreement; and 3d, that he had not performed the condition precedent of the contract, to complete the building, which he had agreed to do by the 1st day of October, 1851. To the rest of the count the defendant demurred. As the verdict of the jury and the judgment rendered for the plaintiff are upon the first amended count, contrary to instructions asked of the court by the defendant, we shall not notice the subsequent pleadings and proceedings in the case, and will confine ourselves to what we consider to have been the legal rights of the parties under the original declaration and the first amended count.

§ 904. *A departure from a building contract with the assent of the builder will not excuse a failure to complete the building within the time stipulated.*

The evidence shows that the three stores and the warehouse were not finished by the 1st of October, 1851. It is also proved that the special contract had been departed from in the course of its execution; that the defendant insisted that alterations and additions should be made in the buildings after they were begun, contrary to the specifications of the special contract, and that the plaintiff had yielded to her requirements. It may have delayed the completion of the stores and warehouse, as it increased the work to be done; but it having been assented to by the plaintiff without any stipulation that the time for performance of the whole was to be delayed, it must be presumed to have been undertaken by the plaintiff to be done, as to time, according to the original contract. The sinking of the wall probably caused the delay, but that cannot give to the plaintiff any exemption from his obligation to finish the stores and warehouse on the 1st of October, without further proof as to the cause of it; nor could it in any event entitle him to an instruction from the court that he might recover under a count or a special contract, in which he avers that the work had been completed by him on the 1st of October, in conformity with it. The defendant in the court below, plaintiff in error here, to maintain the issues on her part, and to reduce the damages claimed by the plaintiff, introduced witnesses to show that the work, though it had been done, had not been so in a skilful and workmanlike manner, and that the materials used for it were of an inferior kind, especially in the construction of the store wall, and that it was so deficient in other particulars that she had been put to a large expense to make the buildings fit for use and occupation, which amounted to \$10,000. The plaintiff gave rebutting testimony, and then the defendant prayed the court to instruct the jury, "that if the three stores and warehouse were not finished fit for use and occupation, and delivered to her on the 1st of October, 1851, but were at the time when they were delivered wholly unfit and unsafe for occupation, with the walls of some of them sunken out of plumb, and cracked, and in danger of falling, so as to be utterly untenable, then the plaintiff was not entitled to demand and recover in this order the said sum of \$5,000, as the stipulated instalment which the special contract purports to make payable on the 1st October, 1851, but that the plaintiff was entitled to recover only the value of his work, after deducting the cost and expense incurred by the defendant in repairing the stores and warehouse, to render them fit for occupation, but that the plaintiff, as claimant, was entitled only to nominal damages.

Also, if the defendant did not, at any time whatever, execute and finish, ready for use and occupation, and deliver in that state and condition to the defendant, the stores and warehouse, but had delivered them over to the defendant in a state wholly unsafe and unfit for use, and untenable, etc., etc., and that the defendant had been obliged to reconstruct the walls, and to refix the buildings, so as to fit them for use and occupation, at her own cost and charges, then that the defendant may recoup or deduct the same against the plaintiff's claim for the said instalment of five thousand dollars claimed in the suit, or the value of the work done by the plaintiff upon the stores and warehouse; but that, in all events, the plaintiff could only recover nominal damages.

These instructions the court refused to give, without the following qualifications: "If the jury shall find from the evidence that the plaintiff, Jones, has executed the work according to the specifications forming a part of the contract, in a skilful, diligent and careful and workmanlike manner, and that his performance of it was with the knowledge and approbation of the defendant, then they should find for the plaintiff the said sum of \$5,000, with interest from the date of the delivery of the stores and warehouse to the defendant."

§ 905. *A covenant in a contract to complete a building at a specified time is a condition precedent to a right to recover instalments due at such time.*

The defendant excepted to the refusal of the instructions as they had been prayed for, and to the qualifications of them as they were given to the jury. There is error in this instruction. The count and the plea of the defendant, and the instruction asked, raised the construction of the special contract, whether or not the right of the plaintiff to recover the second instalment did not depend upon the completion of the stores and warehouse by the 1st of October, 1851; whether that was not a condition precedent, or a case in which the parties had agreed — one to deliver the buildings finished, according to the special contract, and the other to pay the second instalment concurrently, if they were then so delivered. A failure by the plaintiff to finish and deliver on that day is fatal to a recovery upon the special contract. The plaintiff in the first amended count declares upon it as such, avers his performance accordingly, and the proof is that he had not so performed. We infer, from the whole contract, that it was the intention of the parties that the performance of the work was to be a condition precedent to the payment of the second instalment. There is no word in the contract to make that doubtful. The plaintiff undertook to furnish the materials and to construct the buildings according to specifications. Part of them were to be finished, and to be delivered to the defendant, on the 1st of October, 1851, and the residue on the 1st December afterwards. For the whole, the defendant was to pay \$24,000 — \$5,000 on the 1st of July, 1851; \$5,000 on the 1st of October, 1851, if the stores and warehouse were then finished for use and occupation, and delivered over on that day to the defendant; and if that was done, then the balance of the \$24,000 was to be paid on the 1st of January, 1860, with the interest, as mentioned in the special contract.

§ 906. *Distinction between dependent and independent covenants.*

The words of the contract for payment are, "in consideration of the covenants, and their due performance." Such words import a condition. It is difficult at all times to distinguish whether contracts are dependent or independent; but there are rules collected from judicial decisions, by which it may be determined. We have tested the correctness of them by an examination of several authorities.

“When the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other.” Such is the case with the special contract with which we are now dealing. “If the agreements *go to a part only of the consideration on both sides*, the promises are so far independent. If money is to be paid on a day certain, in consideration of a thing to be performed at an earlier day, the performance of that thing is a condition precedent to the payment; and if money is to be paid by instalments, some before a thing shall be done and some when it is done, the doing of the thing is not a condition precedent to the former payments, *but is so to the latter*. And if there be a day for the payment of money, and that comes before the day for the doing of the thing, or before the time when the thing from its nature can be performed, then the payment is obligatory, and an action may be brought for it, independently of the act to be done. Concurrent promises are those where the acts to be performed are simultaneous; and either party may sue the other for a breach of the contract, on showing, either that he was able, ready and willing to do his act at a proper time and in a proper way, or that he was prevented by the act or default of the other contracting party.” 2 Parsons on Contracts, ch. 3, 189. The first instalment was to be paid on an appointed day, in consideration of the work to be begun; and the second instalment was to be paid on a subsequent day, if the work should then be finished and delivered over to the defendant, ready and fit for use and occupation. Before that day it could not have been demanded; on that day, the work having been performed, it might have been. The evidence shows that the work had not been done on the 1st of October, 1851, and was not finished until the 1st of December.

The plaintiff avers in his first amended count that he had, on his part, complied with his undertaking in the special contract. The issue upon it is, that he had not done so, and he gave no proof to sustain the averment. The evidence entitled the defendant to a verdict on that count; but the court, without regard to the time fixed upon for the work to be finished, instructed the jury that if the work had been done according to the specifications forming a part of the contract, in a skilful and workmanlike manner, or if his execution of it was with the knowledge and approbation of the defendant, then they were to find for the plaintiff the sum of \$5,000, with interest from the date of the delivery of the stores and warehouse. It must be obvious that this instruction makes between the parties a different contract from that into which they had entered, and one different from that the plaintiff had declared upon. The plaintiff gave no evidence to support the count; but there was evidence showing the reverse of performance on his part. For this error in the court's instruction to the jury upon the first amended count, we shall remand the case for another trial upon the plaintiff's original declaration in debt with the common counts, as in *indebitatus assumpsit*.

§ 907. *Work done and materials furnished and accepted must be paid for, although not furnished according to special contract.*

We do not consider that the plaintiff's right to recover upon that declaration was in any way affected by the extra work which was done upon the requisition of the defendant, or by the increase of materials which he furnished for that purpose; or that the sinking of the foundation of the buildings excused him from finishing the work by the time specified; or that the acceptance of the buildings by the defendant as they had been constructed by the plaintiff

was any release of the plaintiff from his undertaking to finish them in the time specified in the contract. But after that time had passed, the plaintiff continued, with the knowledge and permission of the defendant, and also with the knowledge of her superintending architect, to do the work specified in the contract, and also to do the extra work, and to furnish the materials necessary for both. And when the work was done by the plaintiff, however imperfectly that may have been, the defendant accepted it. The law in such a case implies that the work done and the materials furnished were to be paid for. The general rule of law is, that while a special contract remains open — that is, unperformed — the party whose part of it has not been done cannot sue in *indebitatus assumpsit* to recover a compensation for what he has done, until the whole shall be completed. This principle is affirmed and acted upon in *Cutter v. Powell*, 6 Term R., 320; also in *Hulle v. Heightman*, 2 East, 245, and in several other cases. But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with that contract. In such a case, the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration of it. Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred is really worth; and to recover it, an action of *indebitatus assumpsit* is maintainable.

§ 908. — *authorities examined.*

Such is the law now in England and in the United States, notwithstanding many cases are to be found in the reports of both countries at variance with it. It was recognized by this court to be the existing rule in the case of *Slater v. Emerson*, 19 How., 224, 239 (§§ 910-912, *infra*). The difference between the rule now and in earlier times, it is believed, has caused much of the difficulty in the establishment of the present rule. Formerly it was held, that, whenever anything was done under a special contract not in conformity with it, the party for whom it was done was obliged to pay the stipulated price; but that he might resort to a cross-action to indemnify himself for the deficiency in the consideration. *Blair v. Davis*, 1794, cited in 7 East, 470. See Smith's *L. Cases*, in the notes following the case of *Cutter and Powell*, 2d vol., for a full description, historical and chronological, of the rule as it now prevails and as it formerly was.

The rule as it now exists has been recently discussed and affirmed in the queen's bench, in the case of *Munro v. Phelps*, 8 Ell. & Bl., 739; 92 Eng. Com. L. It has been the rule in the courts of New York for more than thirty years. In the case of *Jewell et al. v. Schroepnell*, 4 Cowan, 564, it was decided that if there be a special contract under seal to do work, and it be not done pursuant to the agreement, whether in point of time or in other respects, the party who did the work may recover, upon the common counts in *assumpsit*, for work and labor done. If, when the time arrives for performance, the party goes on to complete the work, with the knowledge of his employer, it was evidence of a promise to pay for the work. So if the employer does not object. This rule prevails also in Massachusetts, in Pennsylvania, and in several of the other states. Also in Alabama, as may be seen in the case of *McVoy v. Wheeler*, 6 Port., 201. It is discussed with a very accurate discrimination of its application, in the second volume of Professor Parsons on Contracts.

§ 909. *In an action to recover a quantum meruit, defendant may recoup damages for failure to perform the contract.*

In the trial of such an action, where the defense is not presented as a matter of set-off, arising on an independent contract, but for the purpose of reducing the plaintiff's damages, because he had not complied with his cross obligations arising on the same contract, the defendant may be allowed a recoupment from the damages claimed by the plaintiff for such loss as she shall have sustained from the negligence of the plaintiff. Such evidence is allowed to prevent circuity of action, and to prevent further litigation upon the same matter. It may be well to say that the court allowed a reconpment in *Green v. Biddle*, 8 Wheat., 1 (CONST., §§ 191–206), to a disseizor, who was a *bona fide* occupant of land, for the improvement made by him upon it, against the plaintiff's damages. But such recoupment cannot be claimed unless the defendant shall file a definite statement of his claim, with notice of it to the plaintiff, sufficiently in time before the trial term of the case to enable the latter to meet the matter with proof on his side.

We have pursued the case in hand further than may have been necessary; but it was thought best to do so, as the points now here ruled have not before been expressly under the consideration of this court. The judgment given in the court below is reversed, and we shall order that the case shall be remanded to it, with directions for its trial again, pursuant to our rulings in this opinion.

SLATER *v.* EMERSON.

(19 Howard, 224–239. 1856.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This case is before us on a writ of error to the circuit court of Massachusetts.

The action was brought by Emerson against Slater on an agreement made the 14th day of November, 1854, in which Emerson, “in consideration of the agreement of said Slater, hereinafter contained, and of \$1 to him paid, covenants and agrees, with said Slater, that he will complete all the bridge work to be done by him for the Boston & New York Central Railroad Company, ready for laying down the iron rails for one track, by the 1st day of December next.”

“And the said Slater, in consideration of the premises, hereby agrees, with said Emerson, that he will pay him, within two days from the date hereof, the sum of \$4,400 in cash. And the said Slater further agrees that he will give to the said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, in Boston, from Dedham, his (said Slater's) five notes, for \$2,000 each, dated when said notes were given, as above provided, and payable in six months from their date, to the said Emerson or his order. Said notes, when paid, are to be applied towards the indebtedness of said Boston & New York Central Railroad Company to said Emerson; it being understood that this agreement is in no way to affect any contract of said Emerson with said company, or any action now pending.”

The execution of this agreement was admitted, and that the work upon the bridges, in said agreement set forth, was completed, ready for laying down the iron rails for one track, about the middle of December, 1854, and that the rails were laid to the foot of Summer street, in Boston, from Dedham, about the last of the same month. It was proved that the defendant was president of

the Boston & New York Central Railroad Company, and a stockholder and bondholder in the same. The corporation failed on or about the 2d of July, 1854. The company was then indebted to the plaintiff, and did not pay him. In the second week of July there was a crisis in the affairs of the company, and Emerson suspended his work, so far as regarded new outlays. In August a new arrangement was made, and he went on till the first or second week in November, and then he kept a force on the great bridges sufficient to retain possession of the work, and would not surrender it; the witness (Willis) then made an effort to get the bridges completed. The question was, how much Emerson would take. The company owed him some \$10,000 or \$15,000, and was then insolvent as respected meeting its engagements.

The defendant then introduced an agreement between the Boston & New York Central Railroad Company, a corporation, and Charles Emerson, of Boston, in which Emerson agreed to build and complete, sufficient for the passage of an engine over the same, on or before the 1st day of May next, all the bridging as now laid out and determined upon by the engineer of said railroad, from the wharf near the foot of Summer street, in Boston, and from South Boston across the South Bay, so called, to the Dorchester shore, in Dorchester, in the manner and with the materials hereinafter described, and to finally complete the same to the satisfaction of the state commissioner and the engineers of said railroad, as soon after the 1st day of May next as may be. Several other bridges were required to be built on the road, Emerson furnishing all the materials, excepting the iron rails, chains and spikes, which were to be furnished by the railroad company. This contract was dated the 23d of December, 1853, and signed by the parties. A receipt dated November 15, 1854, signed by Emerson, acknowledged the payment of \$1,400 by Slater on the contract first above stated.

E. B. Ammidown, a witness, stated he was a director on the railroad, and that in November, 1854, there were negotiations pending for a contract for a through route from Boston to New York, between the Boston & New York Central Railroad Company and the Norwich & Worcester Railroad Company, and the steamboat company plying between Norwich and New York. The contract then existing between said steamboat company and Norwich & Worcester Railroad Company with the Boston & Worcester Railroad Company would expire about December 1, 1854. It was necessary that said steamboat and Norwich & Worcester Railroad companies should make a new contract. They preferred to contract with us instead of the Boston & Worcester Railroad Company, provided our road could be ready to run by December 1, 1854. The only part of our road, as to which there was any doubt of its completion, was the bridges, which the plaintiff was making. The whole matter was talked over, in the presence of the plaintiff. We regarded it as of very great importance. I considered the loss of that contract equal to a quarter of a million of dollars, and the plaintiff said half a million. Committees from Norwich & Worcester Railroad and steamboat companies came on, to make the arrangement, and went over part of the road. Whether this was before or after the contract the witness cannot say, but he has little doubt that it was before. J. C. Hurd, a witness, and who was also a director, and as a committee, about the 14th of August, 1854, made a parol contract with Emerson to pay him \$17,000, and secure to him \$6,000 of Farnum, with indorsements. A larger sum than \$17,000, he thinks, was paid at the time of the contract. Emerson agreed to go on and finish the work, but he declined to sign a written agreement.

On the above evidence the defendant moved the court to rule and instruct the jury, that, by the true construction of said contract declared on, the plaintiff would not be entitled to recover without showing that the work was completed, ready for laying down the iron rails for one track, by the 1st day of December, 1854; but the court refused so to instruct the jury, and did instruct them that the agreement on the part of the defendant to give the notes in said agreement mentioned was not dependent on the completion of said work, ready for laying down said rails for one track, at the time limited by said contract. To which ruling and refusal the defendant excepted.

And the defendant further requested the court to rule and instruct the jury, that if the plaintiff failed to complete said work, ready for laying down said iron rails for one track, by the said 1st day of December, there was thereby a failure of the consideration of said contract, and the plaintiff would not be entitled to recover the amount claimed by him, or any part thereof; but the court refused so to instruct the jury. To which refusal the defendant excepted.

The judge having first called upon the defendant to offer evidence, if he saw fit, of any actual damage by him sustained by the non-performance of said work within the time limited by said contract; and the defendant declining to offer any such evidence, and admitting that no such damages were claimed by him in the suit, the court thereupon instructed the jury to deduct, from any sum they might find for the plaintiff, the sum of \$1 — as nominal damage, for the said non-performance of plaintiff. To which the defendant excepted. The jury found for the plaintiff \$10,199.

§ 910. *A covenant to complete work by a certain time held to be a dependent covenant.*

The declaration contains four counts. The first one alleges the work was completed by the 1st of December, 1854; the second on the 20th of December; third, the same time; the fourth, the same as the second, with an allegation that the defendant waived the time fixed for the work to be completed to the 20th of December. This contract cannot be satisfactorily understood or construed without reference to the circumstances under which it was made. From the evidence, it appears that the work to be completed by the 1st of December was provided for by a previous contract, dated 17th December, 1851, in which the details and prices of the work were specially stated, to be so constructed as to admit of an engine to run over it on or before the 1st of May ensuing, and the whole to be completed as soon after that period as practicable.

The company, it seems, had become embarrassed and were unable to make payment for the work as it progressed; still the contractor, Emerson, was unwilling to give up the contract, and retained a few hands in his employ on different parts of the work, so as to retain the possession of it. Another fact to be noticed as important was, that if the road could be completed by the 1st of December, the company had an assurance that a contract could be made with the steamboat company plying between Norwich and New York, making a continuous line between Boston and New York. This was considered an object of great importance — equal, as was supposed by a witness, to a quarter of a million of dollars, and, as the plaintiff supposed, to half a million.

The defendant was president of the Boston & New York Central Railroad — a stockholder and a bondholder in the same; but it does not appear that he had any authority to bind the company, as he entered into the contract in his individual capacity. Under these circumstances, the contract on which the action is prosecuted was made. It will be at once perceived there was a strong motive

to have the work completed by the 1st of December ensuing, by all who had an interest in the Central railroad. The sum to be paid by Slater was not in addition to the price stipulated in the former contract, but in discharge of so much of that contract. All these facts being admitted or undisputed, we will consider the language of the contract. It states "that the said Emerson, in consideration of the agreement of said Slater, hereinafter contained, and of \$1 to him paid, the receipt whereof is acknowledged, covenants and agrees with said Slater, that he, the said Emerson, will complete all the bridge work to be done by him for the Boston & Central Railroad Company, ready for laying down the iron rails for one track, by the 1st day of December next."

There is no ambiguity in this language. No one can misconstrue it. The work specified was to be completed by the 1st day of December. And the said Slater, "in consideration of the premises," that is, the completion of the work, "hereby agrees with said Emerson, that he will pay him, within two days from the date hereof, the sum of \$4,400 in cash; and the said Slater further agrees that he will give to the said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, in Boston, from Dedham, his (said Slater's) five notes for \$2,000 each, dated when said notes are given, as above provided, and payable in six months."

§ 911. Covenants are dependent or independent according to intention of the parties.

The notes were to be given on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, in Boston; and from this it is argued that the covenants in the agreement are independent. Much is found in the opinions of courts and elementary writers in regard to dependent and independent covenants. And it is said, "where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other." This, as a general rule, is correct, but it is subject to the intention of the parties, as signified in the language of the contract. The great rule is to ascertain the intent of the parties from the language used. The work was to be done by the 1st day of December; and Slater agreed to give his notes, payable in six months after the work was completed; the time of giving the notes, therefore, is referable to the time fixed for the completion of the work. In no just or legal sense can this language be held to enlarge the time limited in the contract.

§ 912. Where a party is to receive notes for ten thousand dollars on the completion of certain work by a certain time, the completion of the work by the time is a condition precedent to the right to the notes.

It is said by some writers that it is impossible to make time of the essence of the contract where damages may compensate for the delay. But this is not correct as a general proposition. And a more fit illustration of this can scarcely be found than the contract under consideration. The amount of compensation for the work is not increased or diminished by the new contract. The first contract stands in all its force, unaffected by the second, except that the payments made under the second shall be applied as a credit on the first. The obligation assumed by Emerson in the new contract was, to finish the work, as stated, by the 1st of December, in consideration that \$4,400 should be paid to him in two days, and notes given for \$10,000 on the completion of the work. Slater, having no other interest in the work than any other stockholder and bondholder of similar amounts, paid the \$4,400, and agreed to give his individual notes for the \$10,000. In this contract he stands in the relation of a surety,

and can only be held responsible under his agreement. That time was an essential part of this contract is clear from the circumstances under which it was made, and the intent of the parties, as expressed. The continuous line to New York was the strong motive of Slater, and that could be secured only by the completion of the work on or before the 1st of December.

The defendant prayed the court to instruct the jury that the plaintiff could not recover without showing the work was completed, ready for laying down the iron rails for one track, by the 1st day of December, 1854, which the court refused to do. In this, we think, there was error. On a contract where time does not constitute its essence there can be no recovery at law on the agreement, where the performance was not within the time limited. A subsequent performance and acceptance by the defendant will authorize a recovery on a *quantum meruit*. It is difficult to perceive any satisfactory mode by which the defendant in the circuit court could recoup his damages for the failure of the plaintiff to perform in that action, or by bringing another suit. As a stock and bondholder, his damages would be remote and contingent. To ascertain the general damage of the company by the failure, and distribute that amount among the members of the company in proportion to their interest, would seem to be the proper mode; and this would be complicated, and not suited to the action of a jury. The judgment of the circuit court is reversed with costs.

§ 913. **Covenants, when concurrent — Rights of parties.**—Covenants are concurrent when there are mutual acts to be performed at the same time. In covenants of this character, if one party is ready and offers to perform his part of the covenant, and the other refuses or neglects to perform his part, the party who was ready has fulfilled his engagement, and may maintain his action for the breach or default of the other, although it is uncertain which was obliged to do the first act. *Snow v. Johnson*,* 1 Minn., 52. See § 892.

§ 914. Where a contract provides for the performance of dependent or concurrent acts, neither party has a right to demand a performance of the other without a performance or a tender of performance on his part. Where there are mutual covenants or acts prescribed in a contract, they are presumed to be dependent unless a contrary intention appears. *McNeil v. Magee*, 5 Mason, 254.

§ 915. **Dependency, how determined — Assignment of lease.**—Where the covenants in an agreement are dependent or concurrent, the plaintiff must allege and prove performance of or an offer to perform the covenants on his part. And, in order to determine whether the covenants are dependent, the intention of the parties is to be discovered rather from the order of time in which the acts are to be done than from the structure of the instrument or the arrangement of the covenants. Thus, where by a contract to assign a lease the plaintiff was required, within a certain time, to sow the land in wheat and rye, in which condition it was to be delivered to the defendant, the covenants were held to be dependent, and the plaintiff was held bound to prove a performance of or an offer to perform the covenants to sow and convey the land. *Goodwin v. Lynn*,* 4 Wash., 714. See § 894.

§ 916. **Dependency of covenants depends on intention.**—Covenants are to be considered dependent or independent, according to the intention of the parties, which is to be deduced from the whole instrument. Thus, where by a contract to do work for a railroad company, monthly payments were to be made for the work done during each month, and the work was to be completed by a certain date, the company having a right to forfeit the contract and retain a certain percentum of each payment to secure themselves from loss if the work should not proceed to their satisfaction, it was held that the covenants to make monthly payments and to complete the work within the stipulated time were not dependent upon each other, there being no necessary dependency between them, and no intention apparent to make them dependent. *Philadelphia, etc., R. Co. v. Howard*, 13 How., 807 (§§ 1595-1608).

§ 917. **In executory contracts for the sale of property the contracts of the parties are to be considered dependent unless a contrary intention clearly appears.** *Bank of Columbia v. Hagner*, 1 Pet., 464.

§ 918. **Furnishing supplies — Locating mine — Condition precedent.**—It seems that where one party agrees to furnish another with certain supplies, on condition that the latter

shall prospect and locate mines for the joint benefit of both, the party who is to do the prospecting may treat the agreement to furnish supplies as a condition precedent, and if such supplies are not furnished, then the party may treat the contract as abandoned, and may go on and locate claims which shall belong to him alone. *Murley v. Ennis*, * 2 Colo. T'y, 305.

§ 919. Sale of patent right—Extension—Condition precedent.—An owner of a patent, for an extension of which an application was pending, contracted in writing with P. that in case such extension was granted, then P. should have a certain right in a certain territory upon the payment of a certain proportion of the expenses of obtaining the extension. The extension was procured, and P. offered to pay the patentee his proper proportion of the expenses of obtaining the extension, but the patentee refused to disclose the amount of such expenses. P. went on with the manufacture of the patented machines, and was sued by the patentee for infringement. *Held*, that the agreement of P. to pay his share of the expenses was a condition precedent, and that until such payment was made he had no rights under the assignment. The wrongful refusal of the patentee to disclose the amount of the expenses would furnish a good cause of action against him, but would not furnish a defense to the suit for infringement. *Pitts v. Hall*, 3 Blatch., 204.

§ 920. Agreement for the surrender of a contract—Condition precedent.—Where a contract in its terms is dependent upon the surrender and cancellation of a contract to convey land within a certain time, such surrender and cancellation is a condition precedent, and if not performed, the other party may declare the contract at an end. A mutual understanding between the parties and the grantee of the contract, that the contract should be released, is insufficient, though acquiesced in by the parties. *Washington v. Ogden*, 1 Black, 458.

§ 921. Dependent agreement.—Where two instruments are executed at the same time, between the same parties, relative to the same subject-matter, and to effectuate one object, they are to be taken in connection as parts of the same agreement. *Wildman v. Taylor*, 4 Ben., 47.

§ 922. Sale—Payment of price—Transfer of title.—Where, by the terms of a written contract, the title to property which is sold on credit is not to pass till the full purchase money is paid, the stipulation of the contract controls, and title does not pass although all but a small portion of the price is paid. The stipulations for payment are conditions precedent. *In re Lyon*, * 7 N. B. R., 182.

§ 923. Executory contract to assign securities.—An assignment of securities "upon the payment" of a specified sum, "with interest from date," is an executory contract to assign, and the assignment becomes valid only on payment of the sum named. *French v. Hay*, 22 Wall., 236.

§ 924. Bond for purchase money—Condition as to failure of title.—Where a bond given for the purchase money of real estate has an agreement indorsed upon it that it shall not be enforced, either as to principal or interest, if title to the land fails, such agreement is a perpetual covenant not to enforce the bond in case title fails at any time, and it operates as a condition of the bond, and so qualifies its condition as to payments of principal and interest that such payments may cease and the bond shall become of no effect on the happening of the event mentioned. *Noonan v. Bradley*, 9 Wall., 405.

§ 925. Lease of railroad—Independent covenants.—A lease by a railway company provided that the lessor should provide for, classify and adjust its indebtedness, and that the lessee should pay a certain rent. *Held*, that these covenants were not dependent; that the agreement of the lessor to provide for, classify and adjust its debts was not a condition precedent to the payment of rent, especially in view of the length of time required for such classification, and in view of the fact that the stipulated rent had been regularly paid; also, that while the lessee was not bound to wait an unreasonable time for the performance of such covenant on the part of the lessor, still it was not entitled to a rescission of the contract until a reasonable time should be given to the lessor to make such provision, classification and adjustment, after demand; and where a bill was filed by the lessee, the court fixed a time within which the lessor might perform his covenant. *P., C. & St. L. R'y Co. v. C., C. & L. R'y Co.*, 8 Biss., 483.

§ 926. Contract to furnish cloth—Performance excused.—A manufacturer contracted to furnish a certain specified quantity of cloth at certain times, but before it had been furnished his mill burned. Owing to this fact, he did not furnish all the cloth within the time required. *Held*, that no right of property in the cloth passed to the purchaser till it was delivered; also, that in executory contracts of this kind, time is of the essence of the contract, and that the purchaser will not be bound to accept and pay for the goods unless tendered upon the day specified; also, that the burning of the mill would furnish no excuse. An impossible condition is one which cannot be performed, and if a person contract to do something which is impossible at the time, the contract will not bind him, because no man can be obliged to perform an impossibility. But where the contract is possible in itself, the perform-

ance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party nor within his control. *Jones v. United States*, 6 Otto, 28.

§ 927. *Promise to convey on the performance of certain work.*— Where a person agrees to convey land to another on his performing a certain amount of work for a stipulated price, the person who is to do the work acquires no right to a conveyance till he performs the work agreed upon. *Stansbury v. Taggart*, 3 McL., 459.

3. *Entire and Divisible.*

SUMMARY— *Part performance*, § 928.— *Whether contract was entire or divisible*, § 929.

§ 928. Part performance of an entire contract does not give a right of action on the contract. So where defendants promised to pay a certain sum towards the building of a railroad, one instalment to be paid when a certain portion was graded, another instalment when another portion was graded, etc., it was held that the contract was entire, and that a partial performance by plaintiffs did not give them a right of action on the contract. *Gray v. Hinton*, §§ 930-932.

§ 929. In an action by an agent to recover a percentage on renewals of life insurance policies procured by him, it was held that if plaintiff had an absolute right to a percentage on the renewals during the lives of the insured, his contract was entire; but if he was entitled to his commission only as the policies were renewed from year to year, his contract was divisible; and that the jury should determine the question. *Ensworth v. New York Life Ins. Co.*, §§ 933, 934. See § 935.

[NOTES.— See §§ 935-952.]

GRAY v. HINTON.

(Circuit Court for Nebraska: 2 McCrary, 167-172. 1881.)

STATEMENT OF FACTS.— The defendants had promised to pay the Nebraska Railway or order \$65,000 in instalments as follows: \$10,500 when the road-bed was graded and culverts built through the precinct of Ohio; \$35,000 when the same was done through the precinct of Falls City; \$19,500 when the road was graded, tied and ironed through both the above precincts. The railway company had agreed to complete its road before December 1, 1876, but the road had not been completed at the time of bringing this suit, January, 1881. The questions raised by the petition and demurrer are stated in the opinion.

§ 930. *Whether a contract is entire or separable is a question of intention.*

Opinion by McCRARY, J.

The demurrer raises the question whether suit can be maintained on the contract upon the facts disclosed by the petition. The plaintiff sues after the expiration of the time within which, by the terms of the contract, the road was to have been finished. It is alleged that the grading was completed according to the contract, but it is not alleged that the road was finished. The question is, whether, under the contract, plaintiff can recover for the grading without alleging that he has finished the road, or offering some sufficient excuse for his failure to do so; or, in other words, we are to consider whether the agreement to do the grading was a contract separate and distinct from and independent of the agreement to finish the road, so that the plaintiff can sue upon the contract and recover for the grading without alleging compliance or readiness to comply with the other part of the agreement. Speaking of the "entirety of contracts," Mr. Parsons says: "The question whether a contract is entire or separable is often of great importance. Any contract may consist of many parts; and these may be considered as parts of one whole, or as so many distinct contracts entered into at one time, and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which this question in a given case may be settled. Like most other questions of con-

struction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract." 2 Pars. Con., 517. From what appears upon the face of this contract and surrounding circumstances, we are to determine whether it was the intention of the parties to make one contract for the construction of a railroad, or two separate contracts, one for the grading and the other for the bridging, tying and ironing of the roadway through the precincts of Ohio and Falls City.

§ 931. — *the contract in this case was entire.*

It seems pretty clear that the subject-matter of the contract was an entirety, to wit: A completed railroad. The case is not like many we find cited in the books, in which two or more separate and distinct articles of property are sold and conveyed by a single instrument, for separate and distinct prices, at one and the same time. In such cases it often appears that the purchase of each article was a separate and distinct transaction, and intended to be so regarded by the parties to the contract. There is in such cases no necessary connection between several articles sold and conveyed. There is nothing from which it can be inferred that it was not the intention of the purchaser to secure one without also securing the others. The case before us, however, is quite different. It cannot be supposed that the defendants would have employed the railroad company to do the grading alone, without it had at the same time agreed to go on and complete the road. The contract itself declares that the consideration for the contract, on the part of the defendants, was the benefits they were to receive by the construction of the road through the two precincts named. Suppose the railroad company or its contractors, after completing the grading, had failed or refused to go on and complete the road upon the demand of the defendants, would it be contended that the plaintiff, under such circumstances, could maintain an action upon the contract? This is probably the test. See *Robinson v. Green*, 3 Metc. (Mass.), 159. If it were alleged in the petition that the railroad company or the contractors completed the grading and were ready, able and willing to go on and finish the road; that they offered to do so, and were prevented by the act or fault of defendants, a very different question would arise; but an allegation that the grading was completed, without more, is insufficient, because it is manifest that the defendants did not intend to bind themselves to pay for grading, and leave the contractors at liberty to finish the road or not at their option.

The parties must have understood that the defendants were binding themselves to pay a large sum of money to secure the construction of the railroad through the precincts in which they resided and held property. If the proposition upon which this action is based, to wit, that the defendants were to pay the price named for the grading, whether the road was completed or not, had been suggested at the time of the execution of the contract, no one of the defendants would have assented to it. They undoubtedly regarded the contract as an entirety. Such was the intention; and the construction of the contract as to its being several or entire depends upon the intention of the parties to it.

§ 932. *Mutuality indispensable to make a contract. There was no mutuality in the case at bar.*

But, independently of this consideration, there can, I think, be no doubt upon another question which is presented by this record. The contract itself shows no mutuality. The defendants bound themselves to pay a certain sum of money, provided plaintiff's assignor, the railway company, would complete

a certain railroad; but there is nothing in the contract to bind the company to complete the road. The performance of the contract by the railroad company would avoid this objection. The rule is that where one party agrees to pay a certain sum of money, if another party will do certain acts, the latter is not bound; but the agreement of the former may be considered as a request to the latter to do the acts named, and the doing of the acts is an assent; and the promise thereby becomes mutual and obligatory. But this case presents the question whether a performance of a part of the act specified and a failure to perform another part will answer the objection that there is no mutuality. The rule is that performance is an assent to the terms proposed; but I know of no authority for the proposition that part performance will amount to an assent. See 13 Ohio St., 94, where it is distinctly held that "this rule does not appear to be applicable where the act done only constitutes a part of the consideration, and shows no assent to the terms of the contract." The performance by the party to whom the offer is made takes the place of a formal acceptance of a proposition to contract; but a part performance, without an offer to make full performance, is not an acceptance, no more than an acceptance in writing of a part of a proposition could be regarded as an acceptance of the whole. In such a case, whatever the rights of the plaintiff might be in a suit upon the *quantum meruit*, he has no right of action upon the contract itself. The demurrer to the petition is sustained.

ENSWORTH v. NEW YORK LIFE INSURANCE COMPANY.

(Circuit Court for Ohio: 1 Flippin, 92-96. 1868.)

STATEMENT OF FACTS.—Plaintiff, agent for defendants, was to be allowed ten per cent. on original policies procured by him and five per cent. on renewals. He was dismissed for acting as agent for another company (although this was not forbidden in his contract of employment), and brought this suit to recover for breach of contract in withholding from him the premiums on renewals.

Charge by SHERMAN, J.

If an agent should grossly misconduct himself in the course of his agency, and should prove unfaithful to his trust, he would forfeit his claim to his compensation or commission, but his misconduct and infidelity must be gross and aggravated before such consequences would follow; ordinary or slight misconduct would not work a forfeiture of his commissions, although it might be a good cause for a revocation of his agency.

§ 933. *Rules by which to determine whether a contract is an entirety.*

In this case the contract is claimed by the plaintiff to be an entire contract, and that there may be an entire breach; that the damages can be readily ascertained from well known principles derived from long used life tables. On the other side it is claimed to be a divisible contract, and that the breach can be severed into several parts. I know of no general rule of law that would absolutely and definitely determine into which class this particular case would fall, nor can any adjudicated case, similar in all respects to this, be found. If any existed, it would undoubtedly have been found by the learning and research of the counsel. This contract may be said to be a continuing contract; but whether it is an entire or divisible contract depends upon its terms. When a contract is made for the building of a house, and a party refuses to fulfil, it may be considered an entire contract; and one refusal may properly be treated as an absolute breach, and one suit may cover all the damages. On the other

hand, a contract to deliver the crops of a farm for several successive years is one capable of division, and several actions can be brought—one for each year—for the refusal to deliver the crops.

Again, it has been held and decided, that a continuing contract to pay a sum of money by instalments, or the hire of a laborer by the month for a whole year, is a divisible contract and may be sued on from month to month, or when the instalments become due and payable. On the other hand, it is well settled that a contract to board, clothe and support old people during their lives is one entire contract; and one suit may be brought for the whole damages sustained by the breach. The principle deduced from these cases is: that if a contract is formed of parts which are so far inseparable that if any one is taken away there is a completed and final breach, then all must be included in the damages; but if the contract is such that it can be separated and divided into one or more distinct and separate breaches, then an action will lie and damages be had for those breaches.

If it be found from the evidence that this contract contemplated that the plaintiff should have the absolute right and ownership in the policies obtained by him, to the extent of five per centum on their renewals during the life of them, and that this right became fixed at the moment and could not be divided from other duties and other matters, then it is one entire contract, and you must find and fix his damages from the evidence given as to the value of such an interest in the policies. But if the contract contemplated that he was entitled to the commissions on the premiums, only as the policies were renewed from year to year and the premiums paid to the life insurance company, then the contract is divisible, and he can only sue and recover damages after those premiums for renewals are paid in. In this case the plaintiff would be entitled to recover the amount of the commissions on the renewals only down to the day on which he brought his suit.

§ 934. *Admissibility of evidence of usage.*

In this connection it may be said that a well-established custom among life insurance companies and their agents, as to the kind and extent of the property that agents may possess in the lists of policies they procure, may be considered as explaining the contract as claimed, because the parties are presumed to make the contracts in reference to that custom.

§ 935. *Whether a contract is entire or several depends upon the intention of the parties, and this must be discovered in each case by considering the language employed, and the subject-matter of the contract.* So where a contract was made to sell a quantity of land lying substantially in one body for a certain sum per acre, it was held to be an entire contract. *Coos Bay Wagon Road Co. v. Crocker*, 6 Saw., 581. See § 929.

§ 936. *Independent provisions -- Distinct breaches and causes of action.*—Where a contract contains various substantive and independent provisions, if there is a breach or failure to perform more than one of the stipulations, there are as many distinct causes of action as breaches. *Oh Chow v. Hallett*, 2 Saw., 260; *William v. Hallett*, 2 Saw., 263.

§ 937. *Contract, when apportionable -- Assignment.*—The general rule of the common law is that contracts are not apportionable, and this rule seems ordinarily though not universally true, where the apportionment is by the act of the party, and not by mere operation of law, or where the contract is only in part performed and is not in its own nature and terms severable. A license permitting the grantee and six persons to be employed by him to manufacture matches, if assigned, must be signed as an entirety, and it cannot be apportioned among different persons in severalty. *Brooks v. Byam*, 2 Story, 548.

§ 938. *Contract for the payment of an entire sum.*—Unless there is some express stipulation to the contrary, whenever an entire sum is to be paid for the entire work, the performance or service is a condition precedent; being one debt and one consideration, it cannot be

divided. A contract by which it is agreed that one party shall use the patented machine of the other, and pay therefor a certain proportion of the savings of fuel effected thereby, the mode of ascertaining the amount of savings being specially set forth, and the agreement to continue during the continuance of the patent, is an entire one. And the party is not entitled to recover for the use of his machine, if beneficial, without regard to the fact of rescission, or continuance, or fulfillment of the contract on his part. *Steam Packet Co. v. Sickles*, 10 How., 419 (§§ 1029-32).

§ 939. Contract for the payment of distinct sums at different times.—It seems that a contract for the payment of distinct sums of money at different periods is very much in the nature of so many distinct contracts. An action of debt lies for each sum as it becomes due, and when that sum is paid the debtor or contractor is forever discharged from the contract to pay it. *Faw v. Marsteller*, 2 Cr., 24.

§ 940. A broker's contract for the buying of stock, each share of which has an independent and distinct value, cannot be regarded as entire. *Marye v. Strouse*, 5 Fed. R., 486.

§ 941. Contract to build a house—Entire.—A contract was made to build a house for a certain price, but no time for its completion or for payment was mentioned. *Held*, that the contract was entire; that as no time for performance was mentioned, the law will imply that a reasonable time was contracted for, and that till the contract was fully performed no action would lie thereon. *Walling v. Warren*,* 2 Colo. T'y, 488.

§ 942. Agreement embracing distinct subjects.—Where an agreement embraces a number of distinct subjects which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement after it is closed. *Perkins v. Hart*, 11 Wheat., 250 (§§ 1005-1009).

§ 943. A contract for the conveyance of merchandise is in its nature an entire contract, and unless it be completely performed by the delivery of the goods at the place of destination, the carrier will in general derive no benefit from the time and labor expended on the partial conveyance. But if the owner of the merchandise is the cause of its not being carried, full freight may be recovered. *Hart v. Shaw*, 1 Cliff., 363.

§ 944. Contract to do work and take pay in stock—Executory.—Where a contractor agrees to do certain work for a railway company, and take his pay in stock, such contract is merely executory, and if the contractor is stopped in his work before its completion, no title to any part of the stock vests in him any more than it would have vested to money in the hands of the company's treasurer, had the contract been payable in money; and the contractor may maintain an action against the company for damages. *Myers v. New York & Cumberland R'y Co.*, 2 Curt., 36.

§ 945. Paving contract—Entire—Condition precedent.—Contractors entered into a contract by which they were to do certain preliminary work and lay down a certain kind of pavement, upon obtaining the written consent of all the abutting property owners to lay down that particular kind of pavement. *Held*, that the contract was an entire one; that the written consent of the property owners was a condition precedent, and that without such consent the contractors could not recover for preliminary work done. *Hitchcock v. City of Galveston*, 2 Woods, 279.

§ 946. Sale of goods—Delivery of part only.—A. sold to B. seven hundred tons of iron rails, to be shipped from Europe to Philadelphia in February, to be delivered by one or more vessels on the wharf at the latter place, United States custom-house weights to decide quantity, and to be paid for on presentation of invoice and United States certificates for each lot. B. having refused to accept one cargo of three hundred and twenty tons, which arrived in May, A. sued B. for breach. The latter filed an affidavit of defense, stating that A. had not shipped the rest and never had intended to ship them. *Held*, that the contract was an entire one, and that the defense was good. *Havemeyer v. Wright*,* 5 Fed. R., 773.

§ 947. Sale of goods, to be delivered so much a month.—Plaintiffs sold to defendants five thousand tons of iron, to be shipped at about one thousand tons per month, but the whole quantity to be shipped before a day fixed. The first two monthly shipments were both much less than one thousand tons. Defendants received and paid for first shipment, but declined to accept or receive any more, and claimed the right to rescind the contract. *Held*, that defendants had that right, on account of plaintiff's failure to ship the stipulated quantity in the first two shipments. *Norrington v. Wright*,* 5 Fed. R., 768.

§ 948. Agreement for compromise—Rescission as to some of the parties only.—A plantation and slaves were sold for a certain sum, and notes were given for the purchase money, which were indorsed by various parties. After a part of the money was paid default was made in payment of the notes due, and an attachment was issued against the purchaser and his indorsers. Subsequently a compromise was entered into between the seller, the purchaser and the indorsers, by which the seller was to take back the land and retain the money re-

ceived, and the indorsers were each to pay something to him. *Held*, that the agreement for compromise was one entire contract, and could not be rescinded as to a part of the parties only. *Shields v. Barrow*, 17 How., 140.

§ 949. Sale of vessel — Restraining employment on certain waters — Divisible contract. — A., engaged in navigation on the waters of California, sold to B., engaged in navigation on the Columbia river, a vessel, upon agreement that it should not be used in the California waters for the period of ten years from that time. Three years later B. sold the vessel to C., upon agreement that it should not be employed on either the waters of California or of the Columbia river for the period of ten years from the date of the sale. It was held that this second contract was so divisible that it could stand as to the California portion of it, as to the seven years during which B. was bound to protect A. as to California waters, although it might be void as in restraint of trade for the remaining three years. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall., 64 (§§ 694-697).

§ 950. Consideration good in part and bad in part — Usury. — At the request of one of its debtors, a national bank agreed to extend the time of payment on a note in consideration of a payment in advance of usurious interest and of the absolute indorsement to it, before due, of a certain note held by the debtor. *Held*, that though the consideration for the extension was in part good and in part bad, yet that which was good would be sustained, and that the transfer to the bank of the note by indorsement was valid and made the bank a holder for value; also, that as the national banking act does not declare a contract void for usury, but simply provides that the interest shall be forfeited, it would be imposing a penalty not prescribed by law, if the court were to declare the transfer to the bank void. *Oates v. National Bank*, 10 Otto, 240.

§ 951. Invalid parts separable from valid parts. — Where some parts of a contract are valid, and others are invalid, and the latter parts are separable from the parts relied on, and are not *mutum in se*, the invalid do not affect the valid parts, and the latter may be enforced. *Gelpcke v. City of Dubuque*, 1 Wall., 223.

§ 952. Though a single stipulation in a contract may be void as against public policy, yet the contract will be allowed to stand if it can be eliminated without impairing other provisions of the same instrument. *Western Union Tel. Co. v. Kansas Pac. R'y Co.*, 4 Fed. R., 289.

4. Joint and Several.

§ 953. Judgment against one of several joint contractors. — A judgment, even without satisfaction, against one of two or more joint contractors, is a bar to an action against the others, within the principle of the maxim *transit in rem judicatam*, the cause of action being changed into matter of record. The contract being joint, there can be but one recovery. So where three parties were jointly bound on a bond, if one only has been proceeded against thereon, there can be no action thereon against the other two. *United States v. Ames*, 9 Otto, 44.

§ 954. Where an action is brought against one of two joint contractors, a judgment against him is a bar to a suit against both. *Trafton v. United States*, 3 Story, 650.

§ 955. If a contract of several persons be merely joint, a judgment against one extinguishes the right of action as against all the others except in states where the common law has been altered. In such a case the whole cause of action is merged in the judgment. The remaining parties cannot be sued separately, because they have incurred no several obligation; they cannot be sued jointly with the other, because judgment has already been recovered against him, and he would otherwise be subjected to two suits on the same cause of action. *Mason v. Eldred*, 6 Wall., 238.

§ 956. Judgment against one or all of several joint and several contractors. — It seems that where a contract is both joint and several, a judgment against both is no bar to a several action against each of them, and a several judgment against each is no bar to a joint judgment against both. *Trafton v. United States*, 3 Story, 650.

§ 957. Liability of stockholder of bank. — The personal liability of a stockholder of a bank for the debts of the bank is a several liability, and depends in every instance upon the peculiar facts of the case. *Godfrey v. Terry*, 7 Otto, 175.

§ 958. Construction of guaranty of bond. — The following agreement was indorsed on a bond previously executed: "We do jointly and severally guaranty the payment of the within bond with interest, and all proper charges thereupon accruing, as freely as if the said bond had been executed by us." *Held*, that the guaranty is joint and several, and that "us" does not make it joint only, and that the agreement is of the same effect as if written on the face of the bond. *Ex parte Miller*,* 1 N. Y. Leg. Obs., 39.

§ 959. Contract by one partner in name of firm.—The execution of an instrument in the name of the firm by one of several partners, with the consent of the others, makes it their act, and though there may be only one seal, yet in point of law it is the seal of each. *Darst v. Roth*, 4 Wash., 472.

§ 960. In Louisiana the note of a partnership is a contract *in solido* on which each is liable for the whole, and either or any of the partners may be sued thereon without joining the others. *Breedlove v. Nicolet*, 7 Pet., 429.

§ 961. Liability of several partners for whom a bill has been drawn by one of them.—An undertaking of several parties to pay a bill of exchange being implied rather than express, the extent of the obligation of the different parties is to be determined by the character of the acts out of which the implied contract arises. So, where a bill drawn by one partner is to be charged to all, and the drawer writes to them all that he expects them to honor the bill, and in his account with them charges them jointly with the proceeds of the bill and credits them with the amount, and the parties have acquiesced in the drawing of the bill and the account rendered, it will be held that they all are jointly liable. *Clark v. Van Riemisdyk*, 9 Cr., 102.

§ 962. Joint adventure in the keeping and sale of cattle.—By the terms of a contract T. furnished B. and two others with certain cattle which were to be kept by B. and the others till a certain date and then sold by T., and after the first cost of the cattle was deducted, the surplus was to be equally divided among the three. *Held*, that as to each of the three the contract was several, and that each might sue alone for his share on the failure of T. to sell and divide as he agreed. *Beckwith v. Talbot*,* 2 Colo. T'y, 649.

§ 963. Defendant covenanted with plaintiff and two others that the three should take care of his cattle for a certain time, that the cattle should then be sold, and that each of the three should then have one-third of half the amount the cattle should bring over a certain sum, defendant to retain the other half of such amount. *Held*, that plaintiff could maintain a separate action upon the agreement, and was not obliged to join with the two others whose interests were equal to his own. *Beckwith v. Talbot*, 5 Otto, 239 (§§ 1797-98).

§ 964. One co-contractor charged singly — Pleading.—One co-obligor or co-contractor cannot be charged singly, if, in due time, he takes advantage of the plaintiff's omission to sue the others who are also bound. But if he fail to protect himself by such a plea, he cannot turn the plaintiff round at the trial by proving that another is jointly bound with him, and he is himself bound severally as well as jointly. *Jordan v. Wilkins*, 3 Wash., 112.

§ 965. Release fraudulently obtained from one of two joint contractors.—Where a release of damages for the failure of the employers to fulfil their contract is fraudulently obtained from one of two contractors, it will not avail the employer as against the other contractor, but it will totally extinguish the right of the party making it, so that he need not be a party to any litigation concerning the claim. *Canal Co. v. Gordon*, 6 Wall., 569.

§ 966. Accepting a note from one of two contract debtors.—Where two persons are indebted to a third upon a simple contract, and a note of one only is taken by the creditor, it is not necessary to the discharge of the other to prove an express agreement to accept the note in discharge of the debt. The agreement may be inferred from the nature and operation of the new contract, or from circumstances clearly indicating that such was the intention of the parties. L. and T. were partners, and on dissolution of the firm T. took the assets and promised to pay the debts, among which was one to H. T. then entered into partnership with B., and that firm contracted a debt to H. This firm was dissolved and T. promised to pay this debt. Afterwards T. and C. entered into partnership, and after contracting a debt to H. they dissolved and T. agreed to pay the debt. The three debts were then consolidated, and three notes were given by T., each for a third of the aggregate amount. *Held*, that L. was not liable in a suit on one of these notes. *Harris v. Lindsay*, 4 Wash., 274.

§ 967. When equity will make a joint instrument several also.—A court of equity will not vary the legal effect of an instrument which is joint on its face, so as to make it joint and several, unless it can see, either by independent testimony, or from the nature of the transaction itself, that the parties concerned, themselves intended to create a separate as well as a joint liability. This presumption will never be indulged in in the case of a mere surety, whose duty is measured by the force of his bond alone. *Pickersgill v. Lahens*, 15 Wall., 143.

§ 968. Liability of principal and surety.—The liability of a principal and a surety in a contract is joint; they may be sued jointly, and the measure of the principal's liability is that of the surety's. *White v. Arleth*,* 1 Bond, 326.

5. Particular Agreements.

SUMMARY — *Implied covenants*, § 969. — *Price of goods to be governed by change in duties*, § 970. — *Contract to canvass for sale of books*, § 971. — *Want of mutual consent*, § 972. — *Agreement not to run a vessel on certain waters*, § 973. — *Special agreement; extra services*, § 974. — *Party not present where tender was to be made*, § 975. — *Price of goods to be governed by price of gold*, § 976. — *Right to dig and carry away ore*, § 977. — *Loan of bonds by city; income tax on mortgage taken out of interest*, § 978. — *Failure to deliver coal monthly; measure of damages*, § 979. — *Rate of payment for stones of varying sizes*, § 980. — *Question for jury as to the terms of the agreement*, § 981. — *As to amount of goods to be offered for transportation; measure of damages*, § 982. — *Debt due after lapse of reasonable time*, § 983. — *Meaning of "factory prices"*, § 984. — *Property in vessel built for the government*, §§ 985, 986. — *Rules for construction of contracts; delivery of flour to be transported by steamer*, § 987. — *Agreement to convey a good and valid title*, § 988. — *Varying selections by a purchaser of land*, § 989. — *Agreement to build on lots purchased*, § 990. — *Performance of agreement to convey a certain quantity of land*, § 991.

§ 969. Certain articles of agreement, which are set out at length in the opinion, held not to contain any covenant as alleged by plaintiffs; also that no such covenant could be shown by implication. Also, certain rules of construction for determining when a covenant can be raised by implication. *Hudson Canal Co. v. Pennsylvania Coal Co.*, §§ 992, 993.

§ 970. A certain contract for imported goods provided that "any change in duties" before the agreed time for completion of the contract was "to be for or against purchasers." Within the time the treasury department made a change in the custom-house valuation of the rupee, the money of account, which caused a change in the amount of duty paid by the importer. *Held*, that the clause in question did not apply to the amount of duty paid, but was intended to apply to changes in the rate of duties. *Detrick v. Balfour*, § 994.

§ 971. Where a party undertook to canvass for the sale of a certain book, agreeing to use his best endeavors to promote the sale of the work, the other party agreeing to furnish books on certain specified terms, it was held that the agent, by canvassing for the sale of another edition of the same work by another firm, released the principal from his obligation to furnish books according to the terms of the contract. *Warren v. Stoddart*, §§ 995-997.

§ 972. A sale of bonds was made by defendants to plaintiffs. The bonds proved to be counterfeit. The question arose as to whether there was a warranty of genuineness, which question depended on a letter (set forth in the opinion), and it was held that in the letter defendants did not express an intention to insist that plaintiffs should take the bonds at their own risk; and further, that even if defendants did so intend, plaintiffs did not so understand them, and that consequently there was no mutual assent and no contract. *Utley v. Donaldson*, §§ 998-1000.

§ 973. A bill of sale contained this clause: "It is agreed that this sale is upon this express condition, that said steamboat" shall not be run upon certain waters within a certain time, etc. The vessel was run on the waters named and within the forbidden time. In an action against the vendor as for a breach of covenant, it was held that under the bill of sale the vendee risked the loss of the steamer for breach of condition, but did not become personally responsible in contract for damages upon breach of the condition. *Hale v. Finch*, §§ 1001-1004.

§ 974. In a suit for commissions by an agent against a principal three letters (which are set out in the case) were introduced in evidence. It was held that the letters constituted a special agreement as to the agent's commissions, and that he was not precluded by such agreement from recovering for services rendered outside the scope of it. *Perkins v. Hart*, §§ 1005-1009.

§ 975. A bond provided that, at any time after a certain date, "if the obligee, or any attorney in fact duly authorized by him, were present in person at an agreed place, the obligor should have a right to tender payment of the sum due, which the obligee should be bound to accept. "But the said tender is not to be made except to said G. [the obligee] or his said attorney in fact in person, in the city and state aforesaid." The obligor had funds ready to make a tender at the agreed time and place, but neither G. nor any attorney of his was in the city. *Held*, that the obligor was not excused from liability on the bond. *Gavinzel v. Crump*, §§ 1010-11.

§ 976. In a contract for certain shovel handles it was agreed that "if the price of gold goes up or down, the price of the handles shall be advanced or reduced accordingly." *Held*, that if gold went up in price, the price of the goods was to be increased. The contract contained

this further provision: "No advance or reduction of the price of gold of twenty-five per cent. shall change the price of handles, unless it shall remain at the advanced or reduced rate sufficiently long to affect the general price of merchandise." *Held*, that if the change in the price of gold exceeded twenty-five per cent. it should of itself work a change in the price of handles; if it did not exceed twenty-five per cent. it should work no change, unless it also affected the general price of merchandise. *Ames v. Quimby*, § 1012.

§ 977. F. covenanted for himself and his heirs to allow B., his heirs and assigns, to dig and carry away, at so much per ton, all iron ore to be found on a certain tract of land belonging to F. *Held*, that by the agreement B. and his assigns acquired the right to work the ore at so much per ton, as long as they chose; that neither the owner of the soil nor his assigns were excluded by the grant from the right to dig ore; also, that the right of the grantee could not be apportioned, but passed to his heirs jointly, to be enjoyed by them as one tenant. *Grubb v. Bayard*, §§ 1013-23.

§ 978. In 1854 the city of Baltimore issued bonds to raise money to loan to a railroad company, which agreed to mortgage its road to secure the bonds and to pay the interest thereon, and "any expense incidental to the issue of any of the bonds." In 1862 the company was compelled to pay a tax on its mortgage to the United States under the income tax law, and the amount of this tax the company reserved from the interest due the city. In an action by the city to recover this amount, it was held that the tax was not an "expense incidental to the issue of the bonds," and that the city had no cause of action against the company for paying the tax. *Baltimore v. Baltimore Railroad*, § 1024.

§ 979. In a contract for coal it was provided that if the G. T. Co. (plaintiff in error) failed to deliver each month the full quantity of coal agreed upon, it should pay, "as liquidated damages, twenty-five cents for each" ton which it failed to deliver, or, instead thereof, P. & St. J. (the purchasers) might "elect to receive all or any part of the coal so in default in the next succeeding month, in which case the quota which the party of the first part would otherwise have been bound to deliver under this contract shall be increased in such succeeding month to the extent of the quantity in default." In an action for failure to deliver the agreed quantity in two separate months, it was held that plaintiffs were entitled to the actual damages sustained by non-delivery of the agreed quantity in those two months. *Grand Tower Co. v. Phillips*, §§ 1025-27.

§ 980. The United States agreed to pay for certain granite blocks "sixty-five cents per cubic foot for all stones when the quarried dimensions do not exceed twenty cubic feet in each stone, and one cent additional for every cubic foot of those having such dimensions exceeding twenty feet." *Held*, that the price per cubic foot for stones whose dimensions exceeded twenty cubic feet was to be ascertained by adding to sixty-five cents as many cents as there were cubic feet in the stone. *United States v. Granite Co.*, § 1028.

§ 981. In an action against a steamboat company plaintiffs alleged that in a contract made between them and defendants' general agent, it was agreed that plaintiffs should place in one of defendants' steamboats a certain patent fuel-saving machine; that the method of ascertaining the amount of saving was fixed; that they had performed their part of the contract. They sued to recover the amount found to be due. There was also a count on a *quantum meruit* for the use of the machine. Defendants' agent testified that he never made the contract declared on, but did give plaintiffs permission to place the machine on the steamboat at their own expense; and agreed to purchase, subject to defendants' approval, on terms to be afterwards agreed on; if defendants failed to approve, the machine to be removed at plaintiffs' expense; that plaintiffs never offered any definite terms, and that he had never refused them permission to remove the machine. *Held*, that the jury should have been instructed that if they believed the agent's testimony they should return a verdict for defendants. *Steam Packet Co. v. Sickles*, §§ 1029-32.

§ 982. In an action upon a sealed instrument, which provided that "the said Noble agrees to transport and deliver to said Robinson . . . a certain quantity of stores [which were to be furnished by R. for transportation between the Ohio and St. Louis], supposed to amount to about three thousand seven hundred barrels. . . . In consideration whereof the said Robinson agrees . . . to pay to the said Noble \$1.50 per barrel, one-half whereof is to be paid on the delivery of said stores at St. Louis, in specie funds or their equivalent, and the other half in Cincinnati, in the paper of banks current therein, at the period of the delivery of said stores at St. Louis." Under the agreement was a memorandum to the effect that the Cincinnati payment was to be in the paper of the Miami Exporting Company, or its equivalent. *Held*, that R. had not bound himself to offer three thousand seven hundred barrels for transportation, and that no action lay against him for failure to do so. R. failed to pay at the agreed time, and it was held that the measure of damages was the specie value of the Miami Company's notes at the time they should have been paid, and that R. was not obliged to pay in specie their nominal value. *Robinson v. Noble*, §§ 1033-34.

§ 983. In a suit upon an instrument of the following tenor:

"COLUMBUS, GA., September 1, 1865.

"Due Joseph Dantel or order \$1,619.66, being balance of principal and interest for four years and six months' services. This we will pay as soon as the crop can be sold or the money raised from any other source, payable with interest.

I. M. NUNEZ & Co."

it was held that the debt became due upon the happening of either of the events named, or upon the lapse of a reasonable time; and that a reasonable time had elapsed at the time of suit, being more than five years after the date of the instrument. *Nunez v. Dantel*, § 1085.

§ 984. The terms "factory prices," in a promissory note, mean the prices at which goods can be bought at the factories, as distinguished from prices of goods bought in the market. *Whipple v. Levett*, § 1036.

§ 985. The secretary of the navy, on behalf of the government, entered into a contract with one S. for the construction by the latter of a war-steamer, to be built according to a certain plan. It was agreed that the secretary of the navy should appoint some person, whom S. should admit within his establishment, whose duty it should be to receive and receipt for, on account of the navy department, all materials delivered therein for constructing said steamer; which materials, when so received and receipted for, should be distinctly marked with the letters "U. S.," and should become the property of and belong to the United States; and it should be further his duty to certify all accounts presented and certified by S. for materials and labor, which should form the evidence on which payments should be made; but the authority of such inspecting officer, it was understood, should not extend to the right to judge of the quality or fitness of the materials or workmanship, but merely as to the cost thereof. S. executed a mortgage upon all the premises, with power in the United States to enter upon and sell the same in case of his failure to fulfil the contract. Final payment for the steamer was to be made only upon the certificate of examiners, to be appointed for that purpose, that in her construction, equipment and armament all the provisions of the contract had been complied with and completed. The advances which were to be made in the mean time were expressly stated to be in consideration of the security given by S. for the faithful performance of his contract. The period for the building of the vessel was from time to time extended, and S. died without completing it. It was held that the property in the unfinished vessel remained in S. and none vested in the United States. *Clarkson v. Stevens*, §§ 1037-38.

§ 986. The courts of this country have not adopted any arbitrary rule of construction as controlling agreements for the building of ships and determining when the property passes, but consider the question of intent open in every case, to be determined upon the terms of the contract according to the circumstances of the transaction. *Ibid*.

§ 987. Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was made, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. Thus where flour stored at Neenah, in the state of Michigan, was sold in midwinter, to be delivered, free of charge, on board of a steamer at that place, and to be conveyed to the purchasers at Boston, in the ordinary manner of transportation, it was held that, as both parties knew that the flour could not be transported until navigation opened in the spring, they did not contemplate that it should be withdrawn from the warehouse until the opening of navigation, but that it should remain where it was, and be delivered on board of a steamer at that place, free of charge to the purchasers, before the spring season of navigation closed. *Nash v. Towne*, §§ 1039-42.

§ 988. In a contract to convey land, an obligation to convey a good and valid title, with a general warranty, will carry with it an obligation to refund in case of eviction. Knowledge by the purchaser of the incumbered state of the title will make no difference. And assignees are in this respect in the same situation as the original parties to the contract. *Pratt v. Law*, §§ 1043-52.

§ 989. Varying selections made by a purchaser of land, under a contract for a certain quantity, without specifying the situation, cannot afford an excuse for non-performance on the part of the vendor, when a tender of a conveyance conformably to any one of those selections would have been a performance. *Ibid*.

§ 990. If a contract under which one purchases city lots imposes on him an obligation to build upon one-third of them, but does not restrict him to any specific lots on which the buildings are to be erected, his choice extends over the whole, and his obligation is not complete until the whole are conveyed to him. *Ibid*.

§ 991. CONTRACTS.—CONSTRUCTION AND INTERPRETATION.

§ 991. A contract for the conveyance of a certain quantity of land, leaving the situation and mode of selection entirely undefined, is not complied with if streets and alleys, to which no title can be conveyed, are embraced in the conveyance as helping to make up the quantity contracted for. *Ibid.*

[NOTES.— See §§ 1053-1171.]

HUDSON CANAL COMPANY v. PENNSYLVANIA COAL COMPANY.

(8 Wallace, 276-291. 1803.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Covenant broken is the foundation of the claim of the plaintiffs, as set forth in the declaration. Reduced to a concise statement, the alleged cause of action is that the defendants covenanted and agreed with the plaintiffs, in the articles of agreement mentioned in the declaration, that all the coal mined by them on their coal lands, and transported over their railroad to the place where the railroad connects with the canal of the plaintiffs, should be transported from that place to tide waters upon the plaintiffs' canal, and that they would pay to the plaintiffs the toll prescribed in the agreements for the use of their canal in such transportation; and the alleged breach is that the defendants have not kept those covenants and agreements. Service of the writ having been made, the defendants appeared and pleaded twelve special pleas in addition to the plea of *non est factum*. Issues were tendered by the defendants in the first, third, fourth, fifth and sixth pleas, which were duly joined, and the plaintiffs having demurred to the second, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth pleas, the defendants joined in the several demurrers.

Particular description of the objections taken by the plaintiffs to the several special pleas demurred to is unnecessary, as the defendants concede that they are bad if the declaration sets forth a good cause of action, but they insist that the declaration is also bad and insufficient, and that they, the defendants, are entitled to judgment because the first fault in pleading was committed by the plaintiffs in the declaration. Judgment in the circuit court was for the defendants, and the plaintiffs sued out a writ of error and removed the cause into this court.

Articles of agreement were concluded on the 31st day of August, 1847, between the plaintiffs and a certain unincorporated association, called the Wyoming Coal Association, and on the 29th of July, 1851, the parties to this suit entered into certain other articles of agreement, in which it is recited, among other things, that the corporation defendants, prior to that date, had, at the request of the coal association, made and constructed the railroad described in the first-mentioned agreement, and that all the business and interests of the coal association had been assigned and transferred, and become fully vested in the said defendants, and the parties therein covenanted and agreed with each other that the former agreement between the coal association and the plaintiffs shall stand, and be deemed and taken to be "the contract of the parties to these presents in the same manner" as if the defendant corporation had originally been the party of the second part to the same, instead of the coal association.

Both of these agreements are incorporated into the declaration, and in determining the rights of the parties in this case, they may both be regarded as

they would be if both had been executed by the defendants as well as by the plaintiffs, as all the obligations contracted by the coal association have been assumed by the defendant corporation. All covenants upon the merits of the controversy contained in the first agreement, as well as those contained in the last, must be considered as covenants between the parties to this suit; and viewed in that light the plaintiffs covenanted and agreed with the defendants in the first agreement to furnish, at all times thereafter, to the boats of the defendants navigating the canal of the plaintiffs, all the facilities afforded by the canal company to boats used by other parties or by the plaintiffs themselves, charging and collecting only a certain toll per ton gross weight, to be adjusted each year and regulated in a prescribed manner by the market value of coal, but subject, nevertheless, to the proviso that the plaintiffs should not be bound to allow the quantity of coal to be transported in pursuance of the articles of agreement to exceed in any one season four hundred thousand tons, unless they should enlarge their canal; nor in that event, to exceed one-half of the whole capacity of the canal for transportation, exclusive of the tonnage employed in the transportation of other articles than coal. Other covenants on the part of the plaintiffs are contained in the original agreement, but none of them are of a character to afford any aid in the solution of the questions involved in the pleadings.

Following the covenants of the plaintiffs are certain unimportant covenants made by the defendants, but in conclusion the defendants also promise and agree, "in consideration of the mutual undertakings herein contained," that they will use all their influence to cause the speedy construction of a railroad from the coal lands which they own to the canal of the plaintiffs, to connect with the same at the point or place therein described; and they also agree that if the construction of such railroad shall not be commenced within one year and be completed within three years, the plaintiffs may declare the agreement null and void.

Based upon these two agreements the declaration alleges that the defendants constructed the railroad therein described and put the same in operation as therein required; that the canal of the plaintiffs at that date did not permit the transit of boats of a tonnage exceeding fifty tons; that relying upon the covenants and undertakings of the defendants they immediately entered upon the work of enlarging their canal, and that they continued to prosecute the work with diligence and at great expense until the same was completed; that the canal as so enlarged permits the transit of boats of the tonnage of one hundred and twenty-five tons, making the capacity of the canal for transportation, in each season of navigation, as enlarged, eighteen hundred thousand tons; that the defendants, claiming the benefits and privileges of the covenants and agreements, did, after the completion of their railroad, construct and procure a large number of boats to be used upon the said canal in the transportation of coal brought over their railroad, and did thereafter for the period therein mentioned transport all the coal which they brought over their railroad upon the canal of the plaintiffs to its eastern terminus at tide-water, as contemplated by the agreements; that they, the plaintiffs, have at all times been ready and willing to furnish to the boats owned and used by the defendants for the purpose of such transportation, all the facilities of navigation the canal ever afforded to their own boats, or to the boats owned or used by any other person or company.

Such facilities were sufficient, as the plaintiffs allege, for the transportation

of all the coal mined by the defendants and transported by them over their said railroad during the period laid in the declaration, but the plaintiffs allege that the defendants, not regarding their covenants and undertakings to transport all their coal, to the extent aforesaid, over the canal of the plaintiffs, and to pay to them the prescribed rate of toll for such transportation, did not nor would they perform that covenant and agreement, but induced another railroad company to construct a branch road and connect the same with their railroad at the place where the latter road connects with the canal of the plaintiffs, and that they thereafter, during the period alleged in the declaration, diverted a large quantity of their coal transported over their railroad from the plaintiffs' canal, and transported the same from the place of such connection to tide-waters over the railroad of such other company, to the damage of the plaintiffs, as they say, in the sum of \$900,000.

Defects of form in the declaration or in the several pleas filed by the defendants are waived, as it is well settled that defects of substance only are open to a party who has pleaded to the merits or to one who has replied to an antecedent pleading. *Aurora City v. West*, 7 Wall., 93; *Clearwater v. Meredith*, 1 Wall., 38.

Particular examination of the several special pleas to which demurrers were filed need not be made, as it is conceded that they were framed upon the theory that the declaration is insufficient. Judgment, therefore, must be for the plaintiffs if it be held that the declaration alleges a good cause of action, but if not, then the judgment of the circuit court must be affirmed, because if that conclusion be adopted the first fault in pleading was committed by the plaintiffs. *Aurora City v. West*, 7 Wall., 94.

Obviously the decision of the question must depend upon the construction to be given to the first agreement therein set forth, as it is quite clear that the declaration is well drawn if that agreement, when properly construed, will support the allegations that the defendants covenanted and agreed that all the coal mined on their coal land, and transported over their railroad to the place where the railroad connects with the canal of the plaintiffs, should be sent forward from that place to tide-waters upon their canal, and that the defendants also covenanted and agreed that they would pay to the plaintiffs the rate of toll therein prescribed for the use of the canal in such transportation. Provision is made by the agreement, it is admitted, that the rates of toll to be charged by the plaintiffs shall be permanently reduced, and the plaintiffs contend that the defendants, in consideration of that stipulation, assumed a correlative obligation to send all their coal brought over their railroad to market upon the plaintiffs' canal. Express covenant to that effect, it is conceded, is not to be found in the articles of agreement, but the plaintiffs contend that the obligation in that respect is so plainly contemplated by the agreement that the law will enforce it as an implied covenant as fully as if it were expressed in appropriate words. *United States v. Babbit*, 1 Black, 61.

§ 992. *Implied obligations are raised, when.*

Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect; as, where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law in such a case, if

the contract is so framed that it binds the party contracting to do the act, will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfil his contract. *Churchward v. The Queen*, Law Rep., 1 Q. B., 195.

§ 993. — *illustrations of the principle, and cases cited.*

Three other examples are put in the case cited, which it may be well to notice as illustrating the general principle, and as showing its true boundary when properly limited and applied. They were first adduced at the bar, but were subsequently adopted and confirmed by the court in substance and effect as follows:

1. If one person covenants or engages by contract to buy an estate of another at a given price, the law will imply a corresponding obligation on the part of such other person to sell, although the contract is silent as to any such obligation, as the person contracting to purchase cannot fulfil his contract unless the other party will consent to sell. *McIntire v. Belcher*, 14 Com. B. (N. S.), 664; *Pordage v. Cole*, 1 W. Saund., 319; *Whidden v. Belmore*, 50 Me., 360; *Barton v. McLean*, 5 Hill, 258.

2. So if one person engages to work and render services which require great outlay of money, time and trouble, and he is only to be paid according to the work he performs, the contract necessarily implies an obligation on the part of the employer to supply the work.

3. Persons often contract to manufacture some particular article, and in such cases the law implies a corresponding obligation on the part of the other party to take it when it is completed according to the contract, because if it were not so the party rendering the services and incurring the expense in fulfilling his contract could not claim any remuneration. *St. Albans v. Ellis*, 16 East, 352; *Randall v. Lynch*, 12 East, 179; *Shrewsbury v. Gould*, 2 Barn. & Ald., 489; *Gerrard v. Clifton*, 7 Term R., 676; *Aspdin v. Austin*, 5 Q. B., 671; *Great Northern Ry Co. v. Harrison*, 12 C. B., 576.

4. Instruments inartificially drafted, or where the language employed is obscure, imperfect or ambiguous, are always open to construction, and the primary rule in all such cases, whether the contract is or is not under seal, is the intention of the parties; but the power of a court of common law extends no further than to collect such intention from the language employed as applied to the subject-matter, in view of the surrounding circumstances. *Tipton v. Feitner*, 20 N. Y., 425.

5. Courts of law cannot incorporate into a sealed instrument what the parties left out of it, even though the omission was occasioned by the clearest mistake; nor can they reject what the parties inserted, unless it be repugnant to some other part of the instrument, and none of the authorities cited by the parties in this case, when properly applied, are inconsistent with the views here expressed. *Bealey v. Stuart*, 7 Hurlst. & N., 753; *Whittle v. Frankland*, 2 Best & S., 49; *Pilkington v. Scott*, 15 Mees. & W., 657; *Rigby v. Great Western Ry Co.*, 14 id., 811; *Seddon v. Senate*, 13 East, 74.

Examined in the light of the rules here suggested, the court is of the opinion that the articles of agreement set forth in the declaration contain no such covenants as those alleged by the plaintiffs as the foundation of their claim; that the terms of the agreement do not support the allegation that the defendants ever made any such covenants, nor that they ever agreed to pay toll except for coal actually transported under the agreement. Language to express any such contract is entirely wanting in the instrument, nor is there any cov-

enant on the part of the plaintiffs from which any such implication can legally arise.

Reference is made by the plaintiffs to the provision of the agreement extending certain facilities to the boats of the defendants and covenanting for a permanent reduction in the rates of toll upon the plaintiffs' canal, as calling for a different construction of the articles of agreement, but it is quite obvious that those concessions were made as inducements to the defendants to locate and construct the contemplated railroad from their coal lands to the plaintiffs' canal, so as to form a continuous line of transportation from the coal mines, over the canal, to tide-waters. Great advantages were expected to result from the completion of that railroad, and it is quite evident that the plaintiffs were willing to accept the prospect of increased freight for transportation upon their canal as affording full compensation for the concession which they made in the articles of agreement. Principal covenant of the defendants was that they would use all their influence to cause the speedy construction of the railroad, and the plaintiffs proffered the concessions described in the agreement to encourage the enterprise and secure its early completion. *Commonwealth v. Delaware & Hudson Canal Co.*, 43 Penn. St., 302.

Support to these views might be drawn from the recitals in the first agreement and from the proceedings of the plaintiff corporation, but it does not seem to be necessary to pursue the subject, as the only covenant of any importance made by the defendants was the one before mentioned, that they would use all their influence to cause the speedy construction of the railroad; and the second agreement contains the recital that the covenant in that behalf had been fully performed as agreed, before the second articles of agreement were executed between the parties. Unsupported as the declaration is by anything else contained in the record, it is clear that it must be adjudged insufficient, and as the first fault in pleading was committed by the plaintiffs, it follows that the judgment of the circuit court was correct.

Judgment affirmed, with costs.

DETRICK v. BALFOUR.

(Circuit Court for California: 7 Sawyer, 249-353. 1891.)

STATEMENT OF FACTS.—Defendants agreed to sell plaintiffs certain sacks to be imported from Calcutta, duty paid. It was further agreed that "any change in duties" before the time of delivery was "to be for or against purchasers." There was no change in the rate of duty within the time, but the treasury department made a change in the custom-house valuation of the rupee, in which money the invoices of the sacks were made, as required by United States Revised Statutes, sec. 2838; this change reduced the amount of duty to be paid by the importer by \$1,121.20, and this action was brought by the purchasers to recover that amount.

Opinion by SAWYER, J.

The plaintiffs' counsel make a very ingenious and plausible argument to show that the words "change in duties" in the clause in question mean not a change in the *rate* of duties made by law, but a change in the *amount* of duties, from whatever cause the amount of duties to be paid may be affected. But, after a careful consideration of the subject, I find myself unable to adopt that view. The word "duties," as used in this clause, doubtless means the tax, charge, custom, toll or tariff levied by act of congress upon the goods — in this case

bags — imported. Congress, in its action upon the subject, regulates the *duties* properly so called, generally, if not always, expressly and directly by prescribing some uniform rate of duties, either specific or *ad valorem*. And generally, doubtless, unless there is something in the surrounding circumstances to indicate a different sense, men also, in their business transactions, and in ordinary conversation, in speaking of the duties on imports, use the term with reference to the charge so directly and expressly imposed according to the rate and rule prescribed. They are spoken of and considered in their immediate, direct, and not in their remote or incidental, relations.

We all know as a matter of general, national, political, as well as legislative and statutory, history of the country, that, during our late civil war, the demands for large revenues induced frequent and continual changes in our revenue laws. The rates of duties, as well as the subjects upon which they were imposed, were constantly changed as necessity and experience suggested modifications, and these changes continued after the close of the civil war as the demands for large revenues diminished while we were getting back to a peace basis again. These frequent changes in the laws imposing duties presented a new element of uncertainty for the merchant to take into consideration in making contracts to be fulfilled in the future, and, doubtless, the introduction of the clause in question had its origin in such a condition of things. The direct and usual, if not the only, mode of changing duties, when that is the purpose to be accomplished, is to change the rate, whether the duties are specific or *ad valorem*, and the language adopted in the contracts, "change of duties," to provide against these contingencies, is well adapted to the purpose, and was doubtless adopted with reference to such intentional, direct and express changes of duties. When the purpose of congress is to change the duties, it manifests that purpose by legislating directly upon the subject. If, in other legislation, it in some instances affects the amounts of duties required to be paid, that effect is incidental and purely accidental. And when parties contract with reference to changes of duties, in all probability they would only contemplate the intentional changes in the duties usually depending on changes of rate, and not those rare, unlooked-for instances where the amount of the duties is accidentally affected as incidental to legislation or official action designed to effect other objects. If parties contemplated protecting themselves against remote accidental effects, they would be very apt to use language to clearly manifest such a purpose. The plaintiffs' counsel insist that the parties could not have contemplated a change in the "rate" of duties; that, if they had, they would have inserted the word "rate" in their contract, and, as they have not used the word, it cannot be interpolated. It may just as well be argued that they did not mean the "amount" of duties; if they had, the word "amount" would have been used, and we are no more authorized to interpolate the word "amount" than "rate."

§ 994. *A change in the custom-house valuation of foreign money of account is not a change in duties, although it operates a change in the amount of duties to be paid on imported goods valued in that money.*

A plain, common sense view of the question must be taken. The change in the amount of the duties in this instance resulted from a change in the value of the rupee, or the money of the country whence the goods were imported. Section 2833 of the Revised Statutes requires the invoice to be made "in the currency of the place or country from whence the importation shall be made, and shall contain a true statement of the actual cost of such merchandise in

such foreign currency," etc. And section 2906 of the Revised Statutes requires the collector to adopt the actual market value *at the period of exportation* to the United States in the principal markets of the country whence the goods are imported; and the period of exportation is the day of sailing from the foreign port. *Simpson v. Peaslee*, 20 How., 571. And duties must be paid in money of the United States. R. S., sec. 3473. The value of all foreign coin must be estimated in money of the United States by the director of the mint, and proclaimed by the secretary of the treasury on the 1st of January of each year. R. S., 3564. The object seems to be to get at the actual value of the foreign coin in the money of the United States. *Collector v. Richards*, 23 Wall., 246. By obtaining the actual value of the foreign coin in our own money, we obtain the actual value of the goods estimated in foreign coins in the money of the United States. In this case there was a change in the value of the rupee between the time of the contract and the time of the importation, by which the value of the rupee was lessened; consequently the value of the goods was diminished. There was a diminution of the dutiable value of the goods—a change, a diminution in the value upon which duties were to be paid, and not a change in the duties to be paid upon that value. The result was the payment of a smaller *amount* of duties, not because of a "change of duties," but because the value of the goods upon which the duties were paid was smaller. This resulted from no action of congress, or of anybody else acting under the authority of congress, intended to affect either the amount or rate of duties, but was incidental to the exercise of other powers to regulate the money of the country, and purely accidental. It might as well be claimed that a diminished or increased amount of duties resulting from a diminution or appreciation of the dutiable value of the goods after the contract, and before importation, resulting from any other cause, is within the terms of the clause of the contract in question. Had the parties contemplated a change in the amount to be paid resulting from a change in the value of the rupee, it is more reasonable to suppose that they would have made the clause read something like this: "Any change in duties, or in the value of the currency of India (or the rupee), to be for or against the purchaser;" than to suppose the construction claimed for the clause in question had been contemplated. The change in value of the rupee is quite as distinct and independent a contingency to be considered and provided for as the "change in duties," and the language suggested would be far more apt and appropriate to express the additional idea. The more natural construction of the language used is to limit it to a direct change in the rate of duties by congressional legislation, or by authority of congressional legislation, and not to extend it to changes in amount of duties rarely effected, and incidentally and accidentally resulting from legislation and official action intended to effect other objects having no reference to duties or revenues.

This is the conclusion to which my mind has come from a consideration of the language itself, viewed in the light of the general and legislative history of the country, without considering the testimony of witnesses relating to the general understanding of merchants as to the purpose and signification of the clause in question. If, however, testimony is competent to show what the purpose and signification of the clause is as generally understood in the mercantile community, where the contract is made, then the testimony clearly shows that it is understood to be limited to changes in the rate of duty by authority of congressional legislation, as I have already held. The plaintiffs' counsel insist that if this testimony is admissible, it can have no significance, for the reason

that the provision now found in section 3564 of the Revised Statutes was not adopted till long after the war, and long after the custom, having its origin in the war and its attendant legislation, of introducing the clause in question, had been established; and at that time the question whether a change in foreign coin would work a change in the duty could not have arisen. Concede this to be so, then, if such a question could not have arisen, for that reason, it follows that the parties making those contracts at that time could not specifically have contemplated embracing such a change in the amount of duties in the term "change of duties," as used in these contracts, and it is not probable that the sense has since been extended. In my judgment, in any view I can take of the matter, such a change in the amount of duties to be paid was not contemplated by the parties when the contract was made, and is not embraced in the words, "change in duties."

There must be a finding and judgment for defendants; and it is so ordered.

WARREN v. STODDART.

(15 Otto, 224-230. 1881.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—Warren, a book agent, and Stoddart, a book publisher, on February 24, 1877, made a contract substantially as follows:

"The said J. M. Stoddart & Co. agree to give the said Moses Warren a general agency for the sale of the American reprint of the *Encyclopædia Britannica* in the following territory." (Describing certain territory, giving prices, etc.)

"Said J. M. Stoddart & Co. also agree to give to said Moses Warren the exclusive right to sell the *Encyclopædia Britannica* within the above named territory, during such time as said Warren shall faithfully perform his part of the agreement as hereinafter stated: 1st. Said Warren agrees to use his best endeavors to promote the sale of the *Britannica* in the above assigned field. 2d. To send to J. M. Stoddart & Co. a weekly report of the number of orders taken the week previous. 3d. To fill no orders outside of his assigned field. 4th. To leave no volumes with booksellers to sell or display in their stores. 5th. To furnish no volumes at less than the regular retail price. 6th. To remit on the 7th day of the month one-half the amount of monthly statement for previous month, and to remit on the 26th day of the month the remaining one-half of said monthly statement.

"Witness our hands and seals on the day and date above mentioned."

Warren obtained several hundred orders for the work and delivered about four volumes to each subscriber. In May, 1878, Warren made another contract with other publishers to sell their edition of the same work in substantially the same territory as that covered by his contract with Stoddart, and thereafter refused to canvass for Stoddart. The latter thereupon refused to furnish him volumes to fill the orders already taken under the above contract, except for cash on delivery, and Warren then persuaded many of the subscribers to the Stoddart edition to change their subscriptions to his (Warren's) new publisher. This change was accomplished at some expense to himself by loss on volumes taken back of Stoddart's edition and loss of profits, and this loss Warren claimed a right to set off against Stoddart in an action by the latter against him for the value of volumes furnished. In the court below a verdict

for Stoddart for the full amount of his claim was directed, and Warren sued out this writ of error.

Opinion by MR. JUSTICE WOODS.

The only question in the case is whether or not the instruction of the court to the jury, to the effect that, on the facts, the plaintiff in error was entitled to no damages, is correct. This will depend upon the construction which is to be put on the contract between Stoddart and Warren, of February 24, 1877. The contract is indefinite as to the time during which it was to continue in force. It is probable that the parties supposed the contract would continue until the twenty-one volumes were published, or at least until the territory named in the contract had been thoroughly canvassed. But no time was mentioned in the contract, nor did it make any provision with respect to the unfilled orders in case of its termination before the publication was completed, and we are left to construe it and settle the rights of the parties under it as they have made it.

§ 995. *Contract by an agent for the sale of books construed.*

The complaint of Warren is not that Stoddart refused to furnish him with the books necessary to fill the orders he had taken, nor that he refused to furnish the books at the price fixed by their contract. His sole complaint is that Stoddart refused to furnish the books on a credit of about thirty days, which Warren insists the contract provided for, and demanded the cash. He claims that after he had stopped canvassing for the reprint of Stoddart, and had made a contract with and entered into the service of a rival publisher of the same work, and had begun in the interest of the rival publisher a canvass of the same territory which had been allotted to him exclusively by his contract with Stoddart, he had the right, upon the refusal of the latter to furnish the books on thirty days' credit, to obtain a cancellation of the orders he had taken for Stoddart's reprint, and substitute therefor orders for the rival edition, and charge the expense of the substitution to Stoddart.

We think it entirely clear that he had no such right. There was no express provision in the contract between Warren and Stoddart which required the latter to furnish the books on credit, and we think that the provision of the contract that Warren should remit on the seventh day of the month one-half the amount of monthly statement for previous month, and on the twenty-sixth day the remaining half, was not continued in force after Warren had terminated the contract and abandoned the service of Stoddart under it. Although the contract fixed no time during which it was to continue in force, yet we think, when either party terminated it, the other was no longer bound by its provisions. It gave Warren the exclusive right to sell the books within certain territory, and by it Stoddart agreed to furnish them to him at stipulated prices and on stipulated terms. On his part Warren agreed to use his best endeavors to promote the sale of the work in the field exclusively assigned to him. These clauses of the contract were reciprocal, and the performance of one was the consideration for the performance of the other. When Warren ceased to canvass for Stoddart's books, he had no right to demand the books at the prices or the terms mentioned in the contract.

§ 996. *Where a party entitled to the benefit of a contract can at a trifling expense save himself from loss, it is his duty to do so.*

But even conceding that the provision referred to remained in force after Warren had declined to go on under the contract, it does not follow that, upon the refusal of Stoddart to give Warren a credit of thirty days upon the books, the

latter could obtain a cancellation of the orders he had taken for Stoddart's reprint and substitute orders for the Scotch edition, and charge the expense of so doing to Stoddart. The claim that upon a simple refusal of Stoddart to allow him a thirty days' credit upon the books as he ordered them, he could go on and substitute other orders for another book and charge Stoddart with the expense of substitution, amounting to \$30,000, is, to say the least, a remarkable one. The damage sustained by Warren because he did not get the thirty days' credit which he thinks he was entitled to is not to be measured in that way. The rule is, that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. *Wicker v. Hoppock*, 6 Wall., 94 (§§ 568, 569, *supra*); *Miller v. Mariner's Church*, 7 Me., 51; *Russell v. Butterfield*, 21 Wend. (N. Y.), 300; *United States v. Burnham*, 1 Mason, 57; *Taylor v. Read*, 4 Paige (N. Y.), 561.

The course pursued by Warren was not necessary to his own protection. He might either have paid Stoddart cash for the books required to fill his orders, or have allowed Stoddart to fill the orders and divide the profits of the business between them on equitable terms. The law required him to take that course by which he could secure himself with the least damage to the defendant in error. Instead of this he unnecessarily destroys a valuable interest of Stoddart in the business in which they were jointly engaged, and then seeks to charge him with the great expense and damage which he brought on himself in so doing.

§ 997. *Measure of damages.*

If Stoddart violated his contract with Warren in refusing to fill his orders except for cash, the measure of Warren's damages would be the interest for thirty days on the amount of cash paid on his orders. As no proof was given to show that Warren had ever paid cash for any books ordered by him, he would only be entitled, in any view of the case, to nominal damages. But, as we have already said, Stoddart was not bound by the contract to furnish the books on credit after Warren had gone over to a rival publisher and refused to go on under his contract. We think, therefore, that the court below was right in saying to the jury that Warren was entitled to no damages at all.

Judgment affirmed.

UTLEY v. DONALDSON.

(4 Otto, 29-50. 1876.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an action at law, brought by the plaintiffs in error. The case was submitted to the court without the intervention of a jury, pursuant to the act of congress of March 3, 1865 (13 Stat., 501). The court found specially.

The question presented for our determination is whether the facts found are sufficient to support the judgment. Those facts are neither voluminous nor complicated. On the 24th of May, 1871, Newman & Havens, bankers, of Leavenworth, telegraphed to Nichols, the cashier of the Commercial Bank of St. Louis, to "get rate for \$15,000 California Central Pacific Railroad bonds, delivered to-morrow." The defendants offered "100½." Newman & Havens accepted by a telegraphic dispatch. On the 25th of May Cashier Nichols received from

Newman & Havens the bonds, and also a letter, in which they said, "The party selling these bonds is waiting here to get the money for them. He is an entire stranger to us." "We desire them sold without any recourse on us." On the same day Cashier Nichols showed this letter to the defendants, and proposed to deliver the bonds without recourse. They refused to receive them on such terms, but offered to take them, and pay for them when ascertained to be good; otherwise, to return them. The cashier acceded to this proposition. On the 24th of May the defendants telegraphed to the plaintiffs, who were brokers in the city of New York, "Make best bid for fifteen Central Pacifics, quick." The plaintiffs answered, on the 25th of May, that they would buy at 102½. Their dispatch to this effect reached the defendants about 10 A. M. the same day. The defendants answered by dispatch on that day, "We accept your offer." The bonds were delivered by the cashier to the defendants on the 25th of May, and were by them forwarded by express on that day to a bank in New York, with a draft on the plaintiffs for \$15,375, the bonds to be handed over on the payment of the draft. On the morning of that day the defendants addressed a letter to the plaintiffs, which is the hinge of this controversy. It is as follows:

"In accordance with your offer for 15 Central Pac. 1st mort. bonds, 102½, we replied, We accept your offer, and have forwarded them by ex. to Bank North America, with draft attached for \$15,375. We would further add, that we have purchased the bonds from a party strange to us; and, not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and, upon being found correct, telegraph immediately (Central all O. K.). We do not doubt the bonds, but, coming to us through strange parties, we use this as a precaution, and not willing to take any risk."

This letter reached the plaintiffs on the 29th of May, a short time before the draft and bonds were presented. The plaintiffs had sold the bonds "to arrive" to Rasmus & Lissignola. They could not be delivered after 2 o'clock. It was within a few minutes of that time when the messenger of the bank presented himself. One of the plaintiffs went with the messenger to the office of their vendees, and requested Rasmus to examine the bonds. He did so, said they seemed to be correct, and thereupon gave a check for the amount his firm had agreed to pay for them. This check was duly paid. On the same day the plaintiffs wrote to the defendants, "The Centrals all correct, and we telegraphed you to that effect." Such a dispatch had been sent. Upon receiving it, the defendants paid the bank for the bonds, and the money was remitted by the bank to Newman & Havens. On the 12th of June, information was received for the first time in New York, or elsewhere, that there were in existence counterfeits of such bonds. On that day the plaintiffs wrote to the defendants, "Look out for counterfeit Central Pacifics; some appeared on market to-day." On the next day the plaintiffs telegraphed to the defendants, "Central Pacifics sold us probably counterfeit. Bonds shipped to Europe. Can't hear from them for several days." On the same day the plaintiffs wrote to the defendants to the same effect, and said further: "In case your parties are doubtful, it would be well to act at once as if the bonds were not genuine. There has been no suspicion of counterfeits until yesterday." On the same day, June 13th, the defendants replied by dispatch: "We sold without risk. Have purchased same day from Commercial Bank, and they from Newman & Havens, of Leavenworth, without risk." The bonds were counterfeit, and the

plaintiffs refunded to Rasmus & Lissignola the amount they had paid. On the 12th of July, the plaintiffs telegraphed to the defendants, "The Central Pacific bought of you in May are declared counterfeit. We shall look to you for indemnity." On the same day the defendants replied by telegraph, and asked upon what ground it was proposed to hold them liable. Some subsequent correspondence took place between the parties, which it is unnecessary to refer to in detail. The plaintiffs asked a transfer of the claim of the defendants, whatever it might be, but without guaranty, against the bank. This the defendants refused to give. The money paid to Newman & Havens by the bank was not called for by the party from whom they received the bonds for two or three weeks after the money was paid to them.

Before examining the case in its strictly legal aspects, it is proper to make several remarks suggested by the facts as found. 1. The defendants sold the bonds absolutely by their dispatch of the 25th of May. The qualification insisted upon was, by their letter of that date, received by the plaintiffs on the 29th. If the defendants intended to qualify, it should have been done in the dispatch. This would have given the plaintiffs notice in time for reflection before the presentation of the draft, might have prevented their selling the bonds before the letter was received, and would have enabled them to avoid the hurry and confusion incident to the payment of the draft and the delivery of the bonds to their vendees. If the draft had not been paid at sight, it would doubtless have been protested. 2. The circumstances attending the purchase of the bonds by the defendants are shown in our analysis of the facts of the case. The statement in the letter upon the subject is not accurate. 3. They refused upon any terms to put the plaintiffs in their place with respect to any claims they might have against the Commercial Bank. 4. They were notified on the 12th of June that the bonds were counterfeit. If they had thereupon at once caused Newman & Havens to be advised also, it is not improbable that the latter would have retained the funds, and thus have saved from loss all the honest parties through whose hands the bonds had passed. The defendants failed to take any step whatever in this direction.

§ 998. *Upon a sale of bonds there is a condition or implied warranty that they are genuine.*

It cannot be questioned that the dispatches between the parties on the 25th of May constituted a complete contract of sale, upon the condition or with an implied warranty, which it is not material here to consider, that the bonds were genuine. Nor can it be doubted that, if the bonds had been delivered without anything further occurring, the defendants, upon the bonds proving to be counterfeit, would have been liable in this action. *Taylor v. Merchants' F. Ins. Co.*, 9 How., 390 (§§ 167-174, *supra*); *Benjamin on Sales*, 56; *Flyn v. Allen*, 57 Penn. St., 482; *Webb v. Odell*, 49 N. Y., 583.

§ 999. — *was there a waiver of this condition in this case? Construction of the contract.*

Was this contract changed so that this condition or warranty was waived by the plaintiffs? In other words, did the letter of the defendants propose the modification insisted upon of the pre-existing contract, and, if so, did the plaintiffs agree to it and accept the delivery of the bonds accordingly? We pass by, without remark, the plaintiffs' propositions that the alleged modification was within the statute of frauds, and could not, therefore, be effectually accepted otherwise than in writing; that there was no consideration for such an agreement; and that, if made, it was contrary to public policy, and there-

fore void. The view which we take of the case renders it unnecessary to consider either of these points.

The first sentence of the letter relied upon by the defendants recognizes distinctly the contract as made by the dispatches. The defendants say: "In accordance with your offer for fifteen Central Pac. first mort. bonds, 102½, we replied: We accept your offer, and have forwarded them by ex. to Bk. North America, with draft attached, for \$15,375." This, standing alone, would have been a mere carrying out of the contract as made, and as it must have been understood by both parties. The stress of the case is upon what follows. The letter proceeds: "We would further add that we have purchased the bonds from a party strange to us." They had in fact bought them from the Commercial Bank, but were not to take them unless genuine, and were not to pay for them until found to be so. Next: "And not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and, upon being found correct, telegraph immediately (Central O. K.)." The phrase "we would sell without recourse," considered in the light of the context and the circumstances, may well be interpreted to mean that the writers would prefer or like so to sell, if it could be done. This view derives support from the succeeding member of the sentence "please examine," etc. Examine for whom? It is not said examine for yourselves. The language employed is usual where the thing asked is for the benefit of the asker, but not where it is for the benefit of the party addressed. Lastly, it is said: "We do not doubt the bonds, but, coming through strange hands, we use this precaution, and are not willing to take risk." This is consistent with the construction we have given to the preceding clause. If the examination the plaintiffs were requested to make showed clearly that the bonds were not counterfeit, then there could be no risk, whether the sale was with or without warranty of genuineness. In connection with these views it is to be observed that while the bonds and draft were sent on pursuant to the original contract, which is distinctly recognized, it is not said in the letter in plain terms, such as would naturally have been used if such had been the intent of the writers. We will sell only at your risk as to genuineness. We will not guaranty it; examine for yourselves. If the bonds are counterfeit, and you take them, the loss will fall upon you, and not upon us. If this language, or terms equally clear and explicit, had been used, the case would have presented a very different aspect. "Every intendment is to be made against the construction of a contract under which it would operate as a snare." *Hoffman v. Ætna Ins. Co.*, 32 N. Y., 405.

Upon the whole letter, considering what it does and what it does not contain, we are unable to come to the conclusion that the defendants intended to require that the modification since insisted upon should be made, and to make such modification the condition upon which the plaintiffs should take the bonds, if they took them at all. This result leaves the rights of the parties as they were under the original contract, and entitles the plaintiffs to recover.

§ 1000. *Mutual assent of parties is vital to the existence of a contract; and equally so to any modification of it.*

But conceding for the purposes of this opinion that the letter did contain such a proposition or annunciation as is insisted upon, then the inquiry arises whether it was so understood and agreed to by the plaintiffs. There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting. It is as indispensable to the mod-

ification of a contract already made as it was to making it originally. Where there is a misunderstanding as to anything material, the requisite mutuality of assent as to such thing is wanting; consequently the supposed contract does not exist, and neither party is bound. In the view of the law in such case, there has been only a negotiation, resulting in a failure to agree. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly.

In *Phillips v. Bistotti*, 2 B. & C., 511, the defendant was a foreigner and understood the English language imperfectly. Certain jewelry was struck off to him at auction for eighty-eight guineas. He was sued for that amount, and set up as a defense that he thought he had bid forty-eight guineas. Abbot, C. J., left it to the jury to find whether the mistake had actually occurred, "as a test of the existence of the contract." *Benj. on Sales*, 43. In *Baldwin v. Middleberger*, 2 Hall, 176, the defendant bought merchandise of the plaintiff, and it was agreed that it should be paid for by the note of a third person payable to the defendant, to be by him indorsed to the plaintiff. After the goods were delivered the note was tendered, indorsed without recourse. The plaintiff refused to receive it, insisting that the agreement was that the note should be indorsed without this qualification, and thereupon brought the suit. The court left it to the jury to find whether there was a misunderstanding between the parties as to the manner of the indorsement. The jury so found; and it was held that the plaintiff was entitled to recover as if there had been nothing said about the note, there being no such assent of the two minds as was necessary to make a contract in relation to it.

In *Coles v. Browne*, 10 Paige, 526, a block of lots was struck off at auction to the defendant. The plaintiff insisted and proved that the sale was of the lots separately. The defendant insisted that his bid was for the entire block as one parcel, and that he so understood the premises to be offered and sold. The vendor instituted the suit for specific performance. The evidence rendered it doubtful whether the defendant's allegations as to his understanding and bid were not true, and upon that ground the chancellor dismissed the bill. If there was a misunderstanding on the subject between the parties, there was clearly no contract. See, also, *Calverly v. Williams*, 1 Ves. Jr., 210; *Saltus v. Pryn*, 18 How. Pr. (N. Y.), 512; *Bruce v. Pearson*, 3 Johns. (N. Y.), 34; *Crane v. Portland*, 9 Mich., 493; 2 *Pars. Contr.* (4th ed.), 475 *et seq.* It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem*. *Hazard v. New England M. Ins. Co.*, 1 Sumn., 218. "Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show, not merely his own understanding as to the new terms of arrangement, but that the other party had the same understanding." *Darnley v. Proprietors, etc.*, 2 Law Rep. II. L., 43, 60.

The plaintiffs were not asked to assent expressly with respect to the waiver of the warranty, if it were demanded, and made no such answer. They were asked to "please examine," etc., and to telegraph the result. This they did. The dispatch was wholly silent as to anything else. That they understood the waiver was demanded as a *sine qua non* in no way appears. On the other hand, the contrary is clearly manifest. The moment they had reason to apprehend that the bonds might be counterfeit, they notified the defendants;

and, as soon as it became certain they were so, the defendants were advised of the fact, and that they would be looked to for indemnity. The defendants denied their liability by reason of their letter. In due time this suit was brought. Conceding that both parties have acted in good faith, it is clear that there was a misunderstanding between them as to the meaning and effect of the letter, and that the plaintiffs never understood and agreed to it as it is now interpreted and insisted upon by the defendants. The *aggregatio mentium* requisite to give that interpretation effect was, therefore, wanting.

To constitute the abandonment of a contract the act must be mutual. *Robinson v. Page*, 3 Russ., 122. It has been held that, to make a negotiation for the modification of a contract effectual, it must appear that it was the intention of the party proposing it wholly to abandon the original contract, if the modification proposed were not assented to. *Murray v. Harway*, 56 N. Y., 347; *Robinson v. Page*, *supra*. "A waiver of a stipulation in an agreement, to be effectual, must be made intentionally and with knowledge of the circumstances." *Darnley v. The Proprietors, etc.*, *supra*; *Howard v. Carpenter*, 2 Md., 259. When one party assents to a contract, relying upon the representations of the other, his assent is given upon the condition that the representations are true. *Duncan v. Hoge*, 24 Miss., 671.

Judgment reversed, with directions to the court below to render a judgment for the plaintiff in error.

Dissenting opinion by MR. JUSTICE STRONG, JUSTICES CLIFFORD and HUNT concurring.

I dissent from the judgment given in this case. Before the plaintiffs received the bonds, and before they accepted or paid the draft drawn upon them by the defendants, they were notified that the defendants would sell without recourse, and that they were unwilling to run any risk. They were requested to examine and telegraph to the defendants whether the bonds were genuine, and this as a precaution of the defendants against risk. The letter of the defendants clearly manifested an intention not to deliver the bonds unless they were genuine, or unless the plaintiffs would take them at their own risk. On any other terms the plaintiffs had a right to take them. Inquiry and notice to defendants afterwards would have been idle and would have been no precaution. Consequently the receipt of the bonds by the plaintiffs, after the notice given to them, can have no other meaning than that they took them at their own risk.

MR. JUSTICE DAVIS did not sit in this case.

HALE v. FINCH.

(14 Otto, 261-270. 1881.)

ERROR to the Supreme Court of the Territory of Washington.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—On the 1st day of May, 1864, the Oregon Steam Navigation Company, then engaged in the transportation, for hire, of freight and passengers on the Columbia river and its tributaries, purchased a steamboat, called the "New World," from the California Steam Navigation Company, then engaged in like business upon the rivers, bays and waters of the state of California. The terms of the sale are embodied in a written agreement, from which it appears that the consideration was \$75,000, and the cove-

nant and agreement of the vendees, not only that they would not "run or employ, or suffer to be run or employed, the said steamboat 'New World' upon any of the routes of travel upon the rivers, bays and waters of the state of California for the period of ten years from the 1st day of May, 1864," but that its machinery should not be "run or employed in running any steamboat, vessel or craft upon any of the routes of travel, or on the rivers, bays or waters of" that state for that period. The Oregon Steam Navigation Company, in that agreement, further stipulated that, in case of any breach of their covenant and agreement, they would pay the California Steam Navigation Company the sum of \$75,000 in gold coin of the United States "as actual liquidated damages,"—such stipulation, however, not to have the effect to prevent the latter from taking such other remedy, by injunction or otherwise, as they might be advised.

On the 18th of February, 1867, the Oregon Steam Navigation Company sold the "New World" to Henry Winsor, Clanrick Crosby, N. Crosby, Jr., and Calvin H. Hale, and executed to Winsor a bill of sale stating the consideration to be \$75,000. That instrument, after setting out the covenant of the vendors to warrant and defend the steamboat and all its appurtenances against all persons whomsoever, recited that "it was understood and agreed" that the sale was "upon the express condition" that the steamboat should not run, nor its machinery be used in running any other steamboat, vessel or craft, within ten years from the 1st day of May, 1867, on any of the routes of travel on the rivers, bays or waters of the state of California, or on the Columbia river and its tributaries. At the time of the making of that bill of sale Winsor and his associates, with L. D. Howe and A. R. Elder as their sureties, executed an additional writing, similar in all respects to that before mentioned as having been executed by the Oregon Steam Navigation Company on the 1st of May, 1864, except that Winsor and his associates, in the paper by them signed, covenanted and agreed that the "New World" should not, for the period of ten years from May 1, 1867, be run, or suffered to be run or employed, nor its machinery used in any other steamboat on the rivers, bays or waters of the state of California, or on the Columbia river and its tributaries.

On the 5th of March, 1867, Winsor executed to Hale a bill of sale of the "New World," reciting a consideration of \$75,000, and by the terms of which the former, for himself, his heirs, executors and administrators, promised, covenanted and agreed to and with Hale to warrant and defend the title to the steamboat, her boilers, engines, machinery, tackle, apparel, etc.

On the 23d of November, 1867, Hale executed to Finch, the defendant in error, a bill of sale, reciting a consideration of \$50,000, and containing among others the following clauses: "And I, the said Calvin H. Hale, have, and by these presents do promise, covenant and agree, for myself, my heirs, executors and administrators, to and with the said Duncan B. Finch, his heirs, executors, administrators and assigns, to warrant and defend the whole of said steamboat 'New World,' her engines, boilers, machinery, and all the other before mentioned appurtenances, against all and every person and persons whomsoever. And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not within ten years from the 1st day of May, 1867, to be run upon any of the routes of travel on the rivers, bays or waters of the state of California, or the Columbia river or its tributaries, and that during the same period last aforesaid the machinery of the said steamboat shall not be run, or be employed in running, any steamboat or vessel or craft.

upon any of the routes of travel on the rivers, bays or waters of the state of California, or the Columbia river and its tributaries."

At the same time a separate written agreement was entered into between Finch and Hale, from which it appears that the former, in terms, covenanted and agreed to do various things which have no connection with this case, and need not, therefore, be here specified. It is only important to observe, as to that separate agreement, that it did not embrace any covenant or agreement whatever on the part of Finch against the use of the steamboat "New World," or of its machinery, upon the waters of California, or upon the Columbia river or its tributaries. The present action was brought against Finch by Hale and those associated with him in the purchase from the Oregon Steam Navigation Company.

The complaint avers that, in all of said transactions, Winsor, as the defendant well knew, represented his co-plaintiffs as well as himself; that the defendant, in violation of his promise and agreement, made at the time he purchased the steamboat, caused, suffered and permitted the same to be taken to San Francisco, on or about the 1st day of October, 1868, and from that date up to May 1, 1874, caused, suffered and permitted it to be run upon the routes of travel on the rivers, bays and waters of California; that on October 5, 1869, the Oregon Steam Navigation Company sued the plaintiffs and their sureties, Howe and Elder, to recover the sum of \$75,000, fixed as liquidated damages, for the breach of the covenants and agreements contained in the within memorandum of February 18, 1867,—the ground of said action being that the defendants therein had run the steamboat "New World," or suffered and permitted it to be run, on the rivers, bays and waters of California, after November 1, 1868, and prior to May 1, 1874, which acts, it is averred, are the same now complained of as constituting a breach of the defendant's alleged agreement of November 23, 1867 (20 Wall., 64); and that, in said action, the Oregon Steam Navigation Company recovered a judgment against the present plaintiffs for \$75,000, which sum, with \$4,000 expended in defending the suit, they had been compelled to pay. Judgment is asked against Finch for \$79,000 in damages, for the violation of his alleged agreement and promise.

The answer puts in issue all the material allegations of the complaint, except the fact that the steamboat, subsequently to the purchase by Finch, was used upon the waters of the state of California during the period charged. The defendant, in addition, pleads: 1. That the alleged agreement was void under the statute of frauds and perjuries of the territory, in that it was not, and is not, to be performed in one year from the making thereof, and was not, nor was any note or memorandum thereof, in writing, signed by the defendant, according to the provision of the statute; 2. That the steamboat was taken to California, and run upon the waters and bays of that state, by the leave and license of the plaintiff, given to the defendant on the 1st day of July, 1868; 3. That the action is barred by the limitations of three and six years, prescribed by the statute of the territory. There was a verdict for the defendant, in obedience to a peremptory instruction by the court, and the judgment rendered thereon was affirmed by the supreme court of the territory. From that judgment of affirmance this writ of error is prosecuted.

§ 1001. *A person not notified of an action, not a party thereto, and having no right to take part, is not bound by the judgment therein.*

Upon the filing in the supreme court of the territory, of the judgment and mandate of this court, in Oregon Steam Nav. Co. v. Winsor, 20 Wall., 64

(§§ 694-697, *supra*), that cause was remitted to the court of original jurisdiction for further proceedings according to law. The defendants therein obtained leave to withdraw and did withdraw their answers. Judgment by default was thereupon entered against them for the sum of \$75,000, the amount fixed as actual liquidated damages, with interest and costs. Satisfaction thereof was entered at the same term of the court. That judgment, it is contended by the present defendant, was obtained by collusion between the parties to that action. It is further claimed that it has never, in fact, been satisfied. Whether these charges are true we need not here inquire. And it is scarcely necessary to say that that judgment is not conclusive of the rights of the present defendant. He was not a party to that action, nor notified of its pendency. He had no opportunity or right, in that case, to controvert the claim of the Oregon Steam Navigation Company, to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. *Railroad Co. v. National Bank*, 102 U. S., 14. Besides, that case was founded upon the written covenant and agreement of Winsor and his associates with the Oregon Steam Navigation Company, while the liability of Finch to the plaintiffs in this action depends altogether upon the construction which may be given to the bill of sale executed to him by Hale. If the record of the case of the Oregon Steam Nav. Co. v. Winsor, etc., is competent evidence in this action, for any purpose, it can only be to show the amount of damages which Winsor and his associates have sustained by reason of the "New World" being run on the waters of California after Finch became owner.

But the liability of those parties for such damages arose out of the covenant and agreement which they made with the Oregon Steam Navigation Company. With that transaction, however, Finch had no connection, and unless he made a similar covenant and agreement with those from whom he purchased,—thereby becoming interested in keeping the covenant and agreement made with that company by Winsor and his associates,—he cannot be affected by the judgment obtained against the latter.

§ 1002. *The language used imports only a condition, not a covenant.*

This brings us to the main contention on behalf of the plaintiffs in error, viz., that the language of the bill of sale from Hale to Finch, if interpreted in the light of all the circumstances attending its execution, imports a *covenant* upon the part of the latter that he would not use, or permit the use by others of, the steamboat or its machinery within a prescribed period, either upon the waters, rivers and bays of California, or upon the Columbia river and its tributaries. If, however, the language, properly interpreted, imports only a *condition*, for breach of which the vendor had no remedy other than by suit to recover the property sold, then it is, as indeed it must be conceded, that the judgment below is right. We are of opinion that the latter construction is the proper one. If we look both at the circumstances preceding and at those immediately attending the purchase by Finch, and if we even impute to him full knowledge of everything that occurred, as well when the Oregon Steam Navigation Company made its original purchase as when it subsequently sold to Winsor and his associates,—all which counsel for plaintiffs contends we are bound, by the settled rules of law, to do,—what do we find?

§ 1003. *What is a condition and not a covenant.*

The written memorandum between that company and the California Steam Navigation Company, in words aptly chosen, shows, as we have seen, an express covenant and agreement upon the part of the former, that neither the

"New World" nor its machinery should be used on the waters of California within ten years from May 1, 1864, and also that a certain sum, as actual liquidated damages, should be paid for any breach of such covenant and agreement. The bill of sale from the Oregon Steam Navigation Company to Winsor and his associates does not contain any words of covenant or agreement. But that company, in view of its express covenants to the California Steam Navigation Company, took care to exact from its vendees a separate written obligation, in which the latter, in express terms, covenanted and agreed with that company, in like manner as the latter had covenanted and agreed with the California Steam Navigation Company. The next writing executed is the bill of sale from Winsor to Hale. It shows nothing more than a covenant to warrant the title to the steamboat, and makes no reference, in any form, to any waters from which the steamboat should be excluded. Then comes the bill of sale executed by Hale to Finch. Its material portions are the same in substance, and in language almost identical, with that given by the Oregon Steam Navigation to Winsor. Each contains a covenant and agreement, upon the part of the vendor, simply to warrant and defend the title to the steamboat, its machinery, etc., against all persons whomsoever. But each recites, let it be observed, only an agreement that the *sale* is upon the *express condition* that it shall not be used or employed upon those waters. Upon the sale by the Oregon Steam Navigation Company to Winsor and his associates, the former, as we have seen, was careful to take the separate obligation of the latter, with surety, containing covenants and agreements, described in such terms as to show that the draughtsman, as well as all parties, knew the difference between a covenant and a condition. The same criticism may be made in reference to the separate writing signed by Finch and Hale, at the time of the execution by the latter of the bill of sale to the former. The latter writing shows, it is true, several covenants and agreements upon the part of Finch, but no covenant or agreement in reference to the use of the boat, such as is found in the writings which passed between the California Steam Navigation and the Oregon Steam Navigation, or such as are contained in the separate agreement between the latter and Winsor and his associates.

If, therefore, we suppose (which we could not do without discrediting some of the testimony) that Finch, at the time of his purchase, had knowledge of all the papers executed upon prior sales of the "New World," the absence, as well from the bill of sale accepted by him as from the written agreement of the same date, signed by him and Hale, of any *covenant or agreement* that he would not use that vessel, or permit it to be used, on the prohibited waters, within the period prescribed, quite conclusively shows that he never intended to assume the personal responsibility which would result from such a covenant. It thus appears that the circumstances, separately considered, militate against the construction for which plaintiff contends.

§ 1004. *Technical words not necessary to make covenant. Authorities examined.*

But if we omit all consideration of the circumstances under which the bill of sale from Hale to Finch was executed, and look solely at the language employed in that instrument, there seems to be no ground upon which the claim of plaintiff can stand. The words are precise and unambiguous. No room is left for construction. It is undoubtedly true, as argued by counsel, that neither express words of covenant, nor any particular technical words, nor any special form of words, is necessary in order to charge a party with

covenant. 1 Roll. Abr., 518; *Sant v. Norris*, 1 Burr., 287; *Williamson v. Codrington*, 1 Ves., 511, 516; *Courtney v. Taylor*, 7 Scott, N. R., 749. "The law," says Bacon, "does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant." Bac. Abr., Covenant, A. So in *Sheppard's Touchstone*, 161, 162, it is said: "There need not be any formal words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in whatsoever words it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made may have his action upon the breach of the agreement." Mr. Parsons says: "Words of proviso and condition will be construed into words of covenant, when such is the apparent intention and meaning of the parties." 2 Parsons, Contracts, 23. There are also cases in the books in which it has been held that even a recital in a deed may amount to a covenant. *Farrall v. Hilditch*, 5 C. B. (N. S.), 840; *Great Northern R. Co. v. Harrison*, 12 C. B., 576; *Severn and Clerk's Case*, 1 Leon., 122. And there are cases in which the instrument to be construed was held to contain both a condition and a covenant; as, "If a man by indenture letteth lands for years, provided always, and it is covenanted and agreed between the said parties that the lessee should not alien." It was adjudged that this was "a condition by force of the proviso, and a covenant by force of the other words." Co. Litt., 203*b*.

But according to the authorities, including some of those above cited, and from the reason and sense of the thing, a covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the part of the person sought to be charged, for the performance or non-performance of some act. Comyns, in his Digest (Covenant, A, 2), says that "any words in a deed which show an agreement to do a thing make a covenant." "But," says the same author, "where words do not amount to an agreement, covenant does not lie; as, if they are merely conditional to defeat the estate; as, a lease, provided and upon condition that the lessee collect and pay the rents of his other houses." Comyns, Dig., Covenant, A, 3. The language last quoted is found also in Platt's Treatise on the Law of Covenants. Law Library, vol. iii, p. 17. It there appears in connection with his reference to the case where A. leased to B. for years, on condition that he should acquit the lessor of ordinary and extraordinary charges, and should keep and leave the houses at the end of the term in as good plight as he found them. In such case, the author remarks, the lessee was held liable to an action for omitting to leave the houses in good plight, "for here an agreement was implied."

Applying these doctrines to the case before us, its solution is not difficult. Without stopping to consider whether a covenant upon the part of Finch could arise out of a bill of sale which he did not sign, but merely accepted from his vendor (Platt, Covenants, ch. 1), it is sufficient to say that the instrument contains no agreement or engagement or promise by him that he would or would not do anything. There is, in terms, a covenant by Hale to Finch to defend the title to the boat and its machinery against all persons whomsoever. This is immediately followed by language implying an agreement that the sale was upon the *express condition* that neither the boat nor its machinery should be used within a prescribed time upon certain waters. It is the case of a bare, naked condition, unaccompanied by words implying an agreement, engagement

or promise by the vendee that he would personally perform, or become personally responsible for its performance. The vendee took the property subject to the right which the law reserved to the vendor, of recovering it upon breach of the condition specified. The vendee was willing, as the words in their natural and ordinary sense indicate, to risk the loss of the steamboat when such breach occurred, but not to incur the personal liability which would attach to a covenant or agreement upon his part, that he would not use, and should not permit others to use, the boat or its machinery upon the waters and within the period named. If this be not so, then every condition in a deed or other instrument, however bald that instrument might be of language implying an agreement, could be turned, by mere construction and against the apparent intention of the parties, into a covenant involving personal responsibility. The vendor having expressly, and the vendee impliedly, agreed that the sale was upon an express condition,—stated in such form as to preclude the idea of personal responsibility upon the part of the vendee,—we should give effect to their intention, thus distinctly declared.

This conclusion disposes of the case, and relieves us of the necessity of considering other questions of an interesting nature which counsel have discussed.

Judgment affirmed.

PERKINS v. HART.

(11 Wheaton, 237-237. 1826.)

CERTIFICATE OF DIVISION from the U. S. Circuit Court for Ohio.

STATEMENT OF FACTS.—Action of *indebitatus assumpsit*, to recover for work and labor, care and diligence, bestowed by plaintiff as the agent of defendant's testator in the sale of lands. The agreement arose out of certain letters passing between plaintiff and the testator, of date January 14, 1812, February 10, 1812, and March 9, 1812. The substance of these letters is stated in the opinion. The points on which the judges were divided in opinion are also set out in the opinion.

Opinion by MR. JUSTICE WASHINGTON.

The first point reserved in the court below, and on which the judges of that court were divided in opinion, consists of two propositions: 1. That, upon the whole evidence, the three letters particularly referred to constitute a special agreement investing the plaintiff with the agency of Hart's lands in Ohio. 2. That this special agreement was open and subsisting at the time the cause of action is claimed to have arisen, which precludes the plaintiff from recovering in this action.

It is not easy to understand what the defendant's counsel mean by the whole evidence. Upon examining the voluminous record sent up to this court, we find that an active correspondence was carried on between Perkins and Hart from the year 1803 to 1816, upon the subject of Hart's lands in Ohio, the payment of the accruing taxes on them, examining, surveying, and preparing them for sale, and of other services to be performed by Perkins, in some way or other connected with those lands. If this be the evidence alluded to, there was no objection to submitting it to the court, to say whether the whole of this written evidence, or any part of it, created a special contract, investing Perkins with the agency of Hart's land.

But we find in this record evidence of a different character, such as accounts, receipts and depositions, in relation to Perkins' agency respecting Hart's lands

in Ohio. If this was intended to constitute a part of the whole evidence upon which the question of law was to arise, we should be of opinion that it was fit only for the decision of the jury, and ought not to have been submitted to the court. The disinclination which this court has always evinced to send parties back to the court below, if, by any reasonable construction, obscure parts of the record can be explained, disposes us in the present instance to consider the verdict as referring to the written evidence, not only because it would have been improper to call upon the court to decide upon the effect of parol evidence, but because that which is spread upon this record has no apparent relevancy to the question of law which is submitted.

§ 1005. *A letter of inquiry as to terms, which is answered, and a reply accepting the terms, constitute a contract.*

In the examination of the question whether there was a special agreement or not, we shall confine ourselves entirely to the three specified letters; because we are of opinion, after an attentive perusal of all the others, that they furnish not the slightest ground for saying that any agreement was entered into which invested Perkins with the agency of Hart's lands. The letters addressed by Hart to Perkins treat him as an agent empowered to perform a variety of acts in relation to the lands of the former. But it was a limited agency, created for particular purposes, and as occasions required, but founded upon no special agreement which bound Perkins to perform any specified duties, or Hart to remunerate the services he might perform, otherwise than the law bound him upon the principle of a *quantum meruit*. The particular agency which the former was requested, from time to time, to assume, was to pay taxes, attend to lawsuits, examine the lands so as to enable Hart to judge of their value, and to have certain lots and townships surveyed, as preparatory to a sale of them at a future period. The taxes were annually paid, and other advances made by Perkins, upon which he charged both a commission and interest, and these, it would seem, were punctually reimbursed when drawn for, although the charge of interest was sometimes complained of.

The preparatory steps for bringing these lands, or certain portions of them, into the market, having been taken, the correspondence commenced, which is particularly referred to in the first and second reserved points. In Hart's letter of the 14th of January, 1812, he requests Perkins to give him his most favorable terms of agency, to appoint sub-agents to do business where he, Perkins, might judge necessary, with such compensation as he might agree upon with them. The letter then proceeds as follows: "State the amount of commissions you shall expect me to pay on amount of sales that shall be collected and remitted, but no commissions to be paid by me till the collections are made. Provided, sales are made by me in exchange for lands, and if I should draw on you for the amount to be paid in lands at a price agreed on, or otherwise, if necessary, to be left with you to be ascertained, in such case what should you expect to charge on sales of that nature? Please be particular in stating your terms of agency, and make them as favorable as possible."

In answer to this letter, Perkins writes on the 10th of February, 1812, as follows: "My commission on sales made by me, the money collected and remitted, is eight per cent. When contracts are made (as is sometimes the case), purchasers make a payment, and then give up the land so as to be left without incumbrance to be sold again, fifty per cent. on such receipt. On these two items the commission cash, as it has been cash received. In case the agency should be closed and a settlement made, and contracts remain on hand unset-

tled, then, in all those contracts that should be carried into effect, five per cent. commission, received in contracts, with a conveyance of the lands covered by the contract or contracts received. On sales made in exchange for lands, etc., three per cent. commission, to be received either in contracts here or lands here, at retail price. Always, as far as practicable, receive commissions in that which shall be similar to that in which it is charged." The letter from Hart to Perkins, dated the 9th of March in the same year, acknowledges the receipt of the above letter, and then adds: "Your observations in regard to the mode of selling new lands are doubtless sanctioned by experience, and I am happy to commit the agency of my property to your experience and good judgment, from whence I expect to derive peculiar advantage."

These letters, we think, constitute a special agreement upon the subject of commissions to be paid by Hart to Perkins, by way of compensation for his agency in the sale of lands. It is confined to that subject only. The first of these letters invites Perkins to state his most favorable terms of agency in the sale of Hart's lands. The answer contains those terms by stating the commissions which he should expect to receive upon sales made, and the amount collected and remitted; upon sales made, and then abandoned by the purchaser after a partial payment of the purchase money; upon sales made, but the amount not collected before the agency should be closed; and, finally, upon sales made by way of exchange for other property. The acceptance of these terms is sufficiently expressed in Hart's reply to this letter, by which he commits to Perkins the agency of his property, the nature of which agency is too clearly explained by reference to the two preceding letters to leave the slightest doubt as to the meaning and extent of the contract which was thus entered into.

§ 1006. *Where a special agreement embraces several distinct subjects, capable of being separately executed, indebitatus assumpsit will lie upon any one of them which has been executed.*

The second proposition is: "That this special agreement was open and subsisting at the time the cause of action is supposed to have arisen." Now, this proposition involves a mixed question of law and fact. If the contract was open, and the action was founded on that contract, then the legal consequence insisted upon, "that Perkins cannot recover in this action," undeniably follows. But whether, in point of fact, it was open when the cause of action is claimed to have arisen, that is, in the life-time of W. Hart, must depend upon the evidence in the cause, of which the jury were alone competent to judge. If the agreement was wholly performed by the plaintiff during the life-time of Hart; if its further execution was put an end to, before its completion; by the act of Hart or by the agreement of both parties, then the plaintiff was not precluded from recovering in this action. Nay, further, if the contract was fully performed in relation to any one subject covered by it; as, for example, by the sale, collection, and remittance of the purchase money for any one township or parcel of land, the plaintiff might well maintain an action of *indebitatus assumpsit* for his stipulated compensation, in cash, on that transaction, and was not bound to wait until all the lands to which his agency extended were disposed of. Where the agreement embraces a number of distinct subjects which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed. If, for instance, the agreement between a merchant and his factor be that the latter shall sell and remit the proceeds of all cargoes

which the former shall consign to him upon a stipulated commission, it can hardly be contended that the factor cannot recover his commissions in this form of action, upon the proceeds of a single cargo which have been remitted, while there remain other cargoes yet undisposed of.

§ 1007. *Whether an agreement be closed or not is a question for the jury.*

But whether this agreement was wholly closed, or whether any one or more of its parts were closed, in either of the ways above mentioned, or in any other way, was a fact resting altogether upon the evidence, whether written or parol, which was or might be laid before the jury. It belonged exclusively to that body to say whether the fact existed or not; and, upon the fact so found, the question of law would fairly arise. In this respect, therefore, we are of opinion that the verdict is clearly defective, and ought to have been set aside by the court below. It may not be amiss to add that if the question reserved were whether the agreement was open and subsisting at the time this action was brought, we should be of opinion that the agency of Perkins having terminated by the death of Mr. Hart, the further execution of the agreement was put an end to by that event, and that, consequently, it was not open when the action was brought. But the proposition is so stated as to refer to a period antecedent to the death of Hart.

The second point reserved is thus expressed: "That, upon the whole evidence, Hart's letter of January 14, 1812," and so referring to the other two letters as in the first point, "constitute a special agreement, defining the nature and extent of Perkins' agency, and settling the subjects upon which he was to receive compensation, and the amount of that compensation; the legal operation of which agreement is to preclude Perkins from claiming compensation for anything done in the execution of his agency, except according to the terms of that agreement."

It has been already stated that the three letters particularly referred to in this point did constitute a special agreement upon the subject of commissions to be paid to Perkins, by way of compensation for his agency in the sale of Hart's lands. And it may be added that this agreement settles the subjects upon which Perkins was to receive compensation, and the amount of that compensation. If so, there can be no question but that the legal operation of this agreement, as to every claim founded upon it, is to preclude Perkins from recovering any compensation which is not consistent with the terms of that agreement. For although in the cases before stated, in which the special agreement has been executed or otherwise closed, a general *indebitatus assumpsit* may be maintained, it is, nevertheless, true that the special agreement may be given in evidence by the defendant for the purpose of lessening the quantum of damages to which the plaintiff is entitled.

§ 1008. *An agent under a special agreement is not thereby precluded from recovering for services rendered by him by request as such agent, other than those mentioned in such agreement.*

But after all this is admitted, the inference of law insisted upon by the defendant, that Perkins is precluded by the special agreement from claiming compensation for anything done in the execution of his agency, except according to the terms of that agreement, does not follow. The agreement is clearly prospective, and is confined to the single subject of commissions on the sale of lands. This is apparent from Hart's letter of the 14th of January, 1812, which he prefaces by stating that he had concluded to offer certain portions of his lands for sale at that time, and his other lands when they should be parti-

tioned. He desires Perkins, as his agent, to make the necessary previous arrangements, and to proceed in the sale of the portions before mentioned, and of No. 2, in the thirteenth range, as soon as the partition should be completed, and then he proceeds to inquire his terms of agency as before mentioned. But when we look into the whole evidence, to which we are referred by the point reserved, it is found that the agency of Perkins commenced as early as the year 1803, and extended to a variety of duties unconnected with that of selling land; such as exploring the lands of his principal, having them surveyed, their quality and value ascertained, investigating titles, attending to lawsuits, paying taxes, and making other advances.

Now it is impossible to contend, with any probability of success, that Perkins was precluded by the special agreement from recovering, under the general counts, a compensation for those services, or, indeed, for any other services rendered by him in his character of agent, which are not strictly within the scope of the special agreement. But the point raised here is that he is precluded from claiming compensation for anything done in the execution of his agency, except according to the terms of that agreement, although the services so rendered are not embraced by it. What was the nature of the particular claim submitted to the jury, upon which the parties consented that a verdict should be given for the plaintiff, the record does not enable this court distinctly to decide. So far as any information is to be derived from the declaration, and the additional bill of particulars, it would rather seem as if it was for general services rendered by the plaintiff without the scope of the special agreement, that being confined, as before observed, to commissions on land sales.

If the paper found in this record, headed thus: "Perkins' account, on which the action is brought," which contains three items for commissions on as many sales of land, and three others for interest on those commissions, is to be considered as the original bill of particulars filed in the cause, it would seem to follow that the action was brought to recover as well those commissions as a compensation for general services not embraced by the special agreement. Upon this state of the case, the conclusion of law insisted upon in this point would, nevertheless, be incorrect, for the reasons already stated.

It was contended by the counsel for the defendant that this action would not lie in a case where, by the agreement, the plaintiff was to be compensated in land. This is not controverted. But it will be sufficient to observe that it is not stated in the points reserved, or in the account just referred to (if it be admitted to be the original bill of particulars), that the commissions there charged arose upon an exchange of lands, or were to be discharged by land. The case is too imperfectly stated to enable this court to say that it gives rise to the question to which the argument is directed.

§ 1009. *An account settled is only prima facie evidence of its correctness, and if confined to particular items concludes nothing as to items not stated in it.*

The third and last point reserved is thus expressed: "That the plaintiff cannot recover for the two items in the bill of particulars claimed and charged to have arisen as matters of account between the parties, in 1814 and 1815, because the plaintiff, on the 1st of February, 1815, and on the 19th of March, 1816, exhibited and stated his general account against William Hart, upon each of which a balance was due from and paid by the said William, as a settlement upon an account stated, which precludes the plaintiff from recovering in this action for said two items claimed to have been due before the said accounts were rendered." The difficulty of this point consists in the imperfect

manner in which it is stated. The court may conjecture that the bill of particulars alluded to is the paper just referred to; but whether it be so or not is by no means certain. If it be the bill intended, the difficulty still remains, as the general account is not stated or referred to so as to enable the court to decide whether it does or does not include the two items which it is supposed cannot be recovered in this action.

If we look through this record in order to obtain information respecting this matter, we meet with two accounts containing charges for advances made by Perkins, in the years 1814 and 1815, for taxes due by Hart, and in discharge of other expenses connected with his agency, both which accounts were discharged. But it surely cannot be contended that the settlement and discharge of an account for money lent and advanced for the use of the testator is a bar to a claim for commissions or of any other demand not included in the settled account. If, to a bill for an account, the defendant plead or in his answer rely upon a settled account, the plaintiff may surcharge by alleging and proving omissions in the account, or may falsify by showing errors in some of the items stated in it. The rule is the same in principle at law; a settled account is only *prima facie* evidence of its correctness. It may be impeached by proof of unfairness or mistake in law or in fact; and if it be confined to particular items of account, it concludes nothing in relation to other items not stated in it. The legal conclusion, therefore, insisted upon by the defendant, that the plaintiff is precluded from recovering in this action for the two items claimed to have been due before the two accounts spoken of were rendered, is not correctly drawn, unless it appeared from the point reserved that those two items were included in what is styled the account stated.

It may further be remarked that even if it appeared that the plaintiff was precluded by the settlement and discharge from recovering the amount of the two items referred to, it would not follow that the law is for the defendant upon the whole verdict, although it might be sufficient to induce the court below to grant a new trial, if it had been applied for, upon the ground that the verdict was for too much. Were this cause before the court upon a writ of error, the imperfections in the points reserved, which have been noticed, would render it proper to reverse the judgment, and to direct a *venire de novo* to be awarded. Being an adjourned case, it would be improper for this court to give any such direction to the court below.

GAVINZEL v. CRUMP.

(22 Wallace, 308-322. 1874.)

APPEAL from U. S. Circuit Court, Eastern District of Virginia.

STATEMENT OF FACTS.—In November, 1863, Gavinzel, a resident of Richmond, Virginia, loaned money to Crump upon his bond and mortgage. In December, 1863, Gavinzel went to Europe and left no attorney to represent him in Richmond. He returned in June, 1865, and demanded payment in United States money on his bond; payment was refused, and he accordingly brought suit. The court below decreed that Crump should pay in United States money a sum equal to the value of the Confederate notes at the time of the loan, with interest on such sum. Gavinzel appealed. Other facts appear in the opinion. The condition of the bond was as follows:

“That the said sum of \$3,260 is to be retained by me, and is not to become

due and payable until the close of the present war between the Confederate and the United States of America, during which time the said sum shall not bear any interest whatever, nor shall the same become due and payable after the close of the said war until demand for the same shall be made by the said Gavinzel or his legal representatives upon me or my legal representative; and as soon as the war shall have closed, and said demand shall thereafter have been made, the principal sum of \$3,260, without interest thereon, shall be paid. But if at that time I shall not be prepared to pay the said sum, I shall have the right to retain the same in my hands for the space of two years from and after the time when such demand is made, I paying legal interest thereon from such time until the said principal sum is paid; and after the expiration of said two years the said principal sum, with such interest as may have accrued thereon after such demand as aforesaid, shall be absolutely due and payable; and the said Gavinzel, his heirs, assigns and personal representatives, shall have the right to enforce the payment of the same.

"[And upon this further condition, that at any time after the 1st day of April, 1864, and during the continuance of the war, if the said Gavinzel, or any attorney in fact duly authorized by him to receive payment of said sum, shall be present *in person* in the city of Richmond, and state of Virginia, I shall have the right (if I elect so to do) to tender said sum, without interest thereon, to said Gavinzel *in person*, or to his said attorney in fact *in person*, in said city and state, in current bankable funds; and upon said tender being made, the said Gavinzel or his said attorney in fact shall be bound to receive the same in full payment and satisfaction of this obligation; and thereupon the said obligation shall be surrendered and canceled. *But said tender is not to be made except to said Gavinzel or his said attorney in fact in person, in the city and state aforesaid.*]

"Witness my hand and seal this November 20, 1863."

Opinion by MR. JUSTICE DAVIS.

The main question in the case arises on the construction of the bond. The bond is peculiar in its character and unusual in its terms. It is not due until the close of the war of the rebellion, and not even then until specific demand is made for the money. Two things must concur to give the obligee or his representative a right of action — the termination of the war and demand for the money. On demand, if the war has closed, the bond can be discharged by the payment of the principal sum, without interest, but the borrower, if he chooses, can retain the money two years longer by paying legal interest. On the expiration of these two years the principal sum and accruing interest is absolutely due and payable. So far the terms of the bond, it is admitted, are plain enough, but there is still another condition on which the chief controversy of the case depends. It is in the concluding words of the instrument.

It is proved in the case that the money lent was Confederate notes, although the fact is not so stated in the bond, and that after the 1st of April, 1864, the war then continuing, Crump provided himself with the funds for the return of the loan, but found no one in Richmond who was authorized to receive them, and he kept them ready to pay till they lost all value by the termination of the war. And it is contended by him, as the tender was prevented by the omission of Gavinzel to appoint an attorney in fact to represent him in his absence, the bond is discharged as completely as if the tender had been actually made and accepted.

§ 1010. *An agreement that a party or his attorney in fact shall receive a payment, if in a named place after a certain day, does not imply a contract to be in that place or to appoint an attorney in fact.*

This would be so if Gavinzel was in default for not appointing an attorney. But the bond does not require him to make the appointment, nor to remain in Richmond. It gives Crump the right to make the tender, if the war continued after the 1st of April,*1864, but the tender could only be made in Richmond, and only to Gavinzel or to an attorney in fact in person who was authorized to receive payment. In other words, the money was payable if Gavinzel was in Richmond, or had an agent there to receive it, but was not payable if he was not there, or had no agent in the city. Crump may have understood that his right to discharge the bond by the tender was to become absolute if the war lasted (and so long as it lasted) after April 1, 1864, but the contract does not admit of a construction consistent with that understanding. And the court cannot, without evidence authorizing it to be done, import words into the contract which would make it materially different in a vital particular from what it now is. There is no occasion to introduce parol evidence to explain anything in the contract, because there is no ambiguity about it, and it is not competent by this sort of evidence to alter the terms of a contract, by showing that there was an antecedent parol agreement or understanding between the parties different in a material particular from that which the contract contained. But if it were competent, the evidence fails to establish any such antecedent agreement. Gavinzel and Crump are the only witnesses, and their statements are inconsistent one with the other. In view of this difference in the recollection of the parties — to use no harsher term — how can the court say that Gavinzel agreed either to be in Richmond or to have an agent there to represent him? Both parties were present when the bond prepared by Cannon on the direction of Gavinzel was read to them, and there does not seem to have been any objection to it, or any alteration proposed in the draft of it. Nor is there anything in the record to show that the parties did not, in this transaction, stand on equal ground, with equal intelligence and equal opportunities of judging of the hazard incurred. If so, hard as the bargain is, there is no good reason in the state of the pleadings why it should not be enforced. The answer sets up only two defenses — the illegality of a contract based on Confederate notes, and the inability of Crump to discharge the debt, according to the last condition of the bond, by the neglect of Gavinzel, on his departure to Europe, to appoint an attorney in fact to receive the money. But the last defense, as we have seen, is not sustained, and in regard to the first this court has held substantially that contracts, based on Confederate currency, will be enforced when made in the usual course of business between persons resident in the insurgent states, and not made in furtherance of the rebellion.

Whether or not this was a wagering contract, and therefore void, is not a question in the case, as no objection to it on that ground was taken in the answer or on the argument. The contract was plainly a contract of hazard, mutual hazard. Each party took risks, and each received a consideration for the risk thus taken. Manifestly, the leading object Gavinzel had in the transaction was to lend his money, so that it would not be repaid until the war closed, whether this event occurred before or after the 1st of April, 1864; and this object, on the contingency of his being able to go to Europe, the terms of his contract enabled him to accomplish. If the war ended by April, 1864, as he swears he thought it would, his purpose was attained, whether he went to

Europe or not. But if the war continued longer, and he was able to get out of the Confederacy, he was in as good condition as if the war had terminated when he expected it would. There were, however, difficulties to be encountered in getting through the lines, represented by Gavinkel in his testimony "as the greatest he ever met with in his life." If unable to overcome these difficulties he would be obliged to stay in Richmond, and Crump would have the opportunity, if he chose to avail himself of it, of paying back the loan in the currency in which he received it.

The inducements to Crump to enter into the compact were the present use of the money and exemption from interest, with favorable terms of repayment. Besides this, there was the chance that he might be able to repay the loan in Confederate money. Both parties not only ran the risk of the war closing before or after the 1st of April, 1864, but also of the value of money whenever the war did close, be that sooner or later, and of the ability of Gavinkel to leave the Confederacy. Certainly the wisdom of Crump in entering into a contract which contemplated such hazards cannot be commended, but if parties make contracts where there is no fraud, upon contingencies certain to both, with equal means of information, the courts cannot undertake to set them aside.

§ 1011. *Confederate money a commodity.*

Confederate currency was a commodity in trade, and the parties risked their judgment upon the future value of it, as they might have done upon any other commodity for sale in the community. But if it be treated in this case as a loan of money, Crump agreed to repay it by a certain time after the termination of the war, in the currency which that termination should bring with it, and onerous as the condition is, he must abide by it. The views we have taken of this case are sustained by the decision in *Brachan v. Griffin*, 3 Call, 375. In that case Griffin agreed, in consideration of £25,000 paper money, to be paid him by Willis in the years of 1780 and 1781, to pay the latter £2,500 in specie in 1790. Griffin brought his bill in chancery for relief against Brachan, the assignee. Fleming, J., denying the relief, said: "The contract in this case was founded upon speculation on both sides. Griffin thought the present use of the money would be advantageous to him; and Willis, that it would be more beneficial to him to receive the specie at a distant day. The contract seems to have been fully understood by the parties, and to have been fairly entered into upon both sides." The language used by this judge is applicable to this contract, which, after all, was a mere speculation upon the paper currency of the Confederacy. Besides this case from Virginia, decided in 1803, there are recent decisions in that state and Maryland which uphold contracts of hazard similar in many respects to the one in this case. *Boulware v. Newton*, 18 Gratt., 708; *Taylor v. Turley*, 33 Md., 500.

Decree reversed, and the cause remanded to that court, with instructions to enter a decree for the complainant, in conformity to this opinion.

AMES v. QUIMBY.

(6 Otto, 824-827. 1877.)

ERROR to U. S. Circuit Court, Western District of Michigan.

STATEMENT OF FACTS.—Quimby agreed to furnish Ames shovel handles, the price to be regulated by the rise or fall of gold, but it was stipulated that an advance or reduction of twenty-five per cent. should not be counted unless it

affected the general price of merchandise. The price of gold having been reduced more than twenty-five per cent., Ames claimed a corresponding reduction. Upon suit brought there was judgment for the plaintiff.

Opinion by MR. JUSTICE HUNT.

The contract of the parties is, in several particulars, susceptible of different constructions. Thus, the price of the articles to be delivered is fixed at \$1.25 per dozen, to be regulated, however, by the price of gold. "If the price of gold goes up or down, the price of the handles shall be advanced or reduced accordingly." If gold goes up in price, does the price of the goods go up, or do they go down? Gold is here made the standard of value, although it was not, at the time this contract was made, the ordinary medium of circulation in this country.

Instead of saying that gold, the standard, goes up or down, it would be more accurate to say that the depreciation of the paper in circulation is greater or less. The court below held that if gold should go up in price, the price of the goods should be increased; if it should go down in price, that of the goods should be diminished. In this we agree; and, as the important question does not here arise, we dismiss this branch of the case.

The contract has this further provision: "No advance or reduction of the price of gold of twenty-five per cent. shall change the price of handles, unless it shall remain at the advanced or reduced rate sufficiently long to affect the general price of merchandise." The price of gold having fallen, between the date of the contract and the delivery of the goods, more than twenty-five per cent., did that fact of itself entitle the defendants to a corresponding reduction in the price of the goods; or were the defendants also bound to show that the general price of merchandise had been thereby affected? In other words, was the qualification that the changed rate should continue so long as to affect the price of general merchandise applicable where the advance or reduction in the price of gold had been twenty-five per cent. only, or where it was twenty-five per cent. or more? The court below held that it was applicable to the present case, where the change in the price of gold had greatly exceeded twenty-five per cent.

§ 1012. *Contract with reference to the future price of gold construed.*

In considering this contract, we are to place ourselves, as far as may be, in the position of the parties, with the knowledge possessed by them of former and present affairs. They were practical business men. They had seen, during the previous four years, an enormous advance—extravagant and fictitious—in the price of everything, and understood it to be dependent upon the character of the currency. They intended to provide for the effect of an appreciation or depreciation of the currency in circulation, called the price of gold; and we think their evident knowledge of the principles governing the subject bears strongly upon the precise point decided by the court below. While it cannot be denied that the language of the contract will bear the construction put upon it by the court below, we are all of the opinion that such construction is not in accordance with the intention of the parties.

It will better bear another interpretation, which is this: Gold being at the price of \$2.25, and having reference to that fact as giving their value, the one party agrees to deliver and the other to receive the goods at \$1.25 per dozen. This price named should not, however, be fixed and absolute. If the price of gold shall change, the price of the goods shall also change. But they do not

propose to embarrass themselves about trifles, and the gold regulation shall be modified by the extent of the change in its price. If it varies more than twenty-five per cent., we agree that that shall be deemed an important change, and shall of itself work a change in the price of the goods. If the variation does not exceed twenty-five per cent., it will not necessarily be important, and we agree that it shall not affect the price of the goods, unless it continues so long as to affect the general price of merchandise. If it does so continue, and does so affect general prices, then that variation shall also regulate this contract.

The parties saw and knew that great changes in the value of gold had taken place in former times and in their times by which the purchasing power of the currency in circulation was greatly affected. They know also that a slight change produced but little effect. To make them say, then, that a change of one hundred or one thousand per cent. should not of itself change the price of the goods to be delivered, but that a change of twenty-five per cent. only should have that effect, is contrary to all reason. On the other hand, to allow them to say that the large change in gold should of itself change the price of the goods, but that a change of twenty-five per cent., or under, should not affect the price of the goods, unless it was so long continued as to affect the general price of merchandise, is in harmony with the whole transaction. It is not necessary to pursue the illustrations which have been or may be given of the effect of the different readings of the contract. We are satisfied that there was error in its construction by the circuit court, and that the case must be remanded for a new trial; and it is so ordered.

GRUBB v. BAYARD.

(Circuit Court for Pennsylvania: 2 Wallace, Jr., 81-100. 1851.)

STATEMENT OF FACTS.—In 1769 Foree conveyed to Bennet twenty acres of land, reserving two hundred and eighty-two acres out of a tract of three hundred and two acres. In reference to the two hundred and eighty-two acres the deed contained the following covenant:

“And the aforesaid David, for himself, his heirs, executors and administrators, doth covenant, promise, grant and agree to and with the aforesaid William, his heirs and assigns, that he, the said William, his heirs and assigns, shall and may, from time to time, and all time hereafter, dig, take and carry away all iron ore to be found within the bounds of the said David's tract of land containing two hundred and eighty-two acres, provided he, the said William, his heirs and assigns, pay unto the said David, his heirs or assigns, the sum of six pence, Pennsylvania currency, per ton, for every ton taken from the premises of two hundred and eighty-two acres aforesaid.”

Bennet died, and Grubb having purchased the interest of ninety-four out of ninety-nine of his representatives, brought this action on the case against Bayard, who had become the owner of the two hundred and eighty-two acres and had taken away many thousand tons of iron ore from that tract of land. It was admitted that neither Bennet nor those claiming under him had ever been hindered in the enjoyment of the grant, otherwise than by defendant's taking away the ore as aforesaid, if that can be held to have been a hindrance. Plea of “not guilty.” Verdict for defendant, and motion for a new trial.

§ 1013. *A covenant authorizing a grantee to dig and carry away iron ore conveys no property in the ore until the power granted has been exercised. It is a license, not a conveyance.*

Opinion by KANE, J.

Is there anything in the deed which asserts that Foree intended to do more than enter into the ordinary covenant that, so long as there was iron ore on the two hundred and eighty-two acres, Bennet and his assigns might work it if they chose, on paying a certain price per ton? I find the legal and apt phraseology in which a lawyer might embody such a covenant, and nothing more. The indenture in the case of *Doe v. Wood*, quoted at the bar, seems to me to resemble the grant of an exclusive incorporeal hereditament, much more than the covenant before us. It was contended, in that case, that it should be regarded as a lease, and there was much in the words that gave countenance to such an interpretation. Thus, it was argued, that the "full and free liberty to dig all metals and minerals, throughout the demised lands," was tantamount to a sole grant of all the minerals, since two individuals could not both have full liberty so to dig; that the exclusive right which was engaged for to the adits or shafts amounted to an exclusive right to the ore, for the ore could not be got out except by the adits; that the right to erect sheds, to make water-courses, and use all the water on the land, showed that an interest passed in the soil; that the limited powers which were reserved to the lessor pending the term of passing through the mines for the purpose of working other mines adjacent; and still more the right of re-entry, in case of breach, which was specially set out in the deed,—all assume that while the term continued the grantee had an estate; and that this was supported by the language in many parts of the instrument, which spoke of the "land hereby granted," the "ground and premises hereby granted," the "land or ground hereby granted," etc. The court was of opinion that the indenture amounted only to a license to dig and work; and Chief Justice Abbott, while he admitted that formal words of demise were not necessary to pass such an interest in the soil as was claimed, added that, whatever doubts the expressions referred to might cast, they were not sufficient to vary the construction of the granting words, which of themselves were not of doubtful import, and that they could not operate to extend the grant, by converting the things granted from chattels personal, when gotten, into a chattel real previously to their being gotten. P. 740, 1. The case in *Bingham*, which the plaintiff's counsel refer to as destroying the value of *Doe v. Wood*, was a case of mutual and well-guarded covenants, which not only authorized the licensees to raise ore, paying therefor a certain toll, but also bound them to do so with a prescribed degree of energy and effect under penalty of a forfeiture—a circumstance of much importance in determining the intent of the parties; besides which they must have contemplated the grant of an assignable interest, for they had covenanted that the license might be assigned by deed.

§ 1014. *A grant of a power to dig and carry away iron ore, without more, is a right of common, and does not exclude the owner of the soil.*

II. But regarding Foree's covenant as an operative grant, what is the right that the plaintiff could claim under it? He says that it is not a right of common, but a right that excludes the owner of the soil. I think he is wrong in this. I should rather call it a right of common, even though it excluded the owner of the soil; that is to say, so far as the policy of the law permits him to be excluded. Common is a right or privilege, says Sir Matthew Hale (*Abr., tit. Common*), which *one* or more persons claim to take and use in the natural

produce of another man's land. It may therefore be exclusive, or rather sole; for the grant, or the prescription or custom, may be in favor of one man only. But it can never exclude the lord of the soil from his reasonable participation. In *Procter v. Mallorie*, 1 Rolle, 365, Coke, J., says, "Notwithstanding a grant of common *sans nombre*, the lord may common with the grantee; and moreover the grantee must use the common with a reasonable number." And the reporter adds, "This was agreed to by the lord chancellor." And in two cases in the Year-books, which I cite from Rolle's Abridgment (title A, Common, pl. 2; and title I., Common Sans Nombre, pl. 5), the same position is affirmed. The owner of the soil, it is there said, hath such an interest in the soil, that though he grant a right of common *sans nombre*, yet the grantee cannot use the common with so many cattle that the owner cannot have common enough for his own cattle. And Coke adds (Co. Litt., 122 a) that "a custom or prescription totally to exclude the owner of the soil is unreasonable, and void as against law; because it was implied in the first grant that the owner of the soil should have common also." One of the points agreed in the case of the Lord Mountjoy was based upon this doctrine; where it is said that, notwithstanding the grant of the right to dig, etc., to the Lord Mountjoy, the grantor, his heirs and assigns, owners of the soil, might dig there also; "like to the case of common *sans nombre*." And the same is relied upon as undoubted law by Lord Ellenborough, in *Chetham v. Williamson*, 4 East, 469. In truth the only exception to its application that I have found contended for in the books is in the case of a free fishery, mooted in a case in 2 Salkeld, 637, *Smith v. Kemp*, and discussed in Mr. Hargrave's note on Coke's Littleton, 122.

§ 1015. *A right in gross to mine is essentially integral and not susceptible of apportionment.*

III. But would such a hereditament as the plaintiff claims to have be susceptible of apportionment? He claims that it is a right in gross; I have given my reason already for regarding it as a right in common. A right of common in gross *sans nombre*. Can such a right be apportioned?

§ 1016. *A right of common in gross and sans nombre, although it can be assigned and may descend, must be exercised jointly and not severally.*

The leading case upon this question is that of the Lord Mountjoy, stated in the argument of the counsel, and just now referred to by me. This case throughout bears on the question before us. It denies that the grantee of a right to mine can either assign his right to a third person for a part of the tract, or so assign an undivided interest in his right for the whole tract as to confer on the assignee a several right to mine; and by the reason which it gives for a continuing right to mine, in the grantor, notwithstanding his grant to another, it shows that the case would not differ, whether the original mining grant were or were not in its terms exclusive, for it refers to the analogy of a common *sans nombre*, in which, as we have seen, the owner of the soil cannot be excluded, but may complain that he is surcharged, even against his own grantee, of common unlimited. In other words, the case decides that a right in gross to mine, whether in terms exclusive or not, is essentially integral, and not susceptible of apportionment. And this may be the meaning of Treby, C. J., where he says (*Weekly Wildman*, 1 Ld. Raym., 407): "although a common *sans nombre* may be granted at this day, yet such grantee cannot grant it over." And a similar explanation may perhaps reconcile the opinion expressed in Sheppard's Touchstone, p. 233, to the same effect with the remark of Treby, and the case in the Year-book, 18 Edw. 4, 84, which the annotators

cite as in opposition to their text. The incorporeal hereditament may well be assignable, and yet not apportionable. The assignment may have legal effect, but if it be to more than one, the assignees take together an indivisible entirety. Such I apprehend to be clearly the law laid down in Lord Mountjoy's case, and I have no reason to suppose that the law of England is different at this day. To the same effect is *Leyman v. Abeel*, in New York, 16 Johns., 30, the points decided in which are well condensed in the syllabus. "The grantee in fee of a right of common in gross and without number may alien it, and it descends to his heirs, but it cannot be aliened in such a way as to give the entire right to several persons, to be enjoyed by each separately; and where it descends to several persons, as tenants, in common, or parceners, it seems that it cannot be divided between them, but that there must be a joint enjoyment of it; nor can one of the tenants alone convey a right in the common, but they may jointly aliene their rights." The same principle is carried out in *Van Rensselaer v. Radcliff*, 10 Wend., 639, where Chief Justice Savage decides that "common of estovers, if divided by the act of the party, is extinguished; if by descent cast, must be exercised by the heirs jointly." The extinguishment of the right by an assignment of it in part is, I suppose, deduced from this consideration, that, the right being essentially an entire one, and the whole neither passing to the assignee nor continuing in the assignor, it remains no longer in any one.

And all this is in harmony with the ancient law of qualified and incorporeal hereditaments. Thus a condition may not be apportioned, but is determined by license as to part. *Dumpor's Case*, 4 Rep., 119 b; S. C., 1 Smith, Lead. Cas., 15. And a right of way in gross doth not pass to several by assignment; and though a rent charge may be apportioned, as by an apportionment of the soil, in respect to which it is reserved, or so far, at least, that parceners may take it (*Co. Litt.*, 164a, 165b), or a rent service, for it is to the advantage of the lord (*Doo v. Meyler*, 2 Maule & S., 276), as parceners may also take a corody certain, or an advowson, or a right of mill certain; yet this is only where the division of the inheritance would not prejudice another, for in the case of estovers or corody uncertain, or piscary or turbary *sans nombre*, there can be no apportionment; and the reason why parceners take in such case at all seems to be that they make but one heir in law, and therefore they must join in actions real, and if disseized, in one assize. *Co. Litt.*, 164a. As they must also join (and so must tenants in common, *qua* parceners under our American statutes of descent) when damages are to be recovered for a *tort* done to their lands. *Daniels v. Daniels*, 7 Mass., 137.

I take, then, the law to be, that if an incorporeal hereditament passed by the words of Force's covenant to Bennet, it was one not susceptible of apportionment; that it passed by his death to his heirs jointly, and can only be enjoyed by them jointly, and as one tenant; that the assignees of the heirs stand in no better plight than the heirs themselves, and can have no separate enjoyment of the mining right, and that neither heirs nor assigns, nor both, can claim to exclude the heirs and assigns of Force, owners of the soil, from a right to dig ore in common with them.

§ 1017. *If it appears that plaintiff is tenant in common with others, not parties, he cannot maintain an action for a right of common in gross.*

3. There remains the third inquiry, Can this suit be maintained, on proof of an apportioned interest, the defendant not having pleaded an abatement? The plaintiff claims not as a tenant in common with others, but as the exclusive

owner of a several right; and he cannot now turn round, and, asserting a tenancy in common instead, exclude the defense from showing that he does not legally represent the interests which on this amended view of his title should have united in the institution of the suit. The right which he asserted was an exclusive one in himself, according to some of the counts, and one that excluded the defendant according to the others. And in one form or the other it was the basis of his suit. The case fails unless his proofs support this exclusiveness of claim.

§ 1018. *A right to dig iron ore on the land of another is an incorporeal hereditament and does not carry a title to the ore.*

Opinion by GRIER, J.

Assuming, for the argument, the plaintiff to be the assignee of the whole right which was vested in Bennet, and that it is a *grant* upon sufficient consideration, let us inquire, what is granted? Not the iron ore. This the plaintiff properly admits in his declaration, where he defines his interest under the deed as a "*right and privilege to dig, take and carry away iron ore to be found*" in the land of defendant. If it had been a grant of an absolute property in all the iron ore in the tract, the deed would have been insufficient to confer title without livery of seizin, and the statute of limitations a bar to the claim. A right or privilege to dig and carry ore from the land of another is an incorporeal hereditament,—a right to be exercised on the land of another. It is a license irrevocable, when granted on sufficient consideration. It may be demised for years or granted in fee; it is assignable. The grantee or assignee of such a license, right or privilege to be exercised in the land of another has no such title to the ore that he can support trover against the owner of the land for ore or coal raised by him. *Chetham v. Williamson*, 4 East, 476. On this subject I may adopt the words of Lord Tenterden in one of the cases relating to mines, quoted at the bar. *Doe v. Wood*, 2 Barn. & Ald., 724, 738. "This indenture in its granting part does not purport to demise the land or the metals or the minerals therein comprised. The usual technical words of demising such matters are well known and usually adopted in a formal deed when the intent is to demise the land or metals or minerals. But the purport of the granting part of this indenture is to grant for the term therein mentioned (here in fee) a liberty, license, power and authority to dig, work, mine and search for metals, minerals, in and throughout the lands described, and to dispose of the ore, etc., *that should be found within the term*, to the use of the grantee, etc. Instead, therefore, of parting with or granting all the ore that was then existing on the land, its words import a grant of such parts thereof as should, upon the license or power given to search and get, be found within the described limits; which is nothing more than a grant of a license to search and get (irrevocable, indeed, on account of its carrying an interest), with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest."

§ 1019. *A grant of a right to dig all the iron ore to be found does not exclude the grantor. "All" relates to the extent, not the exclusiveness, of the grant.*

2. Is the right granted one that is exclusive of the owner of the soil? Much stress has been laid upon the word *all* in this grant, as having the effect of making it exclusive. But so important a restriction cannot be deduced from so equivocal an expression. The deed has been drawn by a very able conveyancer. He seems to have had Lord Mountjoy's case in his mind at the time.

He employs none of the apt and well known terms or phraseology to indicate an intention of giving an exclusive right as against the grantor himself. The grant of a right to dig, take and carry away "*all*" iron ore to be found within the bounds, etc., shows the extent of the license, but not its exclusiveness. The grantee may dig, take, etc., of *any* or *all* the ore he can find on the land, but he has no exclusive right in *any* of it till he *finds it* and *digs it*. It is a right without stint as to quantity, and Lord Mountjoy's case likens it to the grant of a right of common *sans nombre* which does not exclude the owner. This is a point decided in Lord Mountjoy's case as reported by Coke, Leonard and Godbolt.

§ 1020. *A grant of a right to dig iron ore is one and indivisible. It is a question of right and not of pleading.*

3. Did the evidences given by the plaintiff support the allegation that he was possessed of the *exclusive* right to dig, etc., assuming that the deed in question conferred an exclusive right on Bennet to dig, take and carry away the iron ore on this tract of land? The right, license or liberty granted to Bennet is in its nature one and indivisible. Unless the plaintiff is clothed with the *whole* he has *nothing*. As of other things indivisible, it may be held by one or more as joint tenants. But they hold *per my et per tout* (not as Blackstone has erroneously interpreted it, "by the half or moiety and by all"), but "by *nothing* and by *all*" (7 Mann., G. & S., 452, in note), or, in the language of Bracton: "*Quilibet totum habet et nihil habet, scilicet totum in communi et nihil separatim per se.*" As a right to be exercised in the land of another it is an indivisible unit. Whether the plaintiff has one ninety-ninth or ninety-four ninety-ninths makes no difference. If he has not the whole he has nothing. It is a question of title and not of pleading. The case of Lord Mountjoy is conclusive on this point also.

New trial refused.

Opinion by GRIER, J.

As the opinions heretofore delivered by the respective members of this court on the questions argued on the motion for a new trial may possibly be construed as arriving at the same result by a different course of reasoning; and may be considered as deciding the present motion *only*, without any definite opinion of the whole court, as to the nature or construction of the covenant in the deed of 1769, we state the following propositions as ruled by the *whole court*, in which we agree, without repeating the authorities or all the reasons which might be urged in support of them, and for which we refer to our several opinions, as delivered.

1st. For the purposes of the present decision, we *assume* that the covenant in question contains a *grant in fee* to Bennet and his heirs for a sufficient consideration *to be paid*.

§ 1021. *An incorporeal hereditament.*

2d. We decide that the thing granted is *not* the iron ore contained in the land of defendant, but an incorporeal hereditament, a right, or license, or liberty, well described in the plaintiff's declaration as "a right and privilege to dig, take and carry away" *all* or *any* iron ore *to be found* in the land of defendant. It is a license irrevocable, which may be demised for a term of years, or assigned in fee.

§ 1022. *No title accrues until the right is exercised.*

3d. That until the grantee or his assigns exercised this privilege by *digging*,

taking, etc., iron ore found in the land, they had no property in the ore that would support an action of trover for the same.

§ 1023. "*All*" defines extent, but does not exclude the grantor.

4th. That the effect of the word "*all*" in this grant is not to give an exclusive right *as against the grantor*. It describes the *extent* to which the license may be exercised, not its *exclusiveness*. It is a grant of a right to take ore without stint, and is aptly compared to a right of common in gross *sans nombre*, which does not exclude the lord or owner of the land out of which it is granted.

5th. That such a right is *indivisible*, and unless the plaintiff as assignee is clothed with the *whole*, he has *nothing*, and cannot support this suit as against the owner of the land.

6th. And lastly: That the case of the Lord Mountjoy, as reported by several authoritative reporters, and among them by Lord Coke in his Commentary, is directly in point on both parts of the case, and rules it. Its authority has never been questioned, and the application of its doctrines to this case results in a conclusion which accords with our reason and our sense of justice.

BALTIMORE v. BALTIMORE RAILROAD.

(10 Wallace, 543-553. 1870.)

ERROR to U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.—The city of Baltimore, being interested in the completion of the Baltimore & Ohio Railroad, agreed, in 1854, to lend the company money and to issue the bonds of the city therefor, the company to mortgage its road for the amount of the bonds and to pay to the city the amount of interest which would be due by the city to the bondholders, and to pay the incidental expenses. In 1862, under the national income tax law, the company was compelled to pay three per cent. on the interest due the city to the revenue collector, which it did under protest, having first notified the city and deducted the amount from the payment of interest due the city. The city thereupon sued the road.

§ 1024. *The tax was not an expense incidental to the issue of the bonds, and the city has no cause of action against the company because the tax was paid by it.*

Opinion by MR. JUSTICE DAVIS.

It is contended, on the part of the city, that if the tax in question be a lawful exaction by the United States, the burden of it must be borne by the company; and that the obligation of the company to the city is not changed by reason of the imposition and collection of the tax. Whether this be so or not depends on the nature of the contract between the parties, for the company was authorized to withhold the tax, unless it had contracted with the city to pay it. 13 Stat. at Large, 284. The position taken by the city is, that the company was bound to pay the full amount of the interest without deduction, because of the following words in the defeasance clause of the mortgage: "And shall pay all and any expense incidental to the issue of any of the bonds." It is, therefore, necessary to construe these words, and there is no difficulty about it when we consider the subject-matter about which they were employed. The word *expense* may mean one thing in one case and quite a different thing in another. Its meaning in this case cannot be mistaken.

To carry out the arrangement between the parties required a considerable expenditure of money for printing, clerk hire, stationery, advertising, and simi-

lar matters. These expenses were incidental to the issue of the bonds, and it was right and proper that the railroad company — the party to be benefited by the transaction — should pay them. And it agreed to do so; but this agreement cannot be extended to cover the tax in question, for in no sense is it an expense incidental to the issue of the bonds. At the date of the mortgage (1854) there was no tax of the kind, nor any reasonable expectation of one. If there had been, it is easy to see that appropriate words applicable to the subject would have been used. But the words which were used did not relate to the subject of taxation at all, and it is very certain that the possibility of taxation was not in the contemplation of either of the parties to the mortgage.

It is unnecessary to discuss the general rules of law affecting the relations of principal and surety, and to show in what state of case a surety is required to save his principal from loss, because these rules are not applicable to this case. It is always competent for parties capable of entering into a business arrangement to fix the terms of it, and to declare what shall be their respective rights and liabilities under it. If the court can in any case see that this has been done, it is required to give effect to the contract which the parties chose to make for themselves, although, in the absence of a special agreement on the subject, the rule to determine the rights of the parties might be different. The parties to this suit have made a contract in relation to a matter of interest to both, and have settled what each shall do. To hold one of them responsible for contingencies not provided for, and not even anticipated when the contract was executed, would be to disregard instead of giving effect to the will of the parties.

It is contended, however, by the city, that the securities of a municipality like Baltimore are not taxable by the national government, and therefore the tax in question was an unlawful exaction. This presents an important question; but the city is not in a condition to raise it, and, under the circumstances, can have no cause of action against the company for paying the tax. It is difficult to see in what respect the company failed to discharge its duty in regard to this subject. It occupied the position of a stakeholder, owing the money either to the city or the United States, and wholly indifferent to which of the parties it should be paid. It notified the city that the United States were enforcing the collection of the tax, and did not pay it until it was obliged to do so to avoid the consequences provided for in the act in case of refusal, and not then without a written protest stating distinctly all the grounds of objection claimed by the city to the assessment and collection of the tax. In this condition of things, if the city felt itself aggrieved by the action of the officers administering the internal revenue laws in a matter of interest to it, and not the company, it should have stepped in, and taken upon itself the burden of testing the legality of the assessment and collection of this tax by instituting proper proceedings to recover back the money. This it was authorized to do by these laws, which not only provide for the manner of collecting the revenue, but also furnish a mode of redress to the party who has suffered injury by their administration. *City of Philadelphia v. The Collector*, 5 Wall., 731; *Nichols v. United States*, 7 id., 130-1; *The Assessors v. Osborne*, 9 id., 571.

If there were injury at all, the city sustained it, and, as it did not avail itself of the privilege to sue, it cannot turn round and litigate the legality of the tax with the railroad company. This tax was exacted under color of law, and the company, having notified the city of the demand of the United States and the

proceedings taken to enforce it, and having protested against its collection, were justified in paying it. And it cannot be required in this state of case, on its own behalf, to test the correctness of the ruling of the revenue officers.

Judgment affirmed.

GRAND TOWER COMPANY v. PHILLIPS.

(23 Wallace, 471-480. 1874.)

ERROR to U. S Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—Phillips & St. John sued the Grand Tower Company for damages for breach of a contract to deliver coal. It was alleged that the defendant entered into a written agreement to deliver a certain quantity of coal in each of the months between the 15th of February and the 15th of December during the years 1870, 1871 and 1872; that it failed to deliver the quantity due for October, 1870; that plaintiffs elected to take the amount in default in November, but that the company failed and refused to deliver the same, as well as the amount due for November. The questions in the case arose upon the construction of the following stipulations contained in the contract: "It is further mutually agreed, that if for any other than the unavoidable causes hereinbefore mentioned, and through no fault of the said Phillips & St. John, the parties of the second part, the said Grand Tower Company, party of the first part, shall fail in any one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled in such month, the party of the first part shall pay to the parties of the second part, as liquidated damages, twenty-five cents for each and every ton which it may have so failed to deliver; or instead thereof, the parties of the second part may elect to receive all or any part of the coal so in default in the next succeeding month, in which case the quota which the party of the first part would otherwise have been bound to deliver under this contract shall be increased in such succeeding month to the extent of the quantity in default."

Opinion by MR. JUSTICE BRADLEY.

The court below was of the opinion that the plaintiffs were entitled to the actual damages sustained by them by the non-delivery of the quotas of coal for October and November, 1870.

§ 1025. *Measure of recovery on default in the delivery of coal in monthly quotas.*

The question whether this view was right or not depends upon the true construction of the agreement made by the parties, and we are of opinion that the view taken by the court below on this point was correct. It is evident from an inspection of the contract that the election given to the plaintiffs to receive in the following month the coal which they were entitled to receive and did not receive in a particular month was a substitute for the liquidated damages of twenty-five cents per ton. With regard to that particular amount of coal the rule of liquidated damages was at an end. The agreement did not carry it forward to the following month. It imposed upon the defendant the obligation, if the plaintiffs so elected, to furnish the coal itself instead of paying the liquidated sum. If not so, what was the option worth? It amounted to nothing more than the right of giving to the defendant another month to furnish the coal. Surely they would have had that right without stipulating for it in this solemn way. Had not this option been given to the plaintiffs the defend-

ant would have had the option either to furnish the coal or to pay the twenty-five cents per ton for not furnishing it—a sum which they could very well afford to pay upon a slight rise in the market prices. It was evidently the very purpose of the option given to the plaintiffs to avoid this oppressive result. They could require the coal to be furnished at all events, and if they elected to do this, it was the duty of the defendant to furnish it. The contrary construction would make the stipulation worse than useless. The plaintiffs might continue to exercise their election to receive the coal, month after month, without avail, and at the end find themselves exactly at the point they started from—forced to accept the twenty-five cents per ton.

The law affords many analogies in accordance with the views we have taken. Thus, by the common law, a gift of property to several in common, and when either of them dies a gift of his share to the survivors, does not subject that share to further survivorship unless it is so expressly provided. So a condition not to underlet without license does not extend to a sub-tenant. Instances of this kind might be multiplied at will.

§ 1026. — *rule as to the measure of damages in such case.*

But whilst we concur with the court below on this point, which is the most important point in the cause, there are certain assignments of error which seem to be well taken and will require a reversal of the judgment. These relate to the admission of evidence which may have affected, and probably did seriously affect, the amount of the verdict.

In regard to the measure of damages, the plaintiffs were allowed to show the prices of coal during November and December, 1870, at all points on the Mississippi below Cairo even to New Orleans. And the court charged the jury, against the exceptions of the defendant, that the true measure of damages was the cash value during those months of the kind of coal mentioned in the contract, at Cairo, or points below it on the Mississippi river, after deducting the contract price of the coal and the cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation. Now although it is probable that the plaintiffs could have got the prices which the evidence showed were obtained for coal at and below Cairo, had their coal been furnished according to the agreement, yet the rule of law does not allow so wide a range of inquiry, but regards the price at the place of delivery as the normal standard by which to estimate the damage for non-delivery. It is alleged by the plaintiffs that this rule would have been a futile one in their case, because no market for the purchase of coal existed at Grand Tower, except that of the defendant itself, which, by the very hypothesis of the action, refused to deliver coal to the plaintiffs, and which had the whole subject in its own control. This is certainly a very forcible answer to the proposition to make the price of coal at Grand Tower the only criterion. It is apparent that the plaintiffs would be obliged to resort to some other source of supply in order to obtain the coal which the defendant ought to have furnished them. And it would not be fair, under the circumstances of the case, to confine them to the prices at which the defendant chose to sell the coal to other persons. The true rule would seem to be to allow the plaintiffs to show the price they would have had to pay for coal in the quantities which they were entitled to receive it under the contract, at the nearest available market where it could have been obtained. The difference between such price and the price stipulated for by their contract, with the addition of the increased expense of transportation and hauling (if any), would be the true measure of damages. To this is prop-

erly to be added the claim (if any) for keeping boats and barges ready at Grand Tower for the receipt of coal.

But the prices of coal at New Orleans, at Natchez and other places of distribution and sale, although they might afford a basis for estimating the profits which the plaintiffs might have made had the coal stipulated for been delivered to them, cannot be adopted as a guide to the actual damage sustained so long as any more direct method is within reach.

§ 1027. *Certain evidence inadmissible.*

Another point in which the court erred in the course of the trial was in the admission of the letters of Oliphant, the president of the Grand Tower Company, containing his private instructions to and correspondence with the local agent at Grand Tower. This evidence was clearly inadmissible under the issue, and should have been excluded. The particular reasons or motives which the company or its officers may have had in not furnishing coal to the plaintiffs were not in issue. Judgment reversed and a *venire de novo* awarded.

UNITED STATES *v.* GRANITE COMPANY.

(15 Otto, 87-41. 1881.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.— The Granite Company contracted to furnish stone for a public building, and, not being satisfied with the official construction of the contract, brought suit in the court of claims. The clause in dispute was as follows: The United States agreed to pay for stone delivered “the sum of sixty-five cents per cubic foot for all stones when the quarried dimensions do not exceed twenty cubic feet in each stone, and one cent additional for every cubic foot of those having such dimensions exceeding twenty feet.”

Opinion by MR. JUSTICE FIELD.

The clause of the contract in question, upon the interpretation of which the determination of this case must depend, divides the stones to be delivered into two classes,— those whose dimensions do not exceed twenty cubic feet, and those whose dimensions do exceed that number of cubic feet. For those of the first class the price is fixed at sixty-five cents a cubic foot. For those of the second class the price per cubic foot is fluctuating, increasing with the size of the stone; but the mode of ascertaining this price is prescribed. It is to add to the sixty-five cents as many cents as there are cubic feet in the stone; and this sum will constitute the price per cubic foot. The last clause must, therefore, be read as if the words “per cubic foot” were inserted in it; thus, “one cent additional [per cubic foot] for every cubic foot” of the larger stones, that is, for the whole number of such feet in the stone. It will serve to remove doubt as to the meaning of the clause if we look at it with the insertion of these words after eliminating the provision as to the smaller stones. It will then read thus: “The party of the first part hereby covenants and agrees to pay . . . the sum of sixty-five cents per cubic foot for all stones . . . and one cent additional [per cubic foot] for every cubic foot” of the stones; that is, sixty-five cents for each cubic foot plus one cent for every cubic foot in the stone. This is the interpretation for which the claimant contends; and it appears to us to be the only one permissible from the language used. The interpretation adopted by the treasury department requires the interpolation of terms excepting from the computation the first twenty feet; and this exception

is inconsistent with the provision that for "every cubic foot" of the larger stones an additional price is to be paid.

§ 1028. *Construction of contracts.*

Nor is there anything unreasonable in the increased price for the larger stones required by this interpretation. Every contract must be considered with reference to the subject in respect to which it is made, and its language construed accordingly. It was stated by counsel on the argument, and the fact is a matter of common knowledge, that with builders, materialmen and architects the value, and consequently the price, of dressing building stone, per cubic foot, is determined by the size of the stone, and that this value cumulates with the size; thus, the value of a cubic foot of granite in a small block — weighing a single ton, for example — is much less than the value of a cubic foot in a larger block weighing several tons. The difficulty of preparing and moving blocks weighing several tons is very much greater than that of preparing and moving an equal quantity of stone in small blocks; and the expense of time and labor must, of course, be proportionately greater.

The contract compelled the company to furnish "all such stone" as might be required in the construction of the postoffice building. It left the size of the blocks to the direction of the United States. They might have called for blocks equal in size to some of those furnished for the building of the treasury department, which are said to contain five hundred and sixty-three cubic feet, and to weigh forty-seven tons. The dressing and transportation of a stone of such a size would have been very much greater than the dressing and transportation of forty-seven blocks each of a single ton. We do not, therefore, appreciate the force of the objection urged by the government to the construction for which the claimant insists, that instead of allowing a rate gradually increasing beyond the twenty feet dimension, it requires, to quote the language of counsel, "a sudden leap at one point" when the dimensions of the stone pass the twenty cubic feet limit. Had the government called for blocks, all of one hundred or more cubic feet, as it might have done, the change would have been as much against the interest of the claimant as the supposed benefit to him by the change in price at the point mentioned. The reason suggested — and we cannot say that it is not a good one — for having a fixed price for blocks, not exceeding twenty cubic feet, is, that blocks of that size and weight could be handled by a known power, for which provision was made; but for moving stones of a larger size special arrangements would be required, depending upon their dimensions and weight. It may well be that at the point where stones can be readily handled, and beyond which special arrangements are required to move them, a great change should be made in the price. The company may have been indifferent as to their weight and size under a specified figure, and yet been unwilling to furnish any of a larger size without a greatly increased price.

There are many articles in commerce whose value is greatly increased by a small augmentation in size, and they are consequently sold at a cumulative price, as their dimensions are enlarged. Plate-glass is one of them; diamonds are another. Such increased value arises either from the greater rarity of the article of the larger size, or the greater difficulty in its production or transportation. The cumulative character of the price in the present case is not exceptional, for the reasons mentioned, that the difficulty and expense of moving the blocks increase with their size. It is stated in the able opinion of one of the justices of the court of claims, that the price of similar stones

bought by the government for the building of the treasury department was seventy cents per foot for those of ten feet, eighty cents for those of twenty feet, ninety cents for those of thirty feet, and so on; in other words, that there was a cumulative price for every additional cubic foot of the stone. Applying the contract to the subject to which it relates, we think that the interpretation placed by the company upon the clause as to the price was correct. Judgment affirmed.

STEAM PACKET COMPANY v. SICKLES.

(10 Howard, 419-441. 1850.)

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—Sickles and Cook, plaintiffs below, filed their declaration in *assumpsit*, containing two counts. The first sets forth a parol contract made with William Gunton, president of the steamboat company and general agent thereof, in which it was agreed that the plaintiffs should construct and place on board the steamboat Columbia a certain machine invented by Sickles, called a "cut-off," at their own cost; that the machine should be tried, and, if it was found to produce any saving of fuel, that the cost of putting it in operation, not exceeding \$250, should be first paid out of the savings of fuel effected by the machine; that the machine should be used by the defendants during the continuance of the patent, if the boat should last so long; and after paying for its erection, the savings caused thereby in the consumption of fuel should be divided between the plaintiffs and defendants in the proportion of one-fourth to defendants and three-fourths to plaintiffs. The mode of ascertaining the amount of saving is specially set forth; and the plaintiffs aver that they erected their cut-off on said steamboat at the cost of \$242, on the 9th of November, 1844, and that it was afterwards ascertained, in the mode agreed upon, that the saving of fuel caused by using plaintiffs' cut-off exceeded that of the "throttle cut-off," before used by defendants, by thirty-four and one hundred and seventy-five one hundred and ninetieths per cent.; and that the amount saved, over and above the price of erection when this suit was brought, was \$2,500. For the amount of the \$242, and three-fourths of the latter sum, this suit is brought. There is a second count, for putting the machine on the boat at request of defendants, with a *quantum meruit*.

§ 1029. *In an action upon a special contract, the parties having agreed to a certain method of testing the value of a patent, evidence of the result of similar tests elsewhere is corroborative and admissible.*

On the trial of the cause below, evidence was given tending to prove the special contract as laid in the first count, and that the experiment to test the value had been made in the manner agreed upon, with the result as stated in the declaration. The plaintiffs then offered to show experiments made by practical engineers on other boats, and the result thereof, with the opinion of the said engineers as to the value of their cut-off. This evidence was objected to, and its admission is the subject of the first bill of exceptions, sealed at request of defendants.

The objection to this evidence is, that the mode of ascertaining the value of plaintiffs' cut-off is specially stated in the declaration, and no other could be resorted to. But we think that, even if there were no other count in the declaration than that on the special contract, this objection cannot be sustained. The plaintiffs had given in evidence the experiment made in pursuance of their alleged agreement, and as this testimony tended only to corroborate it, and

not to contradict it, or enlarge the claim of the plaintiffs beyond that ascertained by the experiment made by the parties, it cannot be said to be irrelevant or incompetent; at most, it could only be said to be superfluous. But assuming that it was irrelevant on the first count, it is clearly not so as regards the common count on a *quantum meruit*. The plaintiffs had an undoubted right to give evidence which might enable them to recover on the latter count, in case the defendants should succeed in establishing their plea of *non-assumpsit* as to the first. In this view of the case, the competency and relevancy of the testimony cannot be doubted.

§ 1030. *Evidence tending to show that defendants did not make such a contract as that declared on by plaintiffs is admissible.*

To support the issue on their part, the defendants then called William Gunton, the late president of the company, who wholly denied that he made such a contract as that declared on by plaintiffs, and stated that plaintiffs expressed to him a desire to bring their "cut-off" to the favorable notice of the government, with a view of introducing it on board the national steamships. That he gave them leave to erect their machine on the boat at their own expense, and agreed that if, on trial, the machine should be approved by the defendants, they would purchase it, on terms to be afterwards agreed upon; but if not approved, or the terms of purchase offered by plaintiffs should be such as defendants would not accept, then plaintiffs should have leave to take off their machine at their own expense. That afterwards, when the plaintiffs' terms were asked, they said defendants should have the machine on the same terms as the steamboat *Augusta* and other boats, but would not then or at any other time state definitely what those terms were, or what price the *Augusta* had given, or the plaintiffs would be willing to take, so that it could be laid before the company for their approval. That defendants had never refused permission to plaintiffs to take away the machine from the boat, if they so desired to do. Certain letters were also given in evidence, the contents of which it is not necessary to state in order to understand the instructions given to the jury which are now the subject of exception.

Four several bills of exception have been taken to the refusal of the court to give four items of instruction to the jury. Two of these only are relied on here. The first may be briefly stated thus: That if the jury believed the testimony of William Gunton, and that the contract between the parties was such as he stated, defendants were entitled to a verdict. This instruction was refused by a divided court. We are of opinion that the defendants were clearly entitled to have this instruction given to the jury, as the testimony, if believed by them, fully supported the defendants' plea, and showed that the plaintiffs were not entitled to recover on either count in their declaration. They could not recover on the first count, for this testimony showed that there was no such contract between the parties as that set forth in it; nor on the count on a *quantum meruit*, for the use of the machine, for that would be a repudiation of the contract as proved. If the plaintiffs put their machine on board of defendants' boat for the purpose of experiment, on an agreement that defendants should pay for it, if on trial they approved it, and were willing to give the price asked, otherwise the plaintiffs should have leave to take it away, it certainly needs no argument to show, that, without stating their terms or offering to fulfil their contract by a sale of the machine, the plaintiffs cannot repudiate it and sue for the use of the machine. This would be a palpable fraud on the defendants.

§ 1031. *Notice to a principal of the making of a contract for him by his general agent is not necessary in order to bind the principal.*

The only other exception urged to the charge of the court below is in the answer given by the court to the fourth instruction prayed; which is as follows: "If, from the evidence, the jury shall find that William Gunton, the president of the defendants' company, and acting as their general agent, made with the plaintiffs the contract set out in the first count of the said declaration, and that the plaintiffs, under the said contract, put the said machine on the defendants' boat, and the same was used by the defendants at the time and times mentioned in the said count, and that the same was beneficial to the defendants, then the plaintiffs are entitled to recover on the said first count, notwithstanding the jury shall find that the terms of the said contract were not communicated to the defendants, and the said William Gunton reported to the said defendants a different contract." We find no fault with this instruction, so far as it states the liability of defendants for the acts of Gunton as their general agent, whether he reported his agreement to the defendants or not. If he was their general agent, and had power to make such contract, his failure to communicate it to his principals cannot affect the case.

§ 1032. *Part performance of an entire express contract does not give a right of action on the contract; instructions which lead the jury to think otherwise are erroneous.*

But we are of opinion that the court erred in stating that the plaintiffs had a right to recover on their special count, if the machine was useful to the defendants, without regarding the stipulations of said contract as laid and proved, and the fact that the plaintiffs had refused to rescind it, and had expressed their determination to adhere to it, and "to bring an action every week to recover the amount of saving on the terms of the contract."

If the plaintiffs had complied with the request of the president of the company, in a letter addressed to them on the 14th of April, 1841, after the dispute about the nature of the contract had arisen, and taken their cut-off from the boat, and thus put an end to the contract, the instructions given by the court would have been undoubtedly correct. But as the record shows that the plaintiffs have refused to annul the contract, a very important question arises; whether this action and five hundred others, which the plaintiffs have expressed their determination to continue to institute, can be supported on this one contract. By the contract as proved and declared on, the defendants, after the machine has been erected on their boat, are to continue to use it "during the continuance of the patent," if the boat should last so long. The compensation to be paid by the defendants is to be measured by the amount of saving of fuel which the machine shall effect. The mode of ascertaining this saving is pointed out, and the ratio in which it is to be divided. The first \$250 saved are all to go to the plaintiffs, and three-fourths of all the balance. But the contract is wholly silent as to the time when any account shall be rendered or payments made. The defendants have not agreed to pay by the trip, or settle their account every day, or week, or year; or at the end of twenty-seven and one-half weeks, the time for which this suit is instituted. The agreement on the part of the plaintiffs is, that the defendants shall use their machine for a certain time, in consideration of which defendants are to pay a certain sum of money. It is true the exact sum is not stated; but the mode of rendering it certain is fully set forth. It is one entire contract, which cannot be divided into a thousand, as the plaintiffs imagine. If the defendants had agreed to

pay by instalments at the end of every week, or twenty-seven weeks, doubtless the plaintiffs could have sustained an action for the breach of each promise, as the breaches successively occurred. But it is a well settled principle of law, that, "unless there be some express stipulation to the contrary, whenever an entire sum is to be paid for the entire work, the performance or service is a condition precedent; being one consideration and one debt, it cannot be divided." It was error, therefore, to instruct the jury that the plaintiffs were entitled to recover on the first count, if their machine was used by the defendants, and was beneficial to them, without regard to the fact of the rescission or continuance, or fulfillment of the contract on the part of the plaintiffs.

Whether, if there had been a count in the declaration for the \$242, and the jury had believed that the defendants had agreed to pay it as soon as it was earned, the plaintiffs might not recover to that amount, or whether such a construction could be put on the contract as proved, are questions not before us and on which we therefore give no opinion. The judgment of the circuit court must, therefore, be reversed.

ROBINSON *v.* NOBLE.

(8 Peters, 181-199. 1834.)

Opinion by Mr. Justice McLEAN.

STATEMENT OF FACTS.—This case was brought into this court by a writ of error to the district court, which exercises the powers of a circuit court, for the western district of Pennsylvania.

The plaintiffs in the district court commenced an action of covenant on the following instrument: "Article of agreement, entered into this 24th day of February, between William Noble, of the city of Cincinnati, of the one part, and William Robinson, Jr., of the city of Pittsburgh, of the other part, witnesseth: that the said Noble hereby agrees, stipulates and binds himself, to and with the said Robinson, to transport and deliver to said Robinson, in the steamboat Paragon, a certain quantity of subsistence stores, for the use of the United States army, supposed to amount to about three thousand seven hundred barrels, estimating one-half of the quantity of stores as flour barrels, and the other half as whisky or pork barrels, the said Robinson delivering one-half of the same between the 1st and 10th of March, to said Noble, at Cincinnati, and the other half by the 30th of March, at the usual place of deposit, near the mouth of the Ohio; the delivery of which stores is to be made and completed in the order in which they are received, at the town of St. Louis aforesaid, on or before the 15th day of April next ensuing. In consideration whereof the said Robinson hereby agrees and binds himself to pay to the said Noble \$1.50 per barrel, one-half whereof is to be paid on the delivery of said stores at St. Louis, in specie funds or their equivalent, and the other half in Cincinnati, in the paper of banks current therein, at the period of the delivery of said stores at St. Louis. In testimony whereof, the parties signed and sealed the instrument, the 24th of February, 1821."

Under the agreement was the following memorandum: "It is understood that the payment to be made in Cincinnati is to be in the paper of the Miami Exporting Company or its equivalent." Signed, William Robinson, Jr. This covenant being before the jury, the defendant's counsel prayed the court to instruct them that the plaintiffs could only recover the stipulated price for the freight actually transported, and that they were entitled to no more than the

specie value of the notes of the Miami Exporting Company Bank at the time the payment should have been made at Cincinnati. But the court refused so to instruct the jury, and directed them that they were authorized to take "all the circumstances into consideration, and to make an allowance for any freight which the master had it in his power to transport, in addition to that which was furnished. That, if the lading should not be complete, without the default of the master, the rule is to estimate the freight by means of an average, so as to take neither the greatest possible freight, nor the least, and that such average is the proper measure of damages.

And the judge further instructed the jury that "the defendant, having failed to tender to the plaintiff the paper of the Miami Exporting Company, or its equivalent, at the time mentioned in the contract, and the plaintiff having performed all he covenanted to perform, is by the laws of Ohio entitled to recover the numerical value of the paper of the Miami Exporting Company in specie, with interest." And the jury, under these instructions, found for the plaintiff \$2,377.36 in damages. On this statement of the case, the question arises, whether the court erred in refusing to give the instructions prayed for by the defendant. And first, whether the plaintiffs were entitled to recover in damages more than the stipulated price for the freight actually transported.

§ 1033. *Under a contract to carry a quantity of freight, amounting to "about three thousand seven hundred barrels," at one dollar and fifty cents per barrel, no certain number of barrels is agreed upon, and the contract is satisfied by the delivery of three thousand one hundred and five barrels.*

By the article, Noble agreed with Robinson to transport "in the steamboat Paragon, a certain quantity of subsistence stores, etc., supposed to amount to about three thousand seven hundred barrels," etc.; "in consideration whereof, Robinson binds himself to pay \$1.50 per barrel." Under this agreement, only three thousand one hundred and five barrels were delivered for transportation. The plaintiff's counsel insist that Robinson was bound by his agreement to deliver the number of barrels specified, subject only to a reasonable qualification of the words "supposed to amount to three thousand seven hundred barrels;" and that, by this rule, the number could not be reduced below three thousand six hundred barrels. It is clear from the agreement that the amount of freight was not ascertained, and that Robinson did not covenant to deliver any specific number of barrels. It was conjectured there were three thousand seven hundred, and the payment for the transportation was to be at the rate of \$1.50 per barrel.

The master of the steamboat Paragon proved on the trial that the second trip which the boat made under this contract, she had not more than two-thirds or three-fourths of a cargo. And it also appeared that the reason assigned why a greater number of barrels were not delivered to the master of the steamboat was, that one or two flat-boats, laden with flour, designed as a part of the second cargo of the Paragon, were sunk above Cincinnati. If Robinson had bound himself to deliver a certain number of barrels, and had failed to do so, Noble would have been entitled to damages for such failure; but a fair construction of the contract imposed no such obligation on Robinson, and, consequently, the breach assigned in the declaration is not within the covenant.

It is unnecessary to determine, whether, under a certain state of facts, and with proper averments in the declaration, damages might not be recovered, beyond the price per barrel for the cargo transported, as such a case is not before the court. There is no pretense that Robinson did not deliver the whole

amount of freight in his possession at the places designated in the contract. In this respect, as well as in every other, in regard to the contract, he seems to have acted in good faith. And he was unable to deliver the number of barrels supposed, either through the loss stated or an erroneous estimate of the quantity. But, to exonerate Robinson from damages on this ground, it is enough to know that he did not bind himself to deliver any specific amount of freight. The probable amount is stated or supposed, in the agreement; but there is no undertaking as to the quantity. When the circumstances under which this contract was made are considered; the contingencies on which the delivery of the freight in some degree depended, the reason is seen why cautious and indefinite language was used, in regard to the number of barrels, in the contract. And the result proved that this caution was judicious; as, if the contract had stipulated for a specific amount of freight, Robinson would have been bound to pay the full price of transportation, notwithstanding the loss he sustained. The court think that there was no breach of the covenant, in this respect, on the part of Robinson, and that the district court erred in not giving the instruction as prayed for by the defendant.

The second instruction asked by the defendant's counsel in the court below was, that the plaintiffs were not entitled to recover more than the specie value of the notes in which the payment was to have been made at Cincinnati. It was proved, on the trial, that the notes of the Miami Exporting Company, in which, by the contract, the payment was to be made, or other notes of equal value, were not worth more in specie than sixty-six and two-thirds per cent. The express provisions of the contract show that the payment at Cincinnati was not to have been made in specie or what was equivalent to specie. The notes of the Miami Exporting Company were substituted by the parties, as the standard of value, which should discharge this part of the contract, and the payment of those notes, or any others of equal value, was all that Noble had a right to demand. But it is contended that, as the payment was not made at the day, it must needs be made in specie, and to the full amount of the sum agreed to be paid in depreciated paper.

In what does this covenant to pay differ from an agreement to deliver a certain quantity of flour, or any other commodity, on a given day? The notes of the Miami Exporting Company purported to be money, and may, to some extent, at the time, have circulated as such in business transactions; but it is manifest they were not considered as money by the parties to this contract, but as a commodity, the value of which was to be ascertained by the amount of specie it would bring in the market. And if it should not be convenient for Robinson to make the payment in these notes, he was permitted to make it, by the contract, in any other depreciated notes of equal value.

§ 1034. *The specie value of the notes at the time they should have been paid is the measure of damages.*

Robinson failed to make the payment at the time, and is he now bound to pay the nominal amount of these notes in specie? What damage has Noble sustained by the non-payment? Certainly not more than the value of the notes, if they had been paid. Had these notes been equal to specie on the day of payment, Robinson was bound to pay them, or what was of equal value. If they had depreciated to fifty cents in the dollar, Noble was bound to receive them in discharge of the covenant. Each party incurred a risk in the fluctuations of the value of the notes specified; and nothing could be more unjust, or more opposed to the spirit and letter of the contract, than to require Robinson

to pay, in specie, the nominal value of these notes. The law affixes no such penalty for default of payment. Robinson can only be held liable to make good the damages sustained through his default; and the specie value of the notes, at the time they should have been paid, is the rule by which such damages are to be estimated. In this view, it appears that the district court erred in refusing to give the second instruction prayed for by the defendant's counsel; on this ground, therefore, as well as the one first noticed, the judgment of that court must be reversed, and the cause remanded for further proceedings in conformity with this decision.

NUNEZ v. DAUTEL.

(19 Wallace, 560-563. 1873.)

ERROR to U. S. Circuit Court, Southern District of Georgia.

STATEMENT OF FACTS.—In the court below Dautel brought suit against Nunez upon the following instrument:

"COLUMBUS, GA., September 1, 1865.

"Due Joseph Dautel, or order, \$1,619.66, being balance of principal and interest for four years and six months' services. This we will pay as soon as the crops can be sold or the money raised from any other source, payable with interest.

I. M. NUNEZ & Co."

There was also a count for the same amount upon an account stated. Defendants requested the court to charge the jury that if the plaintiff had proved a special agreement, which was still operative, he could not recover for an account stated. The court charged that the above paper did not prove such special agreement, and directed a verdict for plaintiff.

Opinion by MR. JUSTICE SWAYNE.

The paper was clearly not a promissory note, because it was not payable at a time certain, and it was not such a due bill as the law regards as in effect a promissory note for the same reason. Story on Promissory Notes, § 27; *Salinas v. Wright*, 11 Tex., 575; *Ex parte Tootell*, 4 Ves. Jr., 372. It was made up of the following particulars: It acknowledged the amount specified, consisting of principal and interest, to be due to the plaintiff for four years and six months' services, and promised to pay him that sum, with interest, as soon as the crop could be sold or the money could be raised from any other source.

§ 1035. *A debt acknowledged to be due "as soon as the crop can be sold or the money raised from any other source" is due upon the happening of either event, or upon the lapse of a reasonable time.*

No time having been specified within which the crop should be sold or the money raised otherwise, the law annexed as an incident that one or the other should be done within reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditional to the extent of depending wholly and finally upon the alternatives mentioned. The stipulations secured to the defendants a reasonable amount of time within which to procure in one mode or the other the means necessary to meet the liability. Upon the occurrence of either of the events named or the lapse of such time the debt became due. It could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice. *Hicks v. Shouse*, 17 B. Mon., 487; *Ubsdell v. Cunningham*, 22 Mo., 124. The

question of reasonable time, as the case was presented, was one to be determined by the court. *Frothingham v. Dutton*, 2 Greenl., 255; *Kingsley v. Wallis*, 14 Me., 57; *Manning v. Sawyer*, 1 Hawks, 37; *Cocker v. Franklin Hemp & Flax Manuf. Co.*, 3 Sumn., 530. When the suit was instituted more than five years had elapsed from the date of the instrument. This was much more than a reasonable time for the fulfillment of the undertaking of the defendants, and the plaintiff was entitled to recover. The circuit court instructed the jury correctly, and the judgment is affirmed.

WHIPPLE v. LEVETT.

(Circuit Court for Rhode Island: 2 Mason, '89, 90. 1820.)

STATEMENT OF FACTS.— Action of *assumpsit* on a note dated the 23d of November, 1819, for the payment of a sum of money on certain goods at "factory prices."

§ 1036. *Meaning of the term "factory prices."*

Opinion by STORY, J.

The construction of the terms of this note is matter of law; and I am of opinion that the terms "*factory prices*," in this note, must be understood according to their common meaning, that is, the prices at which goods may be bought at the factories, in contradistinction to prices of goods bought in the market after they have passed into the hands of third persons or shopkeepers. If it had appeared in evidence that the terms had acquired a uniform technical sense, universally known and understood in the community, and brought home to the knowledge of the parties to this note, it might have been proper to construe the terms with reference to such universal usage; but no such usage is proved; and it would be strange, indeed, if persons now contracting should have reference to prices established twenty years ago, and not now referred to in practice in cases of real purchases and sales, to fix the terms of their bargains. In the present case, there is a still stronger reason for construing this note according to the plain sense of the terms, because some of the enumerated articles are proved never to have had any "*old ticket prices*" annexed to them. The terms "*factory prices*" must, therefore, have been used in the common sense, the only sense in which they could apply to all of them; and the parties manifestly intended to apply them to all.

CLARKSON v. STEVENS.

(16 Otto, 505-519. 1882.)

ERROR to the Court of Chancery of New York.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.— The controversy in this case arises between the plaintiffs in error, who are, with others, heirs-at-law of Robert L. Stevens, deceased, and the state of New Jersey, and involves the title to an uncompleted ship-of-war, known as the "Stevens Battery."

The claim of the plaintiffs in error is founded on a resolution of congress approved July 17, 1862 (12 Stat., 628), as follows:

"A resolution releasing to the heirs-at-law of Robert L. Stevens, deceased, all the right, title and interest of the United States in and to 'Stevens' Battery.'

"Resolved by the senate and house of representatives of the United States of America in congress assembled, That all the right, title and interest of the

United States in and to 'Stevens' Battery' be, and the same hereby are, released and conveyed to the heirs-at-law of the said Robert L. Stevens, or their legal representatives."

Robert L. Stevens died in 1856, having his domicile in New Jersey, and by his will constituted his brother, Edwin A. Stevens, who was one of his heirs-at-law, and whom he appointed one of his executors, his sole residuary devisee and legatee. Conceiving himself to be the owner of the unfinished vessel, of which he had been in possession since the death of his brother, and claiming as his residuary legatee, Edwin A. Stevens, who died August 7, 1868, directed, by his will, his executors to complete it on his general plan, at a cost not exceeding \$1,000,000, and then to offer it to the state of New Jersey as a present. The executors, after having expended \$919,915.49 upon the vessel, found that they could not finish it for the amount of money to which they were limited, and discontinued the work. In the mean time the state of New Jersey had accepted the bequest, and the consent of congress thereto was given in the following resolution, approved July 1, 1870:

"A resolution giving the consent of congress to the reception of a certain bequest by the state of New Jersey under the will of the late Edwin A. Stevens.

"WHEREAS, Edwin A. Stevens, who was in his life-time the owner of the ship known as the 'Stevens Battery,' originally commenced under contract for the United States government, and upon the building of which large sums of money were spent by his brother and himself, did, by his last will and testament (the United States having previously relinquished all claims to said ship), leave the same to be finished by his executors, at an expense not exceeding the sum of one million of dollars, and when finished to be offered to the state of New Jersey as a present, to be by her received and disposed of as the said state shall deem proper; and

"WHEREAS, Doubts have been suggested as to the right of the said state to accept the said bequest without the consent of congress, under the prohibition of the tenth section of the first article of the constitution of the United States; therefore,

"Resolved by the senate and house of representatives of the United States of America in congress assembled, That the consent of congress is hereby given that the state of New Jersey shall receive and dispose of the said ship according to the terms and conditions of said bequest."

A bill in equity was filed in the chancery court of New Jersey, by the executors of Edwin A. Stevens, asking for a construction of the will, in certain particulars, including the questions arising upon this bequest to the state. The attorney-general appeared on behalf the state, and filed an information, by way of cross-bill, to which the heirs-at-law of Robert L. Stevens were made parties, as claiming an adverse title. A final decree was made, establishing the title of the state, which was affirmed on appeal by the court of errors and appeals. To reverse that decree the present writ of error was brought, the question presented being one which, as it arises under a law of the United States, and the decision thereon of the state court being in denial of the title claimed under the authority thereof, falls within the jurisdiction of this court.

To determine the proper construction and legal effect of the resolution of congress of July 17, 1862, it becomes necessary to trace from its origin the history of the "Stevens Battery." By the act of congress of April 14, 1842, ch. 22, "authorizing the construction of a war-steamer for harbor defense," it is enacted "that the secretary of the navy be and he is hereby authorized to enter

into contract with Robert L. Stevens for the construction of a war-steamer, shot and shell proof, to be built principally of iron, upon the plan of the said Stevens: *Provided*, the whole cost, including the hull, armament, engines, boiler and equipment, in all respects complete for service, shall not exceed the average cost of the steamers 'Missouri' and 'Mississippi,' and \$250,000 was thereby appropriated towards carrying the law into effect.

In pursuance of this law, the secretary of the navy entered, February 10, 1843, into a contract with Robert L. Stevens for the construction of a war-steamer for harbor defense, which recited his proposal, describing the vessel, and containing certain specifications as to its construction, with a covenant on his part that he would faithfully build and construct the steamer conformably to the plan submitted, and complete the same within two years, provided congress should make the further appropriations necessary for the purpose within a reasonable period. According to the plan proposed the war-steamer was to be shot and shell proof against the artillery then in use on board vessels-of-war, viz., from eighteen pounders to sixty-four pounders; to be propelled by submerged machinery, called Stevens' circular shells; to have greater speed than any of our steam vessels-of-war then built; the whole engine to be out of the way of shot from any vessel of an enemy; and with other specifications as to the character of the material and the dimensions and relations of the parts, which are important to be noticed only so far as to show that the proposed vessel was to be constructed upon a plan original and novel, and with the expectation of results not previously obtained in any naval construction.

The secretary of the navy and Stevens entered, November 14, 1844, into an explanatory contract, which recited that the stipulations of the former had been found to be too loose and indefinite as to the details of its execution, and that the parties, considering themselves bound by so much thereof as related to the dimensions, power, ability to resist shot and shell, and other qualities and arrangements of the vessel, and the amount to be paid therefor, entered into further stipulations modifying and explaining the same. The time for the completion and delivery of the vessel was extended two years from the date of the new contract. Many additional specifications as to the details of construction were inserted. It was agreed that, if the cost of making any model; or patterns used in the construction should be included in bills paid by the United States in the course of the work or at its completion, they should become the property of the United States.

It was also agreed that the secretary of the navy should appoint some person whom Stevens should admit within his establishment for building said vessel, whose duty it should be to receive and receipt for, on account of the navy department, all materials delivered therein for constructing said steamer; which materials, when so received and receipted for, should be distinctly marked with the letters "U. S.," and should become the property of and belong to the United States; and it should be his further duty to certify all accounts presented and certified by Stevens, for materials and labor, which should form the evidence on which payments should be made; but the authority of such inspecting officer, it was understood, should not extend to a right to judge of the quality or fitness of the materials or workmanship, but merely as to the cost thereof; "it being understood," the contract proceeds, "that the quality and fitness thereof, with other matters concerning the performance of the contract, are to be inspected and determined in the manner hereinafter provided for."

It was thereupon further stipulated that before the final payment for the said

war-steamer should be made, a certificate should be rendered to the navy department, that, in her construction, armament and equipment, all the provisions of the contract had been fully performed by Stevens, which certificate should be given and signed by persons appointed to examine the vessel, one by Stevens, one by the secretary of the navy, and, in case of disagreement, a third by the other two, the decision of the majority to be conclusive. It was also agreed that Stevens, in lieu of other security for the faithful performance of the contract on his part, should make to the United States a mortgage, which should be a first lien on all the land, docks, wharves, slips and all their appurtenances belonging to and embraced within the establishment at Hoboken, New Jersey, at which the war-steamer was to be constructed, with ample power to enter upon and sell the same in case of failure on his part to fulfil the contract, or so much thereof as should be necessary to complete any deficiencies on his part.

The secretary of the navy agreed to pay, as the price of the said war-steamer when fully completed and delivered at the navy yard at Brooklyn, in conformity with the contract, the sum of \$586,717.84, the supposed mean cost of the steamers "Missouri" and "Mississippi," or any additional sum that might afterwards be ascertained as properly included in that cost, to be indorsed on the contract "as the price which is to be paid for the said war-steamer when fully completed, delivered and accepted."

Payments were to be made, from time to time, upon bills certified by Stevens and the agent of the United States, for not less than \$5,000 each, and approved by the navy department, until the sum of \$500,000 should have been paid; at which time it was stipulated that an examination should be had of the war-steamer by persons to be appointed, as before agreed, for final examination, and if a majority of them should certify their opinion that the vessel could be fully completed according to contract for the remaining balance which might then be due, then payments of further bills in full should continue, not exceeding the full amount of the whole agreed price; but otherwise the examiners were required to certify the amount which, in their opinion, would be required to complete the steamer, when the secretary of the navy was authorized to withhold from future payments such deductions as might be necessary to meet the probable excess of cost. It was further provided that when Stevens should have fully completed the said war-steamer, and she should have been duly delivered to and received by the agent of the United States, according to the terms of the contract, the full amount of the price remaining unpaid and to become due when she should be fully completed and accepted was required to be paid and the mortgage security canceled and returned.

In pursuance of his contract to that effect, Stevens executed and delivered a mortgage on the premises therein described, being the basin, dock, shops, etc., wherein the war-steamer was to be constructed, conditioned to be void in case he fully performed his contract in relation thereto, with a power of entry and sale, on the part of the mortgagee, in case default should be made in the completion and delivery of the said war-steamer at the expiration of four years from that date, according to the conditions and stipulation of the contract, and out of the proceeds of such sale to retain any dues that might have accrued by reason of the failure to perform the contract, or so much thereof as should be necessary to complete any deficiencies on the part of the said Stevens.

The time for the performance of the contract was by a subsequent agreement extended for four years from September 9, 1848. From January 5, 1845,

to December 14, 1855, there was paid out by the navy department on account of the vessel \$500,000. Robert L. Stevens had, in addition, expended in its construction, of his own means, \$113,579. The act of August 16, 1856, ch. 123, contains an appropriation "for Stevens war steamer, \$86,717.85," being the remainder of the contract price; but no portion of this was ever paid. In the mean time, Edwin A. Stevens took possession of the work upon the death of his brother, as executor and residuary legatee, and expended thereon, prior to September 5, 1857, of his own money, the sum of \$39,185.37. Nothing further appears to have been done until the passage of the act of April 17, 1862, ch. 57, making an additional appropriation for the naval service for the year ending June 30, 1862. The second section is as follows:

"And be it further enacted, That the sum of \$783,294, being the amount necessary to be provided, as estimated by a board appointed for that purpose, to pay for and finish the 'Stevens Battery' now partially constructed at Hoboken, New Jersey, be and the same is hereby appropriated out of any money not otherwise appropriated for the immediate construction of said battery: *Provided,* that in the contract for the completion of said vessel it shall be stipulated that no part of the money claimed by Edwin A. Stevens to have been heretofore expended by him upon said vessel shall be refunded until the amount of said claim shall be established to the satisfaction of the secretary of the navy, and the payment of the said sum shall be contingent upon the success of said vessel as an iron-clad, sea-going war-steamer, to be determined by the president, and such contract shall stipulate the time within which the vessel shall be completed: *Provided, nevertheless,* that said money shall not be expended unless the secretary of the navy is of opinion that the same will secure to the public service an efficient steam battery."

The board, whose estimate is adopted in this act, was one appointed by the secretary of the navy, under the authority of a joint resolution of congress, approved July 24, 1861, whose report was communicated to the house of representatives in a letter of the secretary of the navy to the speaker, dated January 2, 1862. Ex. Doc. No. 23, H. R., 37th Congress, 2d Sess. Upon the question of the expediency of completing the vessel, the board specify six important particulars, as among "the many novel characteristics which she would possess," in which she differed from ordinary war-vessels, and conclude by saying: "We cannot recommend the expenditure of important sums of money upon projects of more than doubtful success when put into practical execution; and therefore we do not deem it expedient to complete this vessel upon the plan proposed." The report had previously stated "that the original projector of the vessel was the late Robert L. Stevens, Esq., deceased, and that his brother, Edwin A. Stevens, Esq., who now proposes to complete it, has materially changed the plans from what appears to have been originally intended."

No part of the sum appropriated by the act of April 17, 1862, was applied to the purpose of completing the battery. The secretary of the navy declined to do so, in the exercise of the discretion confided to him in the last clause of the section, for reasons set forth in his letter to the speaker of the house of representatives, dated May 27, 1862, in which he states that he had taken the opinion of a commission of experts, who had reported that "the vessel, if completed on the plans of Mr. Stevens, will not make an efficient steam battery," and, therefore, that he did not feel authorized to make the expenditure unless congress should so direct. Congress thereupon passed the joint resolution, approved July 17, 1862, on which the plaintiffs in error found their claim.

Nothing appears to have been done towards resuming work on the vessel from the date of the last previous expenditure in 1857, until the death of Edwin A. Stevens, on August 7, 1868, during which time it remained in his possession and control. His will contained the following provision: "I empower my executors to apply not exceeding the sum of \$1,000,000 to finish, on my general plans, as near as may be, in the discretion of my said executors, the battery known as the 'Stevens Battery,' and for the accomplishment of the said object I give to them the use of the dock and yards and basin heretofore appropriated to the said battery, and all the material provided for said battery. When said battery shall be finished, I direct my executors to offer the same to the state of New Jersey as a present, to be disposed of as the said state shall deem proper; and if not accepted by the said state, I direct my executors to sell the same, and the proceeds thereof shall fall into the residue of my estate."

In execution of this authority the executors, prior to February 27, 1873, expended \$919,915.49, of which \$27,309.79 was received from the sale of old material. The legislature of New Jersey, on March 21, 1871, had authorized the appointment of commissioners with power to sell the battery, and, in pursuance of that authority, the vessel, never having been finished, was sold for the sum of \$75,000.

§ 1037. *Construction of ship-building contracts. When the title to the structure, complete or incomplete, passes to the owner from the builder. Cases cited.*

The contention of the plaintiffs in error is that the title to the unfinished vessel passed, as the work progressed, to the United States, and became vested, together with the right to enforce the contract for its completion, and the security of the mortgage, as against the estate of Robert L. Stevens, in his heirs-at-law, by force of the joint resolution of July 17, 1862. In support of the proposition that by the building contract the title to the unfinished ship vested, as the work progressed, in the United States, counsel rely upon the rule of construction announced by Lord Tenterden in *Woods v. Russell*, 5 Barn. & Ald., 942, and followed by the English cases of *Clarke v. Spence*, 4 Ad. & Ell., 448; *Carruthers v. Payne*, 5 Bing., 270; *Laidler v. Burlinson*, 2 Mees. & W., 602; *Wood v. Bell*, 5 Ell. & Bl., 772, affirmed in the Exchequer Chamber, 6 id., 355; *McBain v. Wallace*, 6 App. Cas., 588; and by the American cases of *Moody v. Brown*, 34 Me., 107; *Butterworth v. McKinly*, 11 Humph. (Tenn.), 206; *Sandford v. Wiggins Ferry Co.*, 27 Ind., 522; *Soudder v. Calais Steamboat Co.*, 1 Cliff., 370.

This conclusion was assented to in the present case by the chancellor, who proceeded to a final decree, however, against the plaintiffs in error, on the ground that the title of the United States passed by the resolution of July 17, 1862, not to the heirs-at-law of Robert L. Stevens for their own benefit, but to or for the benefit of Edwin A. Stevens, the residuary legatee. The court of errors and appeals, while affirming his decree, took a different view, and decided that the title of the ship never vested in the United States as owner; following its own previous decision in *Elliott v. Edwards*, 35 N. J. L., 265; S. C., 36 id., 449; the New York case of *Andrews v. Durant*, 11 N. Y., 35, and supported by the decision in *Williams v. Jackman*, 16 Gray (Mass.), 514, in which the rule is stated by Bigelow, C. J., as follows: "Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered, or ready to be delivered. This is a general rule of law. It must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract."

The rule first introduced in *Woods v. Russell*, 5 Barn. & Ald., 942, as interpreted by the English courts, according to *Clarke v. Spence*, 4 Ad. & Ell., 448, is "founded on the notion that provision for the payment, regulated by particular stages of the work, is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that, on payment of the first instalment, the general property in so much of the vessel as is then constructed shall vest in the purchaser." This *dictum* from *Woods v. Russell*, according to Benjamin on Sales, 246, 2d ed., was deliberately adopted as a rule of construction by which, in similar ship-building contracts, the parties are held to have, by implication, evinced an intention that the property shall pass, notwithstanding the general rule to the contrary, and adds: "The law thus established has remained unshaken to the present time."

Nevertheless, in *Wood v. Bell*, 5 Ell. & Bl., 772, Lord Campbell, C. J., said: "When a man contracts with another to make any article for him for a given price, the general rule is, in the absence of all circumstances from which a contrary conclusion may be inferred, that no property passes in the chattel until it be completed and ready for delivery; on the other hand, where a bargain is made for the purchase of an existing ascertained chattel, the general rule, in the same absence of opposing circumstances, is that the property passes immediately to the vendee; that is, that there is at once a complete bargain and sale. But these general rules are both and equally founded on the presumed intention of the parties. If, in the first, there are attendant circumstances from which the intention may be inferred that the property shall pass in the incomplete and growing chattel as the manufacture of it proceeds, or even in ascertained materials from which it is to be carried to perfection, that intention will be effectuated; and equally, in the latter, if it appear that the parties intended to postpone the transfer of the property till the payment of the price or the performance of any other condition, such intention will be upheld in the courts of law." "This principle," he added, "we believe to be well settled;" and referring to the cases of *Woods v. Russell*, *Clarke v. Spence*, *Laidler v. Burlinson*, and others, cited in argument, he remarked that "previous decisions, therefore, are mainly useful as serving to guide our judgment in estimating the weight of circumstances as evidence of intention;" and concluded by saying: "Still it must be remembered, after all, that what we have to determine is a question of fact; namely, what, upon a careful consideration of all the circumstances, we believe to have been the contract into which the parties have entered." It is, perhaps, worthy of remark, that this passage from the judgment of Lord Campbell has, by the editors of *Abbott on Merchant Ships and Seamen*, been incorporated into the text of that treatise.

§ 1038. *The intent of the parties controls the construction of ship-building contracts as to when the title passes from the builder to the owner.*

The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent open in every case, to be determined upon the terms of the contract, and the circumstances attending the transaction. 1 Parsons, Shipping and Admiralty, 63. And such seems to us to be the true principle. Accordingly, we are of opinion that the fact that advances were made out of the purchase money, according to the contract, for the cost of the work as it progressed, and that the government was authorized to require the presence of an agent to join in certifying to the accounts, are not conclusive evidence of an intent that the property in

the ship should vest in the United States prior to final delivery. Indeed, in reference to the latter circumstance, it is noticeable, as indicating a contrary intention, that the authority of the inspecting officer was expressly limited, so that it should not extend to a right to judge of the quality and fitness of the materials or workmanship, such matters and all others concerning the performance of the contract being reserved for determination after the completion of the work, as a condition of acceptance and final payment.

Much stress is laid, in argument, upon that provision of the contract which required all materials received at the yard for use in constructing the steamer to be distinctly marked with the letters "U. S.," and declared that they should become the property of and belong to the United States. But it does not follow, because the materials provided for that use were declared to be the property of the United States, it was intended that they should remain so after becoming part of the structure. Such a precaution might well have been suggested, as a security against a diversion of the materials to any unauthorized use, or to preserve them to the United States, in case, by reason of the failure of the work or from any other cause, they should not be used in the vessel. Indeed, as is remarked by the learned judge who delivered the opinion of the court of errors and appeals in this case, the express declaration that defined the property in the unused materials seems to exclude the implication sought to be raised as to the property in the unfinished ship; for the inference is obvious, from the particularity of such a provision, that the larger interest would not be left to mere intendment.

There are two other provisions of the contract which seem to us conclusive of the question, and, in a sense, adverse to the construction of the plaintiffs in error. The first of these is that which required Stevens, in lieu of other security for his faithful performance of the contract, to execute and deliver a mortgage on all the land, docks, wharves, slips, and all their appurtenances belonging to and embraced within the establishment at Hoboken, N. J., at which the war-steamer was to be constructed, with power to the United States to enter upon and sell the same in case of his failure to fulfil his part of the contract, or so much thereof as should be necessary to complete any deficiencies on his part. The taking of this security, as an indemnity to the United States, assumes the anticipated possibility that the failure might be total, so that the vessel, when offered for delivery, might be altogether rejected. And it does not detract from the force of this conclusion, that the alternative provides for completing deficiencies, if they should prove to be remedial; for in that case the United States, at its option, might accept the vessel, thus becoming invested with the title, and make good its deficiencies out of this security.

The other feature of the contract, which corroborates this view, is that which provides that final payment for the steamer shall be made only upon the certificate of examiners, to be appointed for that purpose, that in her construction, armament and equipment, all the provisions of the contract have been fully performed and completed, which requires that the steamer shall be fully completed and delivered at the navy yard at Brooklyn, and fixes the gross amount which is to be paid for it when fully completed, delivered and accepted. The fact that advances are to be made in the mean time is expressly stated to be in consideration of the security to be given by Stevens for the faithful performance of his contract, and that compensation for his time and services must be wholly deferred until the final completing and delivery of the vessel.

It is thus apparent, as we think, from these stipulations that the vessel was

in all respects to be at the risk of the builder until, upon its completion, the United States should accept it, upon final examination and certificate, as conforming in every particular with the requirements of the contract, and answering the description and warranty of an efficient steam battery for harbor defense, shot and shell proof. And looking at the situation of the parties, and the objects they must have had in view, all doubt is removed as to their intention. Stevens was an ardent and sanguine inventor, who had convinced himself that his unique design of a naval structure was practicable and of great value, and that, if adopted, it would prove to be of immense public utility. He succeeded also in persuading the government to make the experiment, and give him the opportunity of realizing his theories. But it was understood to be merely an experiment, and evidently, by the navy department, naturally conservative and inclined to adhere with some tenacity to its own traditions, regarded at best as of very doubtful success. The steamer, when built, was to constitute a part of the naval establishment of the United States. Can it be supposed that this was to take place except upon condition that, after completion and sufficient examination, it should be found fit for the service? This is the view, as it seems to us, which congress, by its legislation, and the navy department, in all its dealings with the subject, constantly entertained and acted upon, and which both Robert L. Stevens and his brother, Edwin A. Stevens, did not hesitate to accept, the latter not shrinking from a further investment of \$1,000,000 in an enterprise which he still cherished with confidence of ultimate success, after it had become to almost every one else a demonstrated failure, and after the government, for whom it was originally intended, had refused to it all further subsidies.

We find, therefore, that on July 17, 1862, the date of the joint resolution of congress, under which the plaintiffs in error make their claim, the United States had no title to the "Stevens Battery;" but that the property in it had continued in Robert L. Stevens until his death, and passed, by his will, to Edwin A. Stevens, as residuary legatee. It follows that it did not pass to the heirs-at-law of Robert L. Stevens by virtue of the joint resolution. It is urged in argument that if the right to the vessel itself did not pass, then the joint resolution must be construed as a transfer to the heirs of Robert L. Stevens of the right of action of the United States to recover against his estate damages for his non-performance of his contract, together with the securities, by way of mortgage and lien, it held as indemnity. We see no ground for a construction that leads to so remarkable a result. The plain meaning of the resolution is limited to a relinquishment on the part of the United States of any interest it might be supposed to have in the vessel, in which the heirs of Robert L. Stevens are mentioned, probably, because it was with him that the building contract was made; and if it could operate at all as a release, would be to them, for the benefit of those who, by law, had become his successors in the title; and that release would necessarily convey with it, as an incident, an extinguishment of the obligation of the contract for construction, and all the securities taken for its performance. It was in effect, and was doubtless intended as, a declaration on the part of the United States for the benefit of whom it might concern, of its entire abandonment of all further connection with the battery and the contract for its construction. The subsequent assent on the part of congress to its acceptance by the state of New Jersey, as a bequest from Edwin A. Stevens, while it could not operate to affect any rights vested in the interval, is, at least a legislative interpretation of its previous release. This resolution expressly

recites that Edwin A. Stevens was the owner of the battery in his life-time, and is scarcely more explicit in the recognition of his title than was the conduct of all the parties, including the present plaintiffs in error. We are of opinion, for the reasons stated, that there is no error in the decree complained of, and it is accordingly affirmed.

NASH v. TOWNE.

(5 Wallace, 639-704. 1866.)

ERROR to U. S. Circuit Court, District of Wisconsin. .

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Controversy in this case grew out of a contract for the purchase, sale and delivery of one thousand barrels of flour, and the parties concur that the flour was never delivered by the original defendants. Special count, as amended, alleged, in substance and effect, that the defendants, on the 5th day of February, 1863, at Milwaukee, in the state of Wisconsin, in consideration of \$5,500, sold to the plaintiffs one thousand barrels of flour, stored at Neenah, in that state, and agreed to deliver the same, when requested, free of charge to the plaintiffs, on board of a steamer to be by them procured or furnished at the place where it was stored, after navigation should open, and a reasonable time before the 31st day of May following, to be conveyed to the plaintiffs, at Boston, in the ordinary manner of transportation. They also alleged demand and refusal to deliver the flour as agreed, and claimed damages for the non-fulfillment of the contract. Declaration also contained the common counts as set forth in the record.

Plea was the general issue, and the verdict and judgment were for the plaintiffs, and the defendants excepted and sued out this writ of error. Exceptions were taken by the defendants to certain rulings of the court during the trial, and to certain instructions of the court as given to the jury after the testimony was closed, which will be considered in the order they are exhibited in the record.

I. Plaintiffs produced and offered to read in evidence, to prove the issue on their part, a certain letter, dated Milwaukee, February 5, 1863, and written by the defendants to the plaintiffs, and a bill of sale of the flour, executed at the same time and place, and signed by the defendants, and which was inclosed in the letter of the defendants so offered in evidence. Material parts of the letter were as follows: "Your Mr. W. left here yesterday, and before going off we sold him one thousand barrels round hoop flour, Empire Mills, Iowa, free, on board steamer at Neenah, for \$5.50, for which find bill inclosed. We have the flour stored and insured, . . . and will value on you at sight for the amount." Inclosed in that letter was the following bill of sale, which was also signed by the defendants:

"Messrs. Towne & Washburne:

"Bought of Nash & Chapin, general commission merchants, one thousand barrels of flour, Empire Mills, Iowa, round hoop, 5½, \$5,500.

"Received payment, sight draft.

(Signed) "NASH & CHAPIN."

§ 1039. *No variance between the allegations and proof is material unless of a character to mislead the opposite party.*

Such being all the evidence offered by the plaintiffs, under the special count, the defendants objected that the evidence was not admissible in the case, be-

cause it tended to prove a different contract from that set out in the declaration, but the court overruled the objection, and the letter and bill of sale were read in evidence to the jury. Defendants excepted to the ruling of the court, and that exception raises the first question presented for decision in the record. Obviously, the exception involves the construction of the special count, and of the contract exhibited in the letter and bill of sale offered in evidence.

Argument of the defendants is that the contract offered in evidence varied from the allegations of the special count in two particulars: 1. That it differed from the declaration as to the time when the flour was to be delivered. 2. That it also differed from the declaration as to the shipment of the flour, and because it contained no agreement to furnish a steamer.

Undoubtedly, the rule is that the proofs must correspond with the allegations in the declaration, but the requirement in that behalf is fulfilled if the substance of the declaration is proved.

1. Allegations of fact in the pleadings, affirmed on one side and denied on the other, must in general be tried by a jury, and the purpose of the rule which requires that the allegations and the proofs must correspond is that the opposite party may be fairly apprised of the specific nature of the questions involved in the issue. Formerly, the rule in that respect was applied with great strictness, but the modern decisions are more liberal and reasonable. Decided cases may be found, unquestionably, where it has been held that very slight differences were sufficient to constitute a fatal variance. Just demands were often defeated by such rulings until the parliament interfered, in the parent country, to prevent such flagrant injustice. 1 Taylor on Ev., § 173, p. 187.

Federal courts have possessed the power, from their organization to the present time, to amend such imperfections in the pleadings, except in cases of special demurrer set down for hearing, and are directed to give judgment according to law and the right of the cause. 1 Stat. at Large, 91. Recent statutes in the states also confer a liberal discretion upon courts in allowing amendments to pleadings, and those statutes, together with the change they have superinduced in the course of judicial decision, may be said to have established the general rule in the state tribunals that no variance between the allegations of a pleading and the proofs offered to sustain it shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defense on the merits. 3 Phillips on Ev. (4th Am. ed.), 148; *Harmony v. Bingham*, 1 Duer, 210; *Catlin v. Gunter*, 1 Kern., 368.

Irrespective of those statutes, however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond. Contract in this case was executed in midwinter, when the navigation was closed, and both parties knew that the flour could not be transported until the navigation opened in the spring. "Free on board the steamer at Neenah" meant that the defendants should deliver the flour on board the steamer without charge to the plaintiffs. Time of delivery is not specified, but it was to be on board a steamer at Neenah, and it would be unreasonable to suppose that the parties contemplated that it should be withdrawn from the warehouse where it was stored in safety and insured and deposited in a steamer, even if one was there, before the navigation opened in the spring.

§ 1040. Rule for construction of contracts.

Courts, in the construction of contracts, look to the language employed, the

subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *Barreda v. Silsbee*, 21 How., 161; *Shore v. Wilson*, 9 Cl. & F., 569; *Addison on Contr.*, 846. Applying those rules to the case, it is quite clear that the parties did not contemplate that the flour should be withdrawn from the warehouse, where it was safely stored and insured, until the navigation opened in the spring, because the withdrawal of the same before that time would have been worse than useless, as it could not be earlier transported to the place of destination, and if withdrawn and delivered it would involve unnecessary expense and the necessity of re-warehousing it and procuring a new insurance. Plain inference, therefore, is that it was to remain in the storehouse where it was until the navigation opened in the spring, but that it was to be withdrawn and delivered on board a steamer at that place, free of charge to the plaintiffs, before the spring season of navigation closed.

Such being the true construction of the contract as to the time the delivery of the flour was to be made, it is evident that the objection that there is a variance in that respect between the proofs offered in evidence and the special count cannot be sustained. Averment of demand and refusal in the count is not unusual in such cases, and, even if not strictly necessary, it certainly can afford no ground to support the present exception.

2. Second objection taken at the argument is that the contract, as proved, does not support the allegation that the defendants agreed to procure or furnish a steamer at the place of delivery, or to ship the flour on board a steamer free of charge to the plaintiffs, as alleged in the special count. Express words of the contract are, "free on board steamer at Neenah," and the terms of the contract also show that the flour, at the date of the contract, was safely stored in a warehouse at the place where it was to be delivered. Those words necessarily imply that the flour was in the possession and under the control of the defendants, and that the delivery was to be made in the future. Terms of the contract also imply as clearly that the place of delivery was on board a steamer at that port as they do that the delivery was to be made by the defendants. Freight was to be paid by the plaintiffs, but the delivery on board the steamer was to be made by the defendants, and it follows, in the absence of any stipulation to the contrary, that the defendants were to procure or select the steamer to transport the flour down the bay, and to the place of transshipment, over the usual route. Our conclusion is, that the allegations of the special count, and the proofs given in evidence, were substantially the same, or, in other words, that the differences between them, if any, were not of a character which could have misled the defendants at the trial, and therefore the objection must be overruled.

II. Evidence was also introduced by the plaintiffs showing that the defendants drew on them for the whole amount of the purchase money in a sight draft, and that they paid the draft, as given in evidence, when it was presented. Exceptions were taken by the defendants to the rulings of the court in admitting that evidence, but the rulings of the court were so clearly correct that it seems unnecessary to remark further upon the subject.

§ 1041. *Reception of the price by the vendor, and refusal to deliver and conversion of the goods, constitute plenary evidence of an implied promise to refund the price paid, and an action for money had and received is the appropriate remedy for the vendee to recover back the money paid.*

III. Plaintiffs also proved that the flour, at the date of the contract, was stored in a railroad warehouse at Neenah, and that the defendants had admitted that it had been sold and delivered to a third person prior to the commencement of the suit. They went further, and proved demand and refusal, and showed that the defendants, at the date of the contract, had but one thousand barrels of flour stored in that warehouse, and that the whole of that parcel was sold and delivered prior to the suit, with the defendants' knowledge and consent.

Witnesses were examined on the subject, and in the course of their examination two other exceptions were taken by the defendants to the rulings of the court in admitting testimony. Substance of the testimony objected to and introduced was that the flour was withdrawn from the warehouse where it was stored, at the date of the contract, under the orders of the defendants, and deposited in another place, and finally delivered to other parties, in part fulfillment of a much larger contract. Testimony previously introduced showed that the plaintiffs accepted the sight draft and paid the same for the purchase money, and that the defendants refused to deliver the flour; and the evidence objected to was doubtless offered to show that they had converted the flour to their own use, and, in our judgment, it was properly admitted for that purpose. Where the seller of goods received the purchase money at the agreed price, and subsequently refused to deliver the goods, and it appeared at the trial that he had converted the same to his own use, it was held at a very early period that an action for money had and received would lie to recover back the money; and it has never been heard in a court of justice since that decision that there was any doubt of its correctness. Anonymous, 1 Strange, 407; 2 Greenl. on Ev., 124.

Assumpsit for money had and received is an equitable action to recover back money which the defendant in justice ought not to retain, and it may be said that it lies in most, if not all, cases where the defendant has moneys of the plaintiff which, *ex equo et bono*, he ought to refund. Counts for money had and received may be joined with special counts; and where, as in this case, the special counts are for damages for the non-delivery of goods, it is perfectly competent for the plaintiff, if the price was paid in money or money's worth, to prove the allegations of the special counts and introduce evidence to support the common counts; and if it appears that the defendant refused to deliver the goods and that he has converted the same to his own use, the plaintiff, at his election, may have damages for the non-delivery of the goods, or he may have judgment for the price paid and lawful interest. Evidence in this case was clear, not only that the plaintiffs paid the price in money, but that the defendants refused to deliver the flour and converted the same to their own use, by selling and delivering it to other persons. Allen v. Ford, 19 Pick., 217; Jones v. Hoar, 5 id., 285. Such a reception of the price, refusal to deliver and conversion of the goods constitute plenary evidence of an implied promise to refund the price paid, and an action for money had and received is an appropriate remedy for the plaintiffs.

§ 1042. *Parol evidence is not admissible to exonerate an agent who entered into a written contract as principal, even though it be to show that he disclosed his agency and the name of his principal at the time the contract was executed.*

Principal defense was that the flour belonged to one Samuel G. Burdick, and

that the defendants, in negotiating the sale, acted merely as the agents of the owner of the flour, and that they, during the negotiation for the sale, informed the plaintiffs of their agency and gave to them the name of their principal as the owner of the flour. They also claimed that the plaintiffs agreed at the sale of the flour to take the warehouse receipts of their principal for the flour, and that the defendants merely held those receipts at the request of the plaintiffs, and for their benefit, and were therefore under no obligations to deliver the flour.

Such was the theory of the defendants; but there was no proof of any such agreement, except that one of the plaintiffs testified that the defendants, when the demand was made for the delivery of the flour, claimed that such was the understanding of the parties at the date of the contract. Defendants introduced no testimony, but offered to prove that in negotiating the sale they acted as agents, and that they so informed the plaintiffs, and gave them the name of their principal. Plaintiffs objected to the testimony, and it was excluded by the court, and the defendants excepted. They still insist that the ruling of the court in that behalf was erroneous, but they admit the general rule that parol evidence is not admissible to supply, contradict, enlarge or vary the words of a written contract; and it is equally well settled that when a contract is reduced to writing all matters of negotiation and discussion on the subject antecedent to and *dehors* the writing are excluded as being merged in the instrument. 2 Kent's Com. (11th ed.), 746; 1 Greenl. on Ev. (12th ed.), § 275, p. 312.

Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed. *Higgins v. Senior*, 8 Mees. & W., 844. Where a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may, in general, maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence, says Baron Parke, does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another, and that the principle has been fully adopted by this court. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 381 (CARRIERS, §§ 220-242); *Ford v. Williams*, 21 id., 289; *Oelricks v. Ford*, 23 id., 63.

Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal, and in that state of the case he may have his remedy against either at his election. *Thomson v. Davenport*, 9 Barn. & Cress., 78. Evidence to that effect will be admitted to charge the principal or to enable him to sue in his own name, but the agent who binds himself is never allowed to contradict the writing by proving that he contracted only as agent, and not as principal. *Jones v. Littledale*, 6 Ad. & Ell., 486; 1 Parsons on Contr. (5th ed.), 64; *Titus v. Kyle*, 10 Ohio St., 444; 2 Smith's Lead. Cas. (6th Am. ed.), 421.

Exceptions were also taken to the charge of the court, but they involve, for the most part, the same questions as are presented in the objections taken to the admissibility of the evidence, and therefore do not require to be further answered. Slight as the evidence was to show that the plaintiffs accepted the warehouse receipts in lieu of the flour, still the court left that question to the

jury, and their finding upon the subject is conclusive. Complaint is also made that the rule of damages given to the jury was not correct, but the complaint is so clearly without merit that we forbear any further comments upon the subject.

Judgment affirmed, with costs.

PRATT v. LAW.

(9 Cranch, 456-500. 1815.)

APPEAL from the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—In order to present a distinct view of the numerous questions which arise out of this intricate and voluminous case, we will pursue them through a history of the transactions in which they originated, and consider them in order as they occur.

It is well known that, at the founding of this city, the proprietors of the soil gratuitously relinquished a proportion of their property to commissioners appointed to receive it. Morris, Nicholson and Greenleaf purchased city lands to the amount of fifty millions of square feet, to which quantity they were entitled on the 3d of December, 1794. Of this quantity, six thousand lots were purchased from the commissioners; two hundred and twenty lots of Daniel Carroll, and the residue of other persons not necessary to be specified in this case. In the agreement with the commissioners, they stipulated to choose the lots by squares; to build twenty houses per annum for seven years; and until the year 1796, not to sell without the building stipulation. In the agreement with Carroll, the division was to take place by lots; not by selection, but alternately, in order; and a variety of building and other stipulations were entered into, which not being complied with, Carroll re-entered on his land, and the contract was finally abandoned.

On the 3d of December, 1794, Law entered into a contract with Morris, Nicholson and Greenleaf for the purchase of two million four hundred thousand square feet of city land, at the rate of five pence, Pennsylvania currency, per foot, for which Law paid them 50,000%, and took their bond to convey him that quantity of land, in the penalty of 100,000%. To secure this bond the mortgage was given, which is the principal subject of these suits. On the 13th of May, 1796, Greenleaf conveyed all his estate and interest in the Washington lands to Morris and Nicholson, who, on the 26th of June, 1797, executed an assignment of all their interest to these complainants (Pratt and others). Greenleaf afterwards becoming bankrupt, John Miller, one of these complainants, was made his assignee.

In the several bills and answers relative to these transactions, there are various contradictory assertions on the subject of fraud; but as there is no evidence to sustain any charge of that kind, and all the various writings executed between the parties appear fair, unimpeached and reconcilable, we shall wholly reject the consideration of that subject, and dispose of the case upon the unequivocal meaning of the contracts of the parties, and their various acts which have relation to the execution of those contracts.

§ 1043. *Right of selection under an agreement to convey a specified amount of land.*

By the bond to make titles, dated December 3, 1794, Morris, Nicholson and Greenleaf are simply bound to make titles to Law for the specified quantity of

land in the city of Washington, leaving the situation of it, and the mode of selection, entirely undefined, and of course retaining it to themselves. On the day following, the same parties entered into articles of agreement, having relation to objects which appear not to have entered into their contemplation originally, and which, on the face of them, bear the appearance of perfect reciprocity. An option is given to Law to decline his purchase in eighteen months, and Law stipulates that if he should not then decline it, he shall be bound to improve every third lot pursuant to the original contract of Morris and Greenleaf with the commissioners in a specified time.

On the 10th of March, 1795, Law purchases other concessions. By relinquishing his right of declining the purchase, he is allowed the right of selecting the property to be conveyed to him, "excepting water property, and excepting such squares as are now appropriated, or respecting which the said Morris, Nicholson and Greenleaf have made arrangements." A list of the excepted squares is subjoined, numerically distinguished. Morris, Nicholson and Greenleaf also stipulate to secure Law, in the discharge of their contract, by a mortgage of other lands in the city, "which are now in their possession, until they can give good and sufficient titles to the said Law, of such property as he may select, and of which the titles are not already vested in them;" but Law is to select by squares; to select in ninety days, and to build in conformity with Morris and Greenleaf's contract with the commissioners. From this contract emanated the mortgage of the 4th of September, 1795.

It was evidently incumbent on Law to make his selection in ninety days, or show some adequate cause to excuse him from the discharge of that part of his agreement. The evidence that he did make his selection in the prescribed time is contained in his amended answer drawn from him by express allegations in the bill, and an exception to his answer, in which he swears that his selection was made in due time, and that a copy of his selection thus made, was, in due time, communicated to the other parties. This fact, therefore, being contradicted by any evidence, and confirmed by the solicitude expressed by Law, in all his correspondence, to obtain his titles, must be considered as established, and throws upon the opposite party an obligation to show either that he complied with the selection so made, or some sufficient reason why it was not complied with. For these purposes they contend that it was in part complied with, and that it was the fault of Law himself that it was not wholly complied with.

It appears that on the 14th of March, 1796, there were conveyed to Law seven hundred and ninety two thousand nine hundred and thirty-nine square feet of ground; and, on the 20th of July, 1797, one million one hundred and fifty-five thousand eight hundred and fifty-seven square feet. In these conveyances, Law acquiesces, with two exceptions: 1. That one hundred and twenty-eight thousand two hundred and twenty-three square feet, contained in squares 727, 789 and 729, have since been recovered of him by due course of law. 2. That in the computation of square feet supposed to be conveyed to him are included the superficies of the alleys passing through those squares, in which the entire squares were not conveyed.

To understand this objection, it is necessary to remark that, in the division between the commissioners and the proprietors, it frequently happens that, several lots in a square were assigned to the proprietor. In the selections made by Morris and Nicholson, and in those made by Law, the exigency of the agreement to choose by squares was considered as gratified by the choice of all

that part of a square which had been allotted to the commissioners. To the first exception the assignees reply that Law was conusant of the defect of title in the squares alluded to; that he took them with his eyes open, and therefore cannot now claim indemnity.

§ 1044. *Conveyance of defective title.*

But we do not subscribe to this opinion. There is no evidence in the case that he did agree to take these squares *cum onere*. The letter of the 1st of September, 1799, proves nothing of the kind. The condition of the obligation is not complied with by a conveyance of a defective title.

§ 1045. *Obligation to convey a good title with general warranty carries with it the obligation to refund in case of eviction.*

The obligation to convey a good and sufficient title with a general warranty will carry with it the obligation to refund in case of eviction. Law's knowledge of the incumbered state of the title is of no consequence, whilst the opposite party was under an obligation to make that title good and sufficient. The assignees are, in this respect, in no better situation than the original parties. Their rights and interests are altogether subordinate to those of Law. They take the property in every respect incumbered with the obligation to make good the contracts of Morris, Nicholson and Greenleaf with him, not only on general principles, but by express exception in favor of existing liens and incumbrances.

§ 1046. *Conveyance of ground covered by public alleys void. Allowance made for lands so covered.*

With regard to the allowance for the superficies of the alleys, we remark that if the alleys be comprised under the denomination of streets, the conveyance of the ground which they cover would be void, and unquestionably will not amount to a gratification of the contract. But from the president's instructions of the 17th of October, 1791, there is reason to think that they were rights of way appurtenant to the lots of each square respectively. If this claim of Law's extended to the alleys in those squares of which the whole was conveyed to him, there would be some ground for disputing it. But as it is confined to those squares only in which the right could not be merged, because some one or more of the lots were the property of another, we think the allowance ought to be made; for Law certainly has not acquired a title in fee-simple in those alleys.

2. It is contended that it was in Law's power to have obtained a full performance; and they charge him with various acts to which alone they attribute the non-compliance on their part.

1. His frequent varying of his selections. On this subject there is a great variety of evidence and many contradictory allegations. But upon the whole, it appears that, after acquiescing in a number of changes, the selections, about the last of the year 1796, settled down to 699, 696, and half of 743, and the deficiency, if any, to be supplied out of squares 730, and north of 697. But Law's inclination to vary his selections furnishes no sufficient excuse; for a tender of a conveyance conformably to any one of those selections would have been a performance.

On the 5th of December, 1796, it appears a deed was tendered; and this is asserted to have been a legal performance of their part of the agreement. Law contends that it was not, because it contained the building stipulation, a distinct, independent contract, and which ought not to have been made a part of this conveyance. This question appears at that time to have been submitted to

counsel and decided in favor of Law. Whether correctly or not, it is now too late to inquire; for it appears to have been acquiesced in, and conveyances executed for nearly the whole of the same land which was contained in the tendered deed. The conveyance tendered cannot, even if in unexceptionable form, be now considered as a performance for the balance unconveyed, since the land contained in it constitutes a great part of that for which credit is given upon the agreement; and after receiving conveyances in a different form, it is surely too late now to contend for the sufficiency of those tendered.

3. It is contended that the selection of squares 696, 699 and 743 was not sanctioned by the contract of March, 1795, and therefore Morris and Nicholson were under no obligation to convey. It appears that these squares were situated in Carroll's land, and in the division between Carroll and the commissioners were assigned to the former. They thus became a part of that land, out of which Morris and Nicholson were to be entitled to have conveyed to them their two hundred and twenty lots; and it is contended that Law's right of selection could not extend to these lots, because they were to be assigned alternately; whereas Law's right of selection was to be made by squares, out of those in which Morris and Greenleaf had the right of selection. It appears, however, that Morris and Nicholson acquiesced in Law's right to select from Carroll's land, and in a letter of March 19, 1797, explicitly acknowledge it.

The solution of this apparent inconsistency is to be found in an observation previously made on another point in this case. A selection by squares was, in practice, considered by these parties as complied with, when made of all those lots contained in any given square which were owned by the party bound to convey. There could, then, be no reason for excluding Law from enjoying his right of selection from among the squares contained in Carroll's land. The objection certainly comes too late at this day. In Morris' letter to Mr. Cranch, of February 22, 1796, is contained an express recognition of the correctness of that selection, or at least of his acceptance of it in lieu of one more correctly made. This act, with its attendant consequences, must be considered by this court as giving legitimacy to the selection, though it had been otherwise indefensible. Had Law been then informed that this selection was not authorized by contract, he would have been thrown on his right to amend his selection, at a time when he might have done it with little prejudice to his interest. But at this time it is surely too late to retract an assent given nearly twenty years ago. With regard to the two other squares selected, as it was only provisional, to make up any deficiency that might exist after conveying the three positively selected, until the three absolutely chosen were conveyed, nothing final could be done with these.

§ 1047. *Contract to build; excuse for non-performance; breach of contract by other party.*

The last objection is founded on Law's failure to comply with his building contract. But to this we answer: Law was not restricted as to the specific lots on which the buildings were to be erected. His choice, therefore, extended over the whole, and the obligation was not complete until the whole land was conveyed to him. We are of opinion that the selection was sufficiently proved; and that Morris, Nicholson and Greenleaf were in default with regard to the deficiency of land. On them, therefore, must fall the consequences of a state of things produced by their own default.

But there are other reasons furnished by the case in support of this opinion.

Law had advanced very considerably in the discharge of his building contract. He asserts (and it is hardly possible to believe otherwise) that he was originally induced to enter into that stipulation in consideration of similar stipulations entered into by Morris, Nicholson and Greenleaf, with the commissioners and Carroll, and urges their failure as his excuse, in part, for desisting from building. But, be this as it may, it is impossible for the ingenuity of man to devise any expedient by which a mean of comparison can be resorted to that would enable this court or a jury to ascertain the injury resulting from this cause, or the sum in damages by which it may be compensated. We therefore put the building contract entirely out of the case.

§ 1048. *Contract for sale of lands only partially executed; purchase money paid; decree made that purchase money be returned pro rata, with interest.*

It then only remains to decide what remedy Law is entitled to. It is contended, in behalf of Morris, Nicholson and Greenleaf, that it should be by specific performance, or by an issue *quantum damnificatus*; that, at any rate, it should not be by a decree to refund the purchase money with interest, as the value of the residue was necessarily diminished by the gratification of so large a proportion of his right to select.

To obtain a specific performance is no object of Law's bill; it is incumbent on the opposite party, therefore, to show some ground of right to force such a decree upon him. But considering, as we do, that Law is not in default, there can be no reason to decree a specific performance, when everything shows that it would be productive of nothing but loss. Besides, a specific performance, such as would answer the ends of justice between these parties, has now become impossible. Carroll's property is resumed, a large proportion of the land purchased of the commissioners sold under legal process, and thus the benefit of selection so diminished that, if performance were to take place, it must take place stripped of this its most valuable appendage; whilst the diminution of the value of property, and the change of circumstances, produced by a lapse of twenty years, would render it mockery to call any execution specific.

An issue *quantum damnificatus* it is certainly competent to this court to order in this case; but it is not consistent with the equity practice to order it in any case in which the court can lay hold of a simple, equitable and precise rule to ascertain the amount which it ought to decree. In this case, the failure on the part of Morris, Nicholson and Greenleaf certainly was as early as December, 1796, at a time when there is no reason to suppose that any diminution in the value of property had taken place.

And as to the argument that the value of the right of selection diminished in proportion to the exercise of it; that each subsequent choice was of less value than the preceding, we think it is a sufficient answer that Law never appears to have enjoyed the full benefit of his right of selection, in consequence of the difficulties which appear, at all times, to have obstructed his getting titles from the commissioners or others. And finally, when his choice settled down upon the squares 727, 789 and 729, and on Carroll's squares 696, 699, and half of 743, he was evicted from the three former, and never could get the titles to the three latter. Now, these squares nearly make up his deficiency; and there is reason to believe they are among the most valuable of his choice. At any rate, they appear to have been the favorite objects of his choice. We are therefore of opinion that the rule of equity in this case is that adopted by the court below, to wit, refunding at the rate of purchase, according to the quantity actually deficient; but that interest is to be calculated only from the time when the

selections were finally made, which we fix at 1st of January, 1797. With regard to the actual deficiency, it is understood that there will be no difficulty in adjusting it, as the measurement and calculations of Mr. King will be acquiesced in.

We must next determine in what manner the money to be decreed to Law, in pursuance of the foregoing principles, is to be raised from the mortgaged premises; and this leads us to the connection between the interests of Law, and those of Campbell and Duncanson. Campbell was holder of the negotiable paper of Morris and Nicholson, to a considerable amount. Greenleaf had conveyed to Morris and Nicholson all his interest in the mortgaged premises, so that each of them was entitled to an undivided half part of the equity of redemption. Campbell sued out an attachment against Morris and Nicholson, severally, under the laws of Maryland (as this part of the District was then under the jurisdiction of Maryland), and had it levied on sundry of these mortgaged squares, specifically designating them by their numbers. An issue was made up, and at the trial before the court to which the writ was returnable, the question was distinctly made, whether the equitable interest of the defendants in these squares was the subject of attachment. That court decided that they were not; and the plaintiff appealed to the court of appeals to have their judgment reversed.

On the hearing before the court of appeals, the decision of that court is reversed, and the squares attached are specifically and numerically condemned, to satisfy the debt due to Campbell. And, finally, process issues out of that court, to the sheriff of the county, reciting the attachment and condemnation of these squares, describing them with equal precision, and commanding the sheriff to make, from the said lands, the money necessary to satisfy the judgment. Under this writ, the squares so condemned were sold; Campbell becomes the purchaser; and Law, at the instance of Campbell, and without the privity of the assignees, executes a release to Morris and Nicholson, which is put on record; at the same time taking a bond of indemnity from Campbell, against all consequences that might result from this act.

§ 1049. *An equitable interest in lands may be attached in Maryland.*

Much ability has been exhibited in argument, on the question whether an equitable interest in lands and tenements be the subject of attachment under the laws of Maryland. But we are of opinion that we are not now at liberty to enter into the consideration of that question. The decision of the court of appeals is final and conclusive on this point. The question was fully brought before them; and, although it had not fixed the law, would have fixed the fate of these lands beyond reversal.

Some doubt is entertained, by one member of the court, whether the laws of Maryland go further than to authorize the condemnation of this interest to satisfy the judgment, so as to leave the plaintiff still under the necessity of applying to an equitable tribunal to effect a sale. But the majority are of opinion that the attachment act, in making this interest tangible, makes it subject to the ordinary process of the law courts, and that in vesting in the courts in which the condemnation takes place the power to issue execution, as in case of other judgments, it has left it with those courts so to fashion its process as to meet the exigency of each case. In this case, the very special nature of the execution shows that it has been fashioned with great care and learning. We therefore hold the sale, under this execution, to be valid.

Some conclusions were attempted to be drawn, in favor of the assignees,

from the inadequacy of the price at which the property sold, and from the following state of facts: Greenleaf had issued an attachment, to the use of the assignees, against this property of Morris and Nicholson, a day prior to that of Campbell. Subsequent to that of Campbell, Morris and Nicholson assign all their interest in this property to these assignees. Greenleaf's attachment was never prosecuted to judgment.

§ 1050. *Effect of levying an attachment.*

It is contended that this union between the prior lien and the interest attached defeats the immediate lien. But we cannot admit this conclusion. Levying an attachment has the double effect of creating a lien and instituting an action. But the lien is only inchoate; it awaits the judgment of the court for its consummation, and must fall with the suit. To decide otherwise would be to permit the defendant, by collusion or his own act, to nullify the lien of the subsequent attachment. As to the inadequacy of price, the evidence is full to show that it was produced altogether by the steps taken by the agents of the assignees to embarrass or prevent the sale, and by the supposed weight of the incumbrances resting upon the land. In this respect, therefore, there is no imputation to be cast upon Campbell.

§ 1051. *Unaccepted release inoperative.*

With regard to the release, it is very evident that, as it was never accepted by the assignees, it ought in nowise to operate to their prejudice; nor ought Campbell to derive any benefit from it, as it was gratuitously proposed by him under an arrangement with Law. Give efficacy to this release, and consider how it will operate. Campbell purchases at a reduced price, subject to an incumbrance; but give effect to this release, and he holds an absolute fee, absolved from all incumbrance.

Again, the property mortgaged to Law is liable for the whole amount to be raised for his indemnity; but give efficacy to this release, and whilst Campbell acquires an unincumbered estate, on the one hand, on the other, the residue of the mortgaged property (that of which the assignees have not been deprived by sale of the sheriff) must be sacrificed to raise the money due to Law. From this it will follow, either that a ratable abatement should be made by Law, proportionate to the squares by him released to Campbell, or that those squares should contribute their due proportion towards paying Law.

Before we proceed to apply these principles to the final disposal of the case, it is necessary to show in what manner the interests of Duncanson and Ward become involved with those of these other parties. Duncanson, at the request of Morris, Nicholson and Greenleaf, and for their use, drew bills on a variety of correspondents, to the amount of 12,000*l*. On the 12th of September, 1795, Morris, Nicholson and Greenleaf executed a mortgage of eighteen squares in the city of Washington, to indemnify Duncanson against the return of these bills. They were eighteen of the squares previously mortgaged to Law. Of these bills about 7,600*l*. were returned under protest, as the property of Ward; and that sum, together with the damages, was paid on the 26th of December, 1796, to Ward by Greenleaf. No satisfaction was entered on the mortgage, nor any assignment demanded until a day long subsequent. The residue of the bills were also returned and paid by Greenleaf.

Thus circumstanced, whilst the mortgage appeared on record in full life, when in fact defunct, as the purpose for which it was created had been answered, the attachment of Campbell was levied on thirteen of these squares, and they were finally condemned, sold, and purchased by him. After the sale,

notice was given to Duncanson not to release, and that an assignment to Miller, the assignee of Greenleaf, would be demanded of him. The demand of Greenleaf, on Morris and Nicholson, arising from taking up these bills, was contained in his assignment to Miller; and this payment is among the items making up the debit side of the account stated between Greenleaf and Morris and Nicholson.

Miller, the assignee, contends that he is entitled to such an assignment from Duncanson, and, therefore, to be considered in this court as entitled to all the advantages which he would have derived from such an assignment if actually made. On the one hand, Campbell had, at the sale, all the benefit of this sum as an existing incumbrance upon the land. It was, in fact, so much credited on the purchase money for which it sold; but on the other, it is contended that it was a fraud upon the public, to keep up the appearance of an existing mortgage on this property, when it was in fact satisfied; that the agents of the assignees alone knew this fact, and good faith demanded of them that they should have avowed it.

§ 1052. *Where A., B. and C. executed bills which they secured by mortgage, and which, being dishonored, A. paid, an equitable interest in the security resulted to A.*

We are of opinion that the answer to this argument is complete. The assignees did not conceive it to be a satisfied mortgage; they then supposed, and now contend, that an equitable interest in the security, given for the payment of the bills, resulted to Greenleaf, for two-thirds of the sum paid by him on the bills, and passed to them on the assignment. This reply, whether correct in point of law or not, certainly removes all imputation of fraud. But if it did not, what reason can be assigned why Campbell should take to himself a benefit from it? Had it been productive, in any mode, of injury or loss to him, it might have been urged with some plausibility; but there is no reason to suppose that any such effect has resulted from it. It could only operate to reduce the sales of the squares; and in this respect all the effects produced by it resulted to his benefit altogether.

One thing is indisputable; that if this mortgage be decreed satisfied, Campbell has acquired an interest which he never purchased, and acquired that interest in property which ought otherwise to belong to the assignees. It might, perhaps, be made a question whether the whole amount apparently secured by the mortgage ought not to be made the measure of compensation to the assignees; for to that amount it may reasonably be supposed the price of the property was reduced at the sale; to that amount were they damnified, and to that amount the purchaser was benefited. But it would not be consistent with the nature of these purchases to apply that rule to them with strictness. The uncertainty under which a purchase is made, when made subject to an unliquidated incumbrance, gives such a purchase somewhat the nature of a speculation which the purchaser ought, to a reasonable extent, to have the benefit of, if it prove lucrative. It is, therefore, only on the ground of an equitable existing lien upon the mortgaged premises, or equitable claim upon Campbell, that the court can decree in favor of the assignees. And, as Campbell has filed his bill of interpleader, in the nature of a bill to redeem, we think the court at liberty, when decreeing in his favor, to impose on him such equitable terms as the nature of the case suggests.

The foregoing reasoning proves that Campbell ought, in conscience, to make compensation to the mortgagor, the former proprietor of the fee, for that part

of the interest which the mortgage appeared to cover. He did not purchase it, and, therefore, although strict right may secure to him the whole, he ought to be charged with a sum in compensation for the interest so acquired above what was proposed to be sold. Again, had these bills not been taken up, and the holder prosecuted all the drawers and indorsers to insolvency, there can be no doubt that the holder would have been entitled to charge the mortgaged premises, in equity, with the payment of the bills. But what difference is there, in equity, between the case of any other holder of these bills, and that of Greenleaf, who, when liable, equitably, only for one-third, was compelled to take up the whole, and did it with his own funds? It consists only in this: that the one becomes creditor for the whole; the other only for two-thirds.

Upon the whole, we are of opinion that the thirteen squares purchased by Campbell should be ratably charged with the payment of the debt resulting, under these transactions, from Morris and Nicholson to Greenleaf.

§ 1053. Contract at Canton for delivery of teas — What should be considered in construing it.—A contract made at Canton for the delivery of tea should be considered, in construing it, with reference to the general market at that place, and so as to preclude a construction which would compel the delivery of qualities not usually brought to that port for exportation. But difficulties in furnishing the goods called for by the contract, owing to the lateness of the season, should not be considered. *Gilpins v. Consequa*, Pet. C. C., 92.

§ 1054. Contract for the sale of teas at Canton construed.—A contract for the sale of tea at Canton provided that it should be fresh, prime and of the first chop. *Held*, that while the contract should be construed with reference to the kind of teas usually brought to Canton, yet as there were no qualifying words, the contract should not be construed either with reference to the season of the year or the state of the market. *Gilpin v. Consequa*,* 8 Wash., 184.

§ 1055. Construction of lease of water power.—A lease giving a right to draw from a canal the amount of water that will flow through an aperture of a given size and position is a grant of a certain quantity of water, in bulk or weight, which is to be ascertained by the rules of hydraulics, from the state of things existing at the time, and the circumstances in which the lease was made. And if the lessee has made large expenditures in constructing his forebay, and has constructed in such a manner that not more than one-half of the water will flow through the aperture which would otherwise flow through it, he is entitled to have the aperture enlarged. *Canal Co. v. Hill*,* 15 Wall., 94.

§ 1056. Construction of water grant by canal company, and subsequent resolution of the company assented to by the grantee.—B., a mill-owner, having made a contract with a canal company for water power from the canal, the water-gauge was, in the execution of the contract by the parties, placed at the mill wheel, instead of at the canal bank, as provided in the contract, and such location was subsequently inspected and approved by the officers of the canal company charged with that duty. Subsequently the directors of the canal company passed a resolution authorizing their engineer to place the water-gauges for the mills at that town at such points as to best effect the objects of the respective water grants, provided the board might, at any time, if they should deem it necessary, alter or change the position of the gauges as contemplated by the lease, this resolution not to change or impair the provisions of the respective leases. B., and the other millers, assented in writing to this resolution, requesting their gauges to be placed near the water-wheels. *Held*, that this resolution (made a contract by acceptance of its provisions), being intended mainly for the benefit of other millers whose gauges were not already placed near their water-wheels, could not deprive B. of any right which he had previously acquired, and that the location of his gauge could not be changed at the pleasure of the company, without cause, or for any reasons except those specified in the grant of water to him. *Canal Co. v. Ray*, 11 Otto, 522 (§ 1851).

§ 1057. Contract between principal and agent as to profits.—F. was employed by G. in the transaction of his business as a merchant and ship-owner, and was to receive a certain share of the net profits at the end of five years, as his compensation. As a part of his business G. was to purchase, charter and sell such ships as might be necessary and proper for the carrying on of the business, and F. was to share the gains and losses resulting. G. procured a ship to be built which was intended for the trade in question. As soon as finished, G. sold

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the ship to the government at a considerable profit. *Held*, that this ship, having been intended for the trade in which F. was engaged, all profits realized from its sale were to be divided with F., even though it was never actually employed in such trade. *Foster v. Goddard*, 1 Black., 510; S. C., *1 Cliff., 158.

§ 1058. — **construction of the word expenses, as used in the contract.**—By the terms of a contract between F. and G. the former was to be employed by the latter in his business of merchant and ship-owner for five years, and at the end of that time was to receive a certain share of the profits of the business as his compensation. The contract provided that in estimating the net profits “the actual expenses which appertain to the goods themselves” should be deducted. *Held*, that this expression included clerk-hire, taxes and advertising, and that G. was properly credited with these amounts in estimating the net profits. *Foster v. Goddard*, 1 Black., 518.

§ 1059. — **refusal of principal to accept payment of a debt.**—G. hired F. to transact certain business for him, providing him a share of the net profits of the business after five years. In the prosecution of the business, goods were sold to N. but were not paid for. The amount of the debt was in dispute between G. and N., and N. offered a certain sum which G. refused. G. alone had authority to make collections, but he took no steps to collect or settle the matter till after the debt was outlawed. After it had been outlawed, N. offered a further sum, which G. refused to receive or to permit F. to receive his share of. *Held*, that as F.’s compensation was dependent upon the profits of the business, it was the duty of G. to have collected the debt, or to have instituted proceedings therefor before the debt was outlawed, and that as he did not he is chargeable with the amount offered by N. after the debt had outlawed. *Ibid*.

§ 1060. **Question whether certain services were performed under a certain agreement.**—F. entered into a contract with G., of Boston, agreeing to act as his agent at Valparaiso, making sales of cargoes consigned to him at that place, purchasing return cargoes, etc. He was to give his whole time to G.’s business in consideration of one quarter net profits in the business of G. in that trade, which he (F.) “conducted to completion.” It was agreed that F. might withdraw from this arrangement at any time, by giving to G. so much notice that any voyage which he may have commenced previous to the receipt of such notice should receive the full benefit of all of F.’s services to its final accomplishment, and not otherwise. After remaining in this business for a time, F. wrote G. telling him that he was going to join a house in Valparaiso, and saying: “I will manage your business as usual until the 31st of December, which will afford you ample time to make arrangements for sending some one out, if you are inclined.” After replying to this letter, assenting to the withdrawal, G. sent out a cargo consigned to F., or, in his absence, to the house which he was going to join. F. conducted the whole business of this voyage as of previous voyages, but did not “conduct it to completion” prior to December 31st. It was held that the services performed by F., in reference to this last voyage, under the agreement contained in this correspondence, was not performed under the old contract; that he was not entitled to one-fourth of the profits in this voyage as his compensation as provided in the old agreement; but that for this voyage he was entitled to reasonable compensation for the services performed. *Goddard v. Foster*, *17 Wall., 128.

§ 1061. G., a merchant and ship-owner, employed F. in the prosecution of his business, and agreed that he should receive as his compensation a certain share of the proceeds of all business conducted to completion by him. The contract also provided that F. might terminate such relationship on the giving of proper notice. F. gave notice in due time that he would cease his employment on a certain date. Some months later G. sent a ship to the port at which F. was, and F., still acting as his agent, procured a return cargo, and sold a part of the cargo before the date at which his employment terminated. On leaving the employment of G., F. entered the firm of A. & Co., which had nominally acted in the sale of the cargo, and which, after F.’s entry into the firm, sold the remainder, and received the commissions. *Held*, that F. was not entitled to recover a share of the proceeds of the cargo under the contract. *Foster v. Goddard*, 1 Black., 514.

§ 1062. **Paving contract relating to specifications not in existence.**—Advertisements on behalf of a city, for certain grading and paving, stated that specifications were on file in a certain office, and the contract entered into provided that all work should be done in accordance with such specifications. As a matter of fact no such specifications were in existence. *Held*, that the parties had power to enter into the contract, though no specifications were on file in the designated office, and that although the specifications mentioned in the contract were not made, yet as the contract provided what materials should be used, and there was a well known way of performing the work, the contractors could either demand the specifications, and refuse to proceed without them, or could go on and do the work in the ordinary way. *Hitchcock v. City of Galveston*, 3 Woods, 297.

§ 1063. Paving contract—Consent of lot-owners.—A contract between a city and certain contractors provided that the latter should do certain work in preparing the streets of the city for grading and paving, and also lay certain specified kinds of sidewalk pavement. The contract provided that a majority of the lot-owners in a block should have the power to determine by vote which of the specified kinds of pavement should be used, or if they did not so determine, then the superintendent of streets and alleys should make the determination. *Held*, that the contract provided that the work of preparation should be done in any case, and that the consent of the lot-owners was not a condition precedent thereto, and that such consent had reference to the materials to be used in constructing the sidewalk merely, and not to whether the work should be done. *Hitchcock v. Galveston*, 6 Otto, 351.

§ 1064. Contract to do filling and grading.—A contract to do certain filling and grading for a city is not affected by the fact that at the time of entering into the contract no grade had been established by the city. *Hitchcock v. City of Galveston*, 3 Woods, 299.

§ 1065. Construction of public works—Approval by city engineer—Resolution of ambiguity in favor of contractor.—This was a suit against a city on a contract for the construction of two public wells. They were to be completed under the supervision and to the satisfaction of the city engineer, and payment was to be made on his report to the city council that the wells were satisfactory. There was an ambiguity in the contract as to the diameter contracted for, whether it was to be exclusive of the curbing or not. The engineer having supervised the construction of the wells and accepted them as satisfactory, it was held that this ambiguity must be resolved in favor of the plaintiff, and both parties considered to have adopted this construction. *Omaha v. Hammond*,* 4 Otto, 98.

§ 1066. The same principle was held to apply with added force to certain smaller shafts sunk deeper than the main ones, in regard to which the contract contained nothing, and which were sunk under the direction and approval of the city engineer. *Ibid*.

§ 1067. Contract by city employing architect.—Cook county, Illinois, and the city of Chicago, its county seat, contracted to erect a public building for their joint use, the city to erect the western half of the proposed building at its own expense. In June, 1875, the county was ready to proceed with its half of the building, appointed its architect, one Egan, and directed him to prepare plans. In August, 1875, the city appointed the defendant in error its architect, and he proceeded immediately to prepare plans. In November, 1875, it appeared that the plans prepared by the two architects for the two halves of the building did not harmonize, a joint meeting of the city and county officials was held, and the architects were directed to prepare compromise plans to be presented at a certain day future. Egan prepared such plans for that time; Tilley did not, but did prepare and show compromise plans at a later joint meeting of the officials. And on January, 1876, the city council directed Tilley's compromise plans to be adopted. In the fall of 1876 and spring of 1877, when the city council determined to proceed with the construction of the building, Tilley offered his services as architect, but they were refused. In August, 1878, he brought this suit. *Held*, that the parties to the contract did not contemplate that Tilley should procure the assent of the county commissioners in order to entitle him to recover for his labor in preparing the plans, and that he was entitled to recover compensation for the work actually done. *Chicago v. Tilley*,* 13 Otto, 146.

§ 1068. Bond to account for advances made under particular contract.—Parties to a bond to account for advances made under a particular contract are not liable thereon for advances made under that and other contracts, indiscriminately. *United States v. Jones*,* 8 Pet., 399.

§ 1069. Contract to supply rations—Waiver of right to requisitions and notices.—Where a contractor with the government has agreed to supply all rations which shall be required of him "at all and every place or places where troops are or may be stationed, etc., thirty days' notice being given of the post or place where the rations may be wanted or the number of troops to be furnished on their march," the fact of his having supplied the fixed posts under a contract of the year before, and knowing thereby the number of rations then required, will not warrant the inference that the contractor has dispensed with any special requisitions and notices, in relation to supplies at fixed posts, under his present contract. *Ibid*.

§ 1070. Contract for the delivery of rations within certain boundaries.—A contract was made for the delivery of rations within certain boundaries. *Held*, that this should be construed to mean the actual reputed boundaries at the time the contract was entered into, and if a place was within the boundaries as reputed at the time the contract was entered into, it is immaterial that it was afterwards ascertained that it lay without the true boundaries, and the contract price may be recovered. *United States v. Wilkins*, 6 Wheat., 142.

§ 1071. Contract to deliver rations on a certain road—Delivery on a new road.—A contract for the delivery of a quantity of rations provided that, for all delivered on a road

between two points, a certain price should be paid, and for all delivered at other points another price should be paid. The road then in existence becoming disused, certain rations were delivered on a new road running between those points. *Held*, that the contract contemplated the facts and situation existing at the time the contract was entered into, and that the latter price was recoverable for the rations delivered. *Ibid*.

§ 1072. Employment of master to load a ship—Implication therefrom as to employment to command the voyage.—A ship captain was employed by a ship-owner to superintend the loading of the ship and the preparations for the voyage, and when the ship was ready for sea another master was put on board and the former was discharged. In an action by him to recover for his services as master during the voyage, it was held that there was nothing inconsistent in the employment of one master to load and another to command for the voyage, and that as the employment of a master for a foreign voyage was a matter of importance and notoriety, it could usually be shown clearly and directly, and that in case such an employment is sought to be implied from the acts of the parties, the evidence must exclude all reasonable doubt that the master's employment was for the whole voyage. *Jones v. Davis, Abb. Adm.*, 450.

§ 1073. Agreement to receive in payment for property goods made therefrom—Mortgage.—Where one person buys property from a third party and furnishes it to the other contracting party to use, and such party agrees to give the first a certain share of the proceeds of the goods manufactured therefrom in payment, the contract will be held to constitute a mortgage, and a purchaser of the machinery of the owner of the legal title with notice of the contract may be required to redeem or restore the property and the rent of it. *Almy v. Wilbur, 2 Woodb. & M.*, 383.

§ 1074. Recovery of loan made in void bank-bills.—It is no defense in an action to recover a loan that the money received was the bills of an unchartered bank which were illegally and fraudulently issued, and which were absolutely void and worthless, where it is shown that they passed current, unless it is shown that they proved worthless in the defendant's hands, or he has been injured by the fact of their being bad. *Orchard v. Hughes, 1 Wall.*, 75.

§ 1075. Purchase of property belonging, by contract, to another.—Where logs were cut under a license or permit, the owner of the land, under the terms of the contract, retaining "full control and ownership of all logs and lumber," etc, until all matters under the contract were settled and adjusted, a purchaser of logs cut took no better title than his grantor had. *Homans v. Newton*,* 4 Fed. R., 880.

§ 1076. A contract not to sue within a given time is not a defense to a suit brought within the time. *Walling v. Warren*,* 2 Colo. T'y, 487.

§ 1077. Agreement to invest bonds in lands at a certain price in bonds—Sale of bonds and investing proceeds.—A person acknowledged the receipt of a sum of money in bonds and coupons of a railway company, and agreed to use the bonds and coupons in the purchase of land of the same company at an average price of \$5 per acre. *Held*, that by the agreement he was to have purchased the land at the price of \$5 per acre in bonds, and that to sell the bonds at a nominal price, and invest the proceeds in land at \$5 per acre, was contrary to the agreement. *Kitchen v. Bedford, 13 Wall.*, 417.

§ 1078. Agreement to deliver stock upon repayment, in a certain manner, of advances.—H., who had made advances to the amount of \$15,000 to aid in establishing the manufacture of certain machines, held in his name certain shares of stock which he agreed to transfer to W., on the payment to him of the amount advanced as follows: \$3,000 in thirty days, \$1,000 in sixty days, \$1,000 in ninety days, \$7,000 in nine months, and \$3,000 in twelve months. H. further agreed that "upon payment of every sum of \$1,000 or upwards, a *pro rata* amount of the whole stock to be delivered to W. . . . shall be delivered, as rapidly as said advances are reimbursed." W. made or secured payments to the amount of \$3,000, leaving unpaid only the \$7,000 due in nine months, and received eight-fifteenths of the stock to be delivered. Before the nine months had elapsed he tendered \$1,000, and demanded one-fifteenth of the stock. *Held*, that under the agreement he was entitled to one-fifteenth of the stock upon tendering the \$1,000 at the time he did, and that it was not necessary that before the nine months he should have tendered the other \$6,000 at the same time to be entitled to any stock. *Wheeler v. Helmbold*,* 5 Blatch., 503.

§ 1079. Question whether one railroad controls another within the meaning of a contract.—By contract defendant gave plaintiff the exclusive right to furnish, for a term of years, drawing-room cars upon its road, "and on all roads which it now controls or may hereafter control by ownership, lease or otherwise." Plaintiff claimed that since the date of the contract defendant had acquired control of the St. Louis, Iron Mountain & Southern Railway, so as to bring that road within the terms of the contract. The facts were that defendant had become the owner of a majority of the stock of the St. Louis, Iron Mountain &

Southern Railway Company, and its board of directors had been elected by the defendant; that seven members of that board were also directors in the defendant's board; and that the same persons were respectively president and vice-president of the two corporations. Upon an application for an injunction to restrain defendants from violating their contract, *held*, that defendant did not control the Iron Mountain Railroad within the terms of the contract. *Pullman Palace Car Co. v. Missouri Pac. R'y Co.*, * 8 McC., 645.

§ 1080. Sale of stalls under charter authorizing a market.—By act of congress, May 20, 1870, the appellant was authorized to erect a market with stalls and sell the same to the highest bidder "for one or more years," subject to the payment of an annual rent, etc. And it was provided that the successful bidder should "be considered as having the good will and the right to retain the possession thereof (viz., the stall), so long as he chose to occupy the same for his own business and pay the rent therefor." The stalls were sold at auction for a term of two years from July 1, 1872. Appellees bought the several stalls which they occupied, and claimed that they were entitled to hold the stalls as long as they chose to occupy them for their own business and pay the rent, although the term of two years had expired. *Held*, that the charter did not authorize appellant to create a tenancy at will, but required it to sell the stalls for a term, with the privilege of fixing the length of the term; and that appellees had no right to continue in possession after the term of two years had expired. (BRADLEY and HARLAN, JJ., dissented.) *Market Co. v. Hoffman*, * 11 Otto, 112.

§ 1081. Reward for records stolen — Gratuitous bailee of reward money — Payment of it by him.—Certain record-books, deeds, mortgages and other papers having been stolen from the office of the register of deeds of a county, the county officers, by an arrangement with some detectives, placed a sum of money in the hands of an attorney's firm to be paid to the person causing the return of the books and papers, if done within a certain time. The "failure to deliver some small paper or papers" was not to invalidate the agreement. Within the time limited, upon the presentation of a receipt from the deputy sheriff of the county stating that he had received the record-books and also some papers and small index-books, the attorneys gave the money to the person presenting the receipt. The officers, on behalf of the county, brought an action against the attorneys to recover back the sum so paid, on the ground that the books when returned were not in such a condition as to justify the attorneys in paying the money. It was held that, as the attorneys were simple bailees and agents, acting for the county without compensation, there was, in the absence of any pretense of bad faith, no right of recovery, the attorneys not being required by the circumstances of the case to examine the books or await an examination and report of their condition by the register, before paying the reward. *Eldridge v. Hill*, * 7 Otto, 92.

§ 1082. Performance — Reasonable time.—In an agreement between two steamboat owners it was provided that they should use each other's barges "until such a time as they can meet and exchange barges without loss or injury to either party." Under this clause it was held that the fact that some inconvenience or slight loss would result to one or both parties from an exchange would not justify either in refusing, and that each party was entitled to a reasonable time to make the necessary arrangements, and that four days was a reasonable time, in view of the fact that the owner on whom the demand was made had just arrived in port with the barge he had, loaded with a cargo which, by the terms of his bill of lading, he was to allow to remain on board four days after arrival. *Scott v. Steamboat Dick Keyes*, * 1 Bond, 164.

§ 1083. Assignment of judgment as collateral security — Duty of assignee to collect — Parol evidence.—The maker of certain notes, as collateral security for their payment, assigned in writing to the payee a judgment against a third person, the only power given to the payee in reference to the judgment being the right to sell if the notes were not paid at maturity, or at the maturity of their renewals. The judgment debtor had property subject to execution at the time of this assignment, but it was all exhausted in satisfaction of other judgments before the maturity of the notes. It was held that the payee of the notes was not bound by the terms of the written assignment to take steps for the collection of the judgment before the maturity of the notes, and that parol evidence was not admissible to prove an alleged promise, made simultaneously with the assignment and as a part of the transaction, to issue execution and collect the judgment whenever the money could be made thereon. *Bast v. Bank*, * 11 Otto, 93.

§ 1084. Abandonment by one party under a power given him by the contract.—The contract between a contractor and a canal company provided that, as the work proceeded, four-fifths of the amount completed should be paid for monthly, and the balance should be retained and forfeited if the company declared the contract abandoned, as they had the power to do under the contract. Having declared the contract abandoned, it was held that the contractors were entitled to be paid for four-fifths of the value of the work done up to the time that the contract was declared abandoned, and this, though the contract provided that after de-

clarifying the contract abandoned the company should be exonerated from every obligation thence arising. *Miller v. Hubbard*, 4 Cr. C. C., 451.

§ 1085. **Intention — Promise to pay as soon as a third person shall settle his account — Reasonable time.**—Contracts are to be construed so as to effectuate the intention of the parties. So where a note promised to pay a certain sum as soon as a third party should settle his accounts with the maker, it was held to be the intention of the parties that the maker should be allowed a reasonable time to settle such account before he would be liable to suit on the note, and that a year was a reasonable time. *Scully v. Roane*, Hemp., 105.

§ 1086. **Contract embracing two separate matters — Misrepresentations as to the one not affecting the other.**—A. and B. made a contract by which A. was to procure claims against the government for B. to prosecute, and that of the fees received A. was to have one-third and B. two-thirds, and that as to four cases already procured for B. by A., the fees were to be divided equally. *Held*, that these four cases were separate from the others embraced in the contract, and that A.'s misrepresentations as to the amount of business he could procure for B. could not affect the division of the fees in these cases. *Hoes v. Wilson*,* 1 MacArth., 478.

§ 1087. **Contract to invest proceeds of cargo in return cargo.**—The undertaking of parties to apply the proceeds of freight coming into their hands in the purchase of a return cargo upon commission is a contract to apply such proceeds in the manner pointed out by the orders of the principal. *Cunningham v. Bell*, 5 Mason, 164.

§ 1088. **Not a contract of partnership.**—A contract between two persons provided that certain cattle were to be furnished by A. to B., to be kept by the latter till a certain date, when they were to be sold by A. The proceeds, after the first cost of the cattle was deducted, were to be divided equally between the parties to the contract. *Held*, that this contract was not a contract of partnership. *Beckwith v. Talbot*,* 2 Colo. Ty., 648.

§ 1089. **Employment of vessel for a certain trip — Guaranty as to depth of water — Breach of guaranty — Earning of freight money.**—By the terms of a contract a vessel was to go from Boston up a river in North Carolina for a cargo of spars, and deliver them in Boston for a certain sum. The shipper guarantied a depth of water of eight feet at the place of loading. It was found on reaching there that at the place of loading there was more than eight feet, but below there the water was but seven feet. *Held*, that the guaranty of eight feet was not merely that it should be of that depth at place of loading, but that it should be of that depth all down the river, and that if the vessel received and carried all it was able to under the circumstances the whole freight was earned. *Shaw v. Hart*, 1 Spr., 569.

§ 1090. **Contract for the hire of convict labor, creating a lien on the stock and tools of the hirer.**—Burt made a contract with the agent of the state for the use of the labor of a certain number of convicts. As required by the statute authorizing such hiring of convict labor, the contract provided that in case of the failure to pay to the state any sums due under the contract, then the state should have a lien on the stock, tools and machinery of Burt, and that the agent at any time might sell such stock, etc., to satisfy such lien. Burt failed while owing the state considerable sums, and the agent claimed a lien on such stock, tools and machinery, and advertised them for sale. *Held*, that the claim of the agent for such lien in behalf of the state was valid. *In re Burt*, 12 Blatch., 253.

§ 1091. **Contract, within the meaning of the revenue law, requiring a stamp.**—Manufacturers of lumber, who also owned a store, issued an instrument in the form, "Due the bearer or C., etc., in merchandise out of our store," which was given for services rendered to the manufacturers, and which entitled the person to whom it was given, or any one to whom it was transferred, to the amount of merchandise mentioned therein. *Held*, that this was a contract, within the meaning of the revenue laws of the United States, and required a stamp. *United States v. Learned*, 1 Abb., 487.

§ 1092. **An agreement for a lease will be construed as a present demise if no further formal lease is contemplated by the parties, and possession is taken under it.** *Jenkins v. Eldredge*, 3 Story, 329.

§ 1093. **Agreement for an affirmance and settlement of a judgment — Failure to pay — Execution.**—The parties to a suit which was pending in the supreme court entered into a contract which provided that the judgment creditor in the court below should pay to the judgment debtor the sum of \$10,000, on or before a certain day, and that such payment should be in full satisfaction of the judgment, which was for a larger sum, and that the judgment of the lower court might be confirmed in the supreme court, in accordance with such agreement. The judgment was affirmed accordingly, and, as the judgment debtor did not pay the amount agreed, execution was issued for the sum recovered in the judgment. *Held*, that the agreement was a conditional one, and that, as the judgment debtor had not performed his part of it, execution properly issued for the amount of the judgment. *Early v. Rogers*, 16 How., 607.

§ 1094. An agreement by two railroad companies to connect their roads, run through cars, and charge uniform rates throughout the line, does not convey or affect the franchise of either. *Columbia, etc., R. Co. v. Indianapolis, etc., R. Co.*,* 5 McL., 450.

§ 1095. Injunction — Objection as to legality.— Plaintiffs, in Ohio, agreed with defendants, in Indiana, to unite their tracks at the state line, and to run through cars, etc. Part of defendants' track was laid at the time the contract was made, and plaintiffs accordingly adopted the same gauge, which was different from the authorized Ohio gauge, and obtained an act of the Ohio legislature to permit them to do so. Defendants afterwards agreed with another and different corporation to run through cars in connection with them, and proceeded to change their gauge. Upon a bill brought for an injunction, *held*, that the proposed action of defendants was in violation of their contracts; that they could not object that the contract between themselves and plaintiffs was in violation of the statute of Ohio, for the state was the only party to raise that objection, and that the injunction must issue. *Ibid*.

§ 1096. Failure to run a race according to agreement — Writing placing penal obligation on the wrong party.—Action of covenant on a penal obligation for a failure to run a horse race. Plaintiff alleged that he was ready and willing to run, but that the defendant failed and refused, etc. The breach alleged was in the language of the condition, viz.: "And it was then and there, by the aforesaid parties, further agreed, that should either of them fail to run agreeable to the said obligation, that the same for six cows and calves was to be in full force and virtue against the other." The defendant contended that by the terms of the agreement the party who failed to comply with the contract had the right of action, and the court, holding that such being the literal reading of the contract, and there being no ambiguity, it would not seek for an intent contrary to the express words of the instrument, especially as the contract was without a valuable consideration, absurd on its face, and of immoral tendency. A demurrer to the declaration was accordingly sustained. *Lemmons v. Flanakin*,* *Hemp.*, 83.

§ 1097. Offer — Acceptance — "All claims" construed to mean "known claims."—An offer to pay a sum certain in full of "all claims" is accepted by an agreement to take the sum proposed in full of "all known claims," and requiring immediate payment. *United States v. Richardson*,* 9 Fed. R., 804.

§ 1098. The United States claimed large sums from A. on account of duties and penalties. A. made a proposition through the proper officers to pay \$55,000, in full of all claims. This proposition was accepted, the acceptance specifying that the sum mentioned was to be in full of "all known claims," payment to be made immediately, and that a part of the sum was to be considered as in satisfaction of duties, and the balance as penalty. *Held*, that the contract was complete; that *all claims* must be construed to mean *known* claims, and that an offer to pay, without more, means cash. But *held*, further, that as the government failed to tender a release to A. before his death, an action would not lie against his executors. *Ibid*.

§ 1099. Conditional contract to accept bills — Reasonable time.—J. B. & Bro., live stock dealers, arranged with defendants, their consignees, that the latter should pay a draft which the former were to draw on certain shipments of live stock, with bills of lading attached. The defendants accordingly telegraphed the plaintiff, the intended payee of the draft, "We will pay J. B. & Brother's draft, bill of lading attached, for three cars of cattle and one of hogs." The draft which was drawn was signed "A. D. B. & Bro.," the two names being used interchangeably for the same firm. When this draft was presented, no bills of lading were attached, and payment was refused. A draft signed by J. B. & Bro., and presented a few days later, without the bills of lading, was also refused. More than a year after this, this last draft, having the bills of lading attached, was presented, with like success. It was held that the defendants' promise was a conditional one, and that they were not liable thereon, the conditions not having been complied with, the last presentation not having been made within a reasonable time. *First Nat. Bank of Lacon v. Bensley*,* 9 Biss., 378.

§ 1100. Lease — Breach by lessee — Cancellation.—A. and his wife entered into a contract with B., by which B. was put into possession of a stock farm belonging to the wife of A., to manage its business and operations, and, retaining one-third of the profits, to account to A. and his wife for the other two-thirds. The stock and farming utensils then on the farm were to be valued, and accounted for at the end of the lease. The expenses were to be paid out of the general stock fund of the concern, and the concern was to allow interest on advances made by either of the parties. In case of the death of B. during the term, the other parties were to have peaceable possession of the premises. The length of the lease was eleven years, and no rent was to be paid. About a year after going into possession B. began to sell the stock, and, A. having died about that time, continued the sales until all was disposed of. He subsequently leased the farm to a third person, but paid no rent to the widow of A. It was held that B. had disregarded the contract and rendered himself unable to carry it into effect; that the widow was under no obligation to continue it, and that she was entitled to have it canceled and to have possession of the premises, notwithstanding B.'s offer to give security

for the payment of any rent that had accrued under his lease to the third person, or that might accrue. *Tibbatts v. Tibbatts*,* 6 McL., 80.

§ 1101. Contract creating a charge upon property — Bankruptcy.—A tanner and a leather merchant entered into a contract by which, in consideration of moneys advanced by the latter to the former for the purchase of skins to be tanned and finished by the former, the tanner agreed to send the skins so tanned and finished to the merchant. The merchant agreed to sell the same, and, after deducting his advances and commissions, to place the proceeds at the disposal of the tanner. The skins, whether green, in process of tanning, tanned or entirely finished, were to be a security for the advances of the merchant. The tanner subsequently becoming unable, on account of bad health and financial embarrassments, to proceed further in the execution of the contract or to repay the advances, it was agreed between the parties that the merchant should take possession of the tannery and use the same, together with the materials on the premises, to complete the skins then on hand, and, after reimbursing himself out of the proceeds of their sale, pass the balance to the credit of the tanner. The merchant immediately took possession, and a few days after the tanner filed a petition in bankruptcy. In a replevin suit by the assignee in bankruptcy against the merchant for possession of the skins, it was held that the first agreement created a charge upon the property in favor of the merchant which was valid as against the assignee, and that the second agreement was not void as contrary to the provisions of the bankruptcy act. *Hauselt v. Harrison*,* 15 Otto, 401.

§ 1102. Agreement to treat advances to firm as capital stock.—Where A. advanced a certain sum to B. & C., whether for themselves, or a partnership to which all three belonged, it did not clearly appear, and all the members afterwards made an agreement, reciting that some had advanced money and funds beyond their shares, and agreeing that each should make a statement of the advancements made by him, which should remain a capital stock and represent the share of each member, it was held that as this sum was actually put into the firm by B. & C., A. was bound by his agreement to treat it as capital of the firm if he so agreed, and B. & C. therefore released, although he did not place this sum on his statement of advancements made to the firm. *Gregg v. Moss*,* 14 Wall., 564.

§ 1103. Lease of wharf — Suspension of right to collect wharfage.—Where a lease of a wharf from the city of Vicksburg provided for an indemnity to the lessee if his right to collect wharfage should be suspended for any period by the act of third persons, it was held that the interruption by the war of the navigation of the river from states not in rebellion did not suspend the lessee's right to collect wharfage and entitle him to the indemnity. *Marshall v. Vicksburg*,* 15 Wall., 146.

§ 1104. Lease of wharf — Reversion.—Where, by an agreement by which certain premises used for a wharf were conveyed to a city and the grantor given the right to the rents and wharfage, it was provided, if the right to collect wharfage or rents should be interrupted or defeated permanently by the mayor or council of the city, the property should revert to the grantor, it was held that an ordinance drawn up and passed at the grantor's solicitation did not cause a reversion; nor did a tax which the city had reserved a right to impose otherwise than as a wharfage charge, nor a quarantine established by the grantor's assent. *Ibid.*

§ 1105. Promise to procure an act to be done — Contingent compensation — Performance.—Where a person contracts to procure a certain act to be done, and his compensation is contingent upon his procuring the act to be performed, he cannot recover unless he has procured the act to be performed. So if an act is done contrary to what he desires and endeavors to obtain, and such act is accepted by his employer, it gives him no right to compensation either on the contract or on a *quantum meruit*. *Marshall v. Baltimore & Ohio R'y Co.*, 16 How., 837.

§ 1106. A bill of lading is not conclusive evidence of an express contract to pay a specific sum for freight. *McClellan v. Miller*, 2 Cr. C. C., 619.

§ 1107. Carrier's contract to carry beyond its terminus — Provision as to loss by fire.—A general clause in a contract for the carriage of goods between two distant points over a route of which the carrier making the contract owns but one link, which provides that the carrier shall in no event be liable for damage caused by fire arising from any cause whatever, applies to the whole subject-matter of the contract, and exempts the company from liability for loss by fire occurring at any point on the route. *Railroad Co. v. Androscoggin Mills*, 23 Wall., 602.

§ 1108. Agreement to furnish all transportation between two points — Goods starting at a more distant point.—A person agreed to furnish the government all transportation required by river between A. and B., and between each and any intermediate point. The government made a contract for transportation of a cargo from C., a point beyond A., through it to B. The first contractor claimed the right to transmit the cargo thus shipped from A. to B., but the right was refused him. *Held*, that he had no claim for the freight from A. to B.,

and that a contract to carry from C. to B. was different from a contract to carry from A. to B., and that, although it included it as the greater the less, still the two services are as distinct as if the partial sameness did not exist. *Scott v. United States*, 12 Wall., 444.

§ 1109. Promise by indorser to pay on failure to collect from prior parties.—Due diligence on part of indorsee.—The indorsee of a note agreed to send it to a certain bank for collection, and if it was not paid to use due diligence in endeavoring to obtain payment from the maker and prior indorsers, but if he should be unsuccessful, the indorser promised to pay the note and all expenses incurred by the indorsee. *Held*, that the presentment of the note at the bank named, and a demand of payment there when the note became due, was a compliance with the contract as to sending the note to that bank for collection, and that the prompt and honest prosecution of a suit to judgment against the maker and indorsers, and a return *nulla bona*, were evidence of due diligence, though an execution was not sent into the counties in which notoriously insolvent defendants resided before they left the state, and though an error was committed by the court in rendering judgment for too small an amount. *Camden v. Doremus*, 3 How., 531.

§ 1110. Agreement of corporation to indemnify agent—Debt, when accrued.—A law provided that a stockholder in a corporation should not be liable for its debts not paid within a year after they were contracted. *Held*, that where an agreement was made by the company to indemnify an agent, if he should be obliged to make certain payments, and the agent was obliged to make the payments, the debt accrued when the contract of indemnity was entered into, and not when the agent was obliged to pay the money. *Cox v. Gould*, 4 Blatch., 343.

§ 1111. Purchase by agent—Bills drawn for the price by him taken up by him.—Where a firm ordered an agent to purchase salt for them and draw on them for the amount, and the bills drawn were not accepted or paid, it was held that the agent, having taken up the bills and paid also the damages and costs of protest, might maintain an action against the firm for the amount so paid upon a count for money laid out, expended and paid; and that it made no difference that the agent had, after he had taken up the bills, sold the salt without orders from the firm. *Riggs v. Lindsay*,* 7 Cr., 500.

§ 1112. Contract with agent—Liability to agent.—Where a person who is in possession of personal property as the agent of others authorizes another to sell the same, and the person so authorized to sell promises to sell and pay the proceeds over to the agent, he is liable to the agent for such proceeds, notwithstanding the fact that others are interested therein. *Gray v. Reardon*, 2 Cr. C. C., 230.

§ 1113. Ship procured to be built through agent—Sale by agent to innocent purchaser.—A., wishing to build a steamship, furnished his agent with means and sent him to New York with instructions to make all contracts and to have the builder's certificate and the enrollment at the custom-house made in his own name. A. died before the boat was finished but the work was carried on by his administrators in the same manner through the agent, and with the same holding out of the agent as the owner of the boat. The boat being finished, the agent procured the builder's certificate, and had it enrolled in his name as owner, and sold it to the agents of a steamship line for its full price and without any knowledge on their part of any outstanding equitable interest in A. or his administrators. *Held*, that the steamship company took a good title to the steamer, and that the general rule applied, that where one of two innocent parties must suffer, the equity of the case turns against the party who has enabled his agent or any other person to work the injury. *Calais Steamboat Co. v. Scudder*, 2 Black., 373.

§ 1114. Contract between author and publisher as to the publication of a book—Taking of copyright—Assignment.—A., an author, enters into a contract with P., a publisher, by which P. is to publish a certain work, and on the first one thousand copies sold is to pay A. fifteen cents per copy. If a second edition shall be called for, A. is to revise and correct it, and P. is to stereotype it, print as many copies as he can sell, and pay A. twenty cents for each copy sold. P. prints and sells the first one thousand, and takes out a copyright in his own name. A. corrects the manuscript and P. stereotypes it and prints one thousand five hundred copies, and when these are gone prints more, calling it a third edition. P. accounts to A. for the proceeds, and then sells the plates to C., who agrees to account to A. on the terms of the contract. *Held*, that P. may take the copyright in his own name, for the purposes of the contract, and that having done so with A.'s knowledge and acquiescence, A.'s assent is presumed, but that he cannot sell it to C., nor can he assign to C. the right to publish except on the terms of his accounting to A.; also that A. has no right to publish the book, and that the contract covers the entire printing and publishing of the work; also that as P. is to publish as many as he can sell of the stereotyped edition, he is not limited to the number printed as a second edition, if it is found that he can sell more than that number. *Pultra v. Derby*, 5 McL., 329.

§§ 1115-1121. CONTRACTS.—CONSTRUCTION AND INTERPRETATION.

§ 1115. License to use invention — Forfeiture on non-payment of notes given therefor.— A patentee granted to his assignee the right to use a patented machine for a certain time, and took in return therefor certain promissory notes, under an agreement that if any one of the notes should not be paid when due, then the license to use the invention should cease, and the right should revert to the owner. *Held*, from the terms of the agreement, that the license was forfeited the moment one of the notes became due and was unpaid, and it was optional with the inventor to resort to his remedy at common law to enforce the collection of the notes, or to treat the rights of the assignee as forfeited under the stipulations of the agreement. The stipulation is to be considered as a double security given by the assignee to the inventor for the payment of the consideration money. *Woodworth v. Weed*, 1 *Blatch.*, 166.

§ 1116. Contract partly executed sustained, though equity might have decreed its cancellation.— W., the owner of a patent which was about to expire, and of which an extension was expected, agreed to grant to R. the right to use two of the patented machines in a certain county for the period of the extension. Aside from these two machines G. owned the exclusive right to use the machines in that county during such period. R. paid some money on the contract and gave his notes. After such assignment to R., W. assigned his right under such assignment to J., and R. not performing his contract was sued by J. for infringement. Pending the suit J. granted to B. the right acquired by him from W. The decision in the suit between J. and R. was that R. had the right to use one of the machines. After the decision B. set up two machines in the county and was sued by G. for infringement. Up to the time of the suit R. used the two machines. *Held*, that although a court of equity might have decreed a cancellation of the contract with R., yet as the contract was partly executed by the payments made by R. and by his continued use of the two machines, it must be treated as valid till so canceled, and that consequently B. had no right to run the machines by him set up. *Gibson v. Barnard*, 1 *Blatch.*, 391.

§ 1117. Agreement held to give a right to make certain articles with certain patented machinery.— B. and C. were manufacturers of hook-headed spikes. B. claimed to be the inventor of a machine for making them, but C. claimed he was not. After voluminous correspondence B. commenced a suit against C., but pending the suit B. and C. entered into an agreement which provided that the suit was to be discontinued, and that thereafter each was to have the privilege of manufacturing and vending spikes of any kind and character which they might see fit, notwithstanding the conflicting claims up to that time. In an action by the assignee of B. it was held that the agreement gave C. the right to manufacture hook-headed spikes by the machinery patented by B. *Troy Nail & Iron Factory v. Corning*, 1 *Blatch.*, 472; reversed, S. C., 14 *How.*, 210.

§ 1118. Avoiding license to use an invention for breach of condition in selling out of the county.— The owner of a patent granted to C. the right to use six of the patented machines in a certain county, and provided that he should not sell or dispose of the products of his machines anywhere else than in the county. Having sold out of the county, C. was sued for infringement, and it was held that the grant was made upon the express condition that the clause restricting the sale of the manufactured products of the machine should be strictly observed, and that on the failure of C. to observe it, the contract could be avoided by the inventor; and that the contract must be avoided entirely, if at all. *Woodworth v. Cook*, 2 *Blatch.*, 160.

§ 1119. Assignment of patent — Condition — Specific performance.— The assignee of a right to use a patented machine agreed to make weekly payments therefor. *Held*, that the stipulation as to the weekly payments was the condition on which the assignee acquired the right to the use of the machine, and that having failed to make the weekly payments he cannot compel specific performance of the contract. *Brooks v. Stolley*, 3 *McL.*, 526.

§ 1120. Agreement held to have been made in view of the extension of a patent under section 18 of act of July 4, 1836.— A patentee, whose patent was about to expire, entered into an agreement with P. that in case of a renewal of the patent, or of the obtaining of other or further letters patent after the expiration of the existing patent, then P. should have and be entitled to a certain share in the said patent. *Held*, that the agreement was evidently made in view of an extension under the eighteenth section of the act of July 4, 1836 (5 U. S. Stat. at Large, 124), and that the word "renewal" was an apt and proper word to indicate such an intention. *Pitts v. Hall*, 3 *Blatch.*, 203.

§ 1121. Agreement by communists vesting their lands in trustees for the common benefit.— A colony of individuals purchased lands, and afterwards entered into articles of association by which the title to their lands was vested in trustees for their benefit, and by which each relinquished his individual title. The articles provided, further, that each was to have a comfortable support for life. In an action by the heirs of one of the signers for their proportion of the lands, it was held that their ancestor, by signing the articles, divested him-

self of all his rights to the lands, and that the heirs had no title. *Goesele v. Bimler*, 14 How., 603.

§ 1122. *Communitistic society — Writing of withdrawal — Extrinsic evidence.*—The articles of association of a communitistic society provided that if any member withdrew therefrom he should receive a donation such as the superintendent might see fit to give him. A member becoming dissatisfied withdrew and received a donation. He signed a paper reciting that he had withdrawn from the society, and had received the donation agreeably to the contract. *Held*, that this writing is not an ordinary receipt, but must be treated as a contract of dissolution between the member and the society of their mutual obligations and engagements to each other. No evidence of prior declarations or antecedent conduct is admissible to contradict or to vary it. *Baker v. Nachtreib*, 19 How., 128.

§ 1123. *Building contract — Subcontracts — Extra work.*—C. contracted with the United States to build a brig according to specific plans and under the supervision of X., a naval officer. C. let the joiner work to G. & S. for \$1,300. After the latter had done part of the work, X. informed C. that he was not satisfied with their work. G. & S. then arranged with D. to finish the work under their contract, they to receive \$450 and he \$850. D. finished the work, and claimed a large sum for work done in excess of that required by the contract. The terms of the contract between C. and G. & S., as to the work to be done by them, were the same as those between the United States and C. as to such work, and the work claimed as extra was done under direction of X. *Held*, that D. could not recover from C. beyond the price agreed upon with G. & S. if the work was not extra, and that if it was, he could only recover from the government. *Donohue v. Cully*, *Taney, 468.

§ 1124. *Underletting of building contract — Charge for superintending work.*—One who had contracted to construct a culvert on a canal underlet his contract, the subcontractor agreeing that if he failed to use due diligence in prosecuting the work the original contractor might assume control of it and complete it at his, the subcontractor's, expense. It was held that this gave the contractor no right to charge the subcontractor for superintending the work. *Fresh v. Gilson*, *16 Pet., 327.

§ 1125. *Promise by water company to be responsible for neglect of employees — Employees of subcontractor.*—A water company in the contract with the city by which it was to lay water pipes agreed to "protect all persons against damages by reason of excavations made by them" in laying pipes, "and to be responsible for all damages which may occur by reason of the neglect of their employees on the premises." *Held*, that under this agreement the company was responsible for the negligence of the employees of a subcontractor. *Water Co. v. Ware*, 16 Wall., 571.

§ 1126. *Construction contract — Provision against subletting — Prosecution of the work by the sureties of the contractors — Interest of one agreeing with the latter to furnish brick.*—The government wishing to build an aqueduct gave M. power to make contracts for the same, and he contracted with D. & S. for the supply of certain brick. The contract provided that it should not be assigned or sublet. M. & A. were sureties for the performance of the contract, and it having been abandoned by D. & S., they arranged with M. that they should be substituted so that they might save themselves from prosecution on their bond. M. & A. made a contract with K. by which he was to furnish the brick called for, and pay M. & A. a certain percentage of what he received for them, and constituted him their attorney to furnish the brick and collect pay for them. The government concluding to abandon the work, congress by resolution proposed to all interested in the contract that it be abandoned, and promised to settle with them on principles of justice and equity. *Held*, that under this proposition K. had no interest in the contract and had no right to maintain an action thereon. *Kellogg v. United States*, 7 Wall., 364.

§ 1127. *Contract to build bridges — No time of payment fixed — Demand necessary where payment is to be made in stock — Mortgage — Custom of company as to time of payment — Extra work.*—Contract by A. to build certain railroad bridges, one-fourth to be paid in money and the balance in stock of the company at par value. There being nothing said as to the time or place of payment, *held*, that A. could not call for payment until the completion of the work, or, at any rate, before nor oftener than a bridge was completed; that he could not then sue for the stock without a special demand and refusal; that the company's mortgaging its road did not disable it from furnishing the stock; that there being a custom of the road to pay its contractor at the end of each month, this would be regarded as the rule under the contract, and that a special request for the stock was unnecessary; that for extra work the rule of payment must be held to be the same as on the original contract. *Boody v. The Rutland & Burlington R. Co.*, *3 Blatch., 26; 24 Vt., 662.

§ 1128. *Contract to build boilers of a certain capacity for a steamboat.*—A contract for the construction of the boilers of a steamboat provided that the boilers should be of a capacity sufficient "to supply the cylinder with steam at as many pounds pressure to the square

§§ 1129-1134. CONTRACTS.— CONSTRUCTION AND INTERPRETATION.

inch on the piston, when working with the throttle wide open, as were used by the fastest steamboats on the Hudson river when going at their highest rate of speed." *Held*, that this implied that the result stipulated for was to be attained by using such length of cut-off as was customary on the class of boats referred to. *The Isaac Newton*,* Abb. Adm., 11.

§ 1129. Release—Hard and oppressive agreement—Exact performance.—A firm of contractors had performed a large quantity of work for a city, and owing to the failure of the city to meet its engagements had become greatly embarrassed. While in this situation the city agreed to deliver to them its bonds for about one-half the amount of its indebtedness to them, which bonds were actually worth only about fifty per cent. of their par value. The city having set up this agreement as a release in a suit on the contract, it was held that as the new agreement was so harsh and oppressive the city must have lived up to it scrupulously to entitle it to relief, and that having delayed in furnishing most of the bonds, and not having furnished the full amount, it had no right to recover. *City of Memphis v. Brown*, 20 Wall., 306.

§ 1130. Construction of agreement with surety on duty bond.—A railway company, being in embarrassed circumstances and unable to pay duty on its iron, effected an arrangement by which W. became one of its sureties on bonds given to the government for the duty. While the bonds were unpaid the company was sold out, and its successor disputed its liability on the bonds, and W., the only solvent surety, claimed that he was discharged. The bonds being placed in the hands of the district attorney for suit, the railway company promised W. that if he could procure the settlement and cancellation of the bonds for a sum not exceeding \$50,000, that sum to include his fees and any claim he had against the company, it would pay that sum. *Held*, that this was an agreement to pay that sum on account of these two demands, and of W.'s claim for a fair compensation, and that, when these amounts should be ascertained, the sum should be divided proportionately between the government and W. *Ward v. United States*, 14 Wall., 39.

§ 1131. Termination of sureties' liability by notice—Proviso—Condition precedent.—By the terms of a bond, conditioned for an agent's faithful performance of his duty, the surety was given the right to terminate his liability thereon by giving ten days' notice, provided that at the time the accounts of the agent were settled, the balance paid, and all property in his hands delivered up. *Held*, that the last proviso was not a condition precedent to his discharge, but that upon giving the notice, though he would remain liable for the former, he would not be liable for the subsequent default of the agent. *Gass v. Stinson*, 2 Sumn., 457.

§ 1132. Undertaking of surety—Retrospective effect.—The liability of a surety is not to be extended by implication beyond the terms of his contract. His undertaking is to receive a strict interpretation and is not to extend beyond the fair scope of its terms. So where the condition of a bond was "that the said B. shall faithfully execute," etc., it was held that the obligation could have no retrospective force, and could not apply to past derelictions, even though it recited B.'s appointment at a previous time. *United States v. Boyd*, 15 Pet., 203.

§ 1133. Exchange of certificates of indebtedness for preferred stock—Formation of new company—Privity of contract.—A railroad company entered into an arrangement with the holders of certain certificates of indebtedness, by which they were to receive certificates of preferred stock in exchange, on which a certain semi-annual interest was promised. The agreement was accepted and the preferred stock was issued. Previous to the proposition of the company, and before its acceptance, the road and its franchises were mortgaged. The mortgage being foreclosed and the company being hopelessly insolvent, a new company was organized. In an action by the holders of the preferred stock against the new company for the promised interest, it was held that there was no privity of contract between them and the new company. That the obligation rested entirely in contract, and that the new company did not assume the liability of the old, either expressly or by necessary implication. *Sullivan v. Portland & Kennebec R'y Co.*, 4 Otto, 810.

§ 1134. Construction of the words "net earnings" in agreement for the issue of preferred stock.—In order to extricate a railroad company from its embarrassments it was agreed by the stockholders that preferred stock should be issued, which should be entitled to dividends out of the net earnings of the road, after payment of mortgage interest and delayed coupons, in full. After the issue of such stock the railroad became still further embarrassed and borrowed money, paying the interest thereon out of the earnings of the road, which were thus absorbed. In a suit by a holder of preferred stock to recover his dividends, it was held that the word "net" controlled the subsequent words relating to the payment of interest and coupons, and that it meant what was left after the deduction of all charges and outlays, and that the expenditures in payment of the interest on subsequently incurred debts were proper deductions. *St. John v. Erie R'y Co.*, 22 Wall., 147.

§ 1135. Agreement by stockholder to sell his stock for a fair valuation — Settlement.— One of the stockholders of an incorporated company becoming dissatisfied with its management brought a suit against the company and its directors for an accounting. Pending the suit he agreed to sell his stock for a fair and reasonable valuation, to be made upon an examination into the affairs of the company. The examination was made by the plaintiff, who was already pretty well advised of the condition of affairs, assisted by the officers of the company, and all questions put by him were answered, and all books and papers desired by him were furnished. In an action to have the settlement then made corrected and reformed, and an additional sum decreed to him, it was held that in the absence of fraud, concealment or misrepresentation, the plaintiff had no claim for relief. *Held*, also, that it was not a case of settlement between debtor and creditor, which is only *prima facie* proof of its correctness, but that it was a transaction between vendor and vendee, and that the rights of the parties must be measured by the terms of their agreement alone. *Hager v. Thompson*, 1 Black., 90.

§ 1133. Agreement between stockholders to pay paper of the corporation indorsed by any one of them.— The stockholders of a corporation entered into an agreement among themselves that they would severally pay all sums due on paper of the corporation indorsed by any individual stockholder, if the corporation should not be able to do so. *Held*, that a holder for value of paper of the corporation indorsed by a stockholder could not, after the insolvency of the corporation and of the indorser, maintain an action at law against one of the parties to the agreement, though he might go into chancery and be subrogated to the rights of his indorser. *Farmers' Nat'l Bank of Portsmouth v. Hannan*,* 4 Fed. R., 613.

§ 1137. Sale of stock to be paid for out of its earnings — Executed contract — Penalty.— A. sold to B. certain shares of the capital stock of a corporation, and B. agreed to pay the par value thereof, with six per cent. interest, out of the net earnings of the stock, and agreed that if he should make any default in paying to the seller the amount at the agreed times, then the whole sum should become due. *Held*, that the transaction was an executed sale of the stock, and valid; and that the agreement to pay the whole amount in case of failure to pay at the times agreed upon was not in the nature of a penalty, but was of the substance of the contract, and that on such failure the whole debt became due and payable as the personal obligation of the purchaser. *Dean v. Nelson*, 10 Wall., 170.

§ 1138. Work to be paid for in stock — Demand.— A written contract, under seal, provided that A. should do certain work for the corporation and that he would receive stock of the corporation therefor, but contained no agreement by the corporation that it would pay in stock. *Held*, that on the completion of the work A. might sue in *assumpsit* for the price of the work without showing an offer on his part to accept the stock. *Hallihan v. Washington*,* 4 Cr. C. C., 804.

§ 1139. Contract to receive pay for work in corporate stock, as affected by subsequent mortgage.— A contractor for work on a railroad agreed to take a certain proportion of his pay in stock. Soon after the work was started, a mortgage was given of the road to secure existing indebtedness. *Held*, that as the debts of the road were payable out of its property, the mortgaging of the road did not so affect the value of the stock as to discharge the contractors from their obligation to take it, or render the road liable to pay in money instead. *Boody v. Rutland & Burlington R'y Co.*, 24 Vt., 662.

§ 1140. Agreement between city and railway company held not to be *ultra vires*.— A city contracted with a railway company to issue certain bonds in aid of it, and, after the issue of part, agree to issue the remainder when the road should be completed to a certain point. The company relied largely on the sale of the bonds to build its road. A doubt arising as to the validity of the issue of bonds, suits were instituted and the price of the bonds fell greatly. The company had borrowed money and pledged the bonds to the lenders, but the bonds thus becoming depreciated, the holders threatened to sell. The company, being helpless, agreed with the city, each acting in good faith and each for its own interest, that if it would pay the borrowed money for which its bonds were pledged, it would deliver to it all the bonds not negotiated, and cancel its subscription. This agreement was consummated. *Held*, that the transaction was valid, and not beyond the power of the contracting parties. *New Albany v. Burke*, 11 Wall., 102.

§ 1141. Guaranty by railroad company of interest on county bonds — Intention — Original undertaking.— A railway company wishing to obtain money on bonds of a county indorsed thereon an agreement to guaranty to the bearer of the bond the punctual payment of the interest thereon as it may fall due at the time and place specified. *Held*, that the intention of the parties is to govern, and as that evidently was to guaranty the prompt payment of the interest so as to assist the negotiability of the bond, and that as the contract is an original undertaking both by the laws of Ohio, where it was made, and of New York, where it was to be executed, no suit was necessary against the county before bringing suit on the guaranty. *Evans v. Cleveland & Pittsburgh R'y Co.*,* 2 Pittsb. R., 435.

§ 1142. Construction of a contract under which city bonds were delivered to a construction company.— By a contract between the city of Winona and the Minnesota Railway Construction Company, bearing date April 23, 1870, under which the bonds of the former were delivered to the latter, the company stipulated that within three years from that date it would build, equip and put in operation in its own name, or that of its successors and assigns, or of the St. Paul & Chicago Railway Company, a good and substantial railway from St. Paul to Winona (excepting a bridge across the Mississippi river at Hastings), and connect at Winona by bridge or ferry with the La Crosse, Trempealeau & Prescott Railroad; that a part of said railway between certain points specifically mentioned should be completed and put in operation within one year; and that the La Crosse, Trempealeau & Prescott Railroad, from its terminus opposite Winona, should be put in operation to a point on the Milwaukee & St. Paul Railway east of north La Crosse within the year 1870. It was only by performing the stipulated conditions within the designated periods that the company could acquire a valid title to these evidences of indebtedness. In no case was any part of them to be delivered until a truss railroad bridge should be constructed across the Mississippi river at Winona, connecting the St. Paul & Chicago Railway, or the Winona & St. Peter Railroad, with the La Crosse, Trempealeau & Prescott Railroad, at the then terminus of the latter. The depository, in whose hands the bonds and coupons were placed, delivered them to the construction company March 27, 1872, after the road had been built from St. Paul to the western limits of Winona, and its track connected there with that of the Winona & St. Peter Railroad. The liability of the city to pay these coupons was denied chiefly upon the ground that there was not such a compliance with the contract by the construction company as would entitle it to the possession of them. At the date of the contract, the construction company had agreed with the St. Paul & Chicago Company to construct and equip its road between Chicago and St. Paul, and obtain the necessary right of way. And it was to receive all gifts and aids that might be given toward the construction of the projected road. The railroad company sold its road January 3, 1872, to the Milwaukee & St. Paul Railway Company. It was held that the latter was the successor of the construction company within the meaning of the contract. That part of the road which was to be completed within twelve months was equipped and put in operation by the Winona & St. Peter Railroad Company, under a contract with the Chicago & St. Paul Company, with the assent and approval of the construction company. And the roads and parts of roads mentioned in the contract having been respectively constructed, equipped and put in operation within the appointed time, it was held that constructing, equipping and putting in operation the road between St. Paul and Winona by the construction company, the St. Paul & Chicago Company, and the assignees of either, was in that regard a sufficient compliance with the contract. As to the connection of the road from St. Paul with the track of the St. Peter Railway within the limits of Winona, the lower court having held that a connection of the track of the last-named railway with the railroad bridge across the river at Winona — said bridge connecting with the La Crosse Railroad at the point named in the contract — was a connection by bridge or ferry within the meaning of the contract, if, after the purchase of the St. Paul & Chicago Railroad by the Milwaukee & St. Paul Railroad Company, the latter company continued to run its cars over the railroad bridge and the Winona & St. Peter Railroad within the limits of the city; an exception was taken to this holding, it being contended that building the railway from St. Paul to the western limit of Winona, and uniting it there with the Winona & St. Peter road at a point more than a mile west of the west end of the bridge connecting the latter road with the La Crosse Railroad, was not, in the just sense of the term, a connecting of the road from St. Paul by bridge with the La Crosse Railroad, within the meaning or purview of the contract. But the appellate court held that the contract was to be construed as stipulating that the contemplated connection might be made by means of the Winona & St. Peter Railroad, and that it was optional with the construction company to build the St. Paul Railway over the bridge, and form an actual conjunction with the La Crosse road, or to build it to any point in the city and make the required connection by means of the Winona & St. Peter road. *City of Winona v. Cowdrey*,* 3 Otto, 612.

§ 1143. Liquidated damages — Insolvency of company failing to perform — Payment out of proceeds of foreclosure sale.— A contract was entered into between the city of L. and a railway terminating within the city, by which it was agreed that the city should issue certain bonds to enable the railway company to complete its track, and build a bridge, and that the company should complete its track, build the bridge and locate and maintain certain car shops in the city. The contract provided further that on failure of the company to perform its agreements it should pay to the city of L. the sum of \$40,000 as liquidated damages. The company failed to perform its agreement, and, becoming insolvent, the road was sold under a mortgage. The city applied to have the \$40,000 paid to it out of the proceeds of the foreclosure sale. *Held*, that the application must be refused, and that as to the \$40,000 the

city of L. is in no better situation than other unsecured creditors of the insolvent company. *Farmers' Loan & Trust Co. v. L. C. & S. W. R'y Co.*, * 4 Fed. R., 184.

§ 1144. Issue of city bonds in aid of gas company—Guaranty by latter of principal and interest—Compliance with ordinance.—A city ordinance provided for the issuing of certain bonds in aid of a gas company, and for their delivery to the gas company, provided the company would guaranty the bonds, and assume the payment of the principal at maturity. The bonds were delivered, and the president of the company wrote across each bond the agreement to pay the principal and interest when due. *Held*, that the just inference from the city ordinance was that the company were to guaranty interest as well as principal, and that the language used by the company in guarantying the payment was a substantial compliance with the ordinance. *New Orleans v. Clark*, 5 Otto, 651.

§ 1145. Contract giving right to control certain judgments, but not vesting any property in them.—Rogers purchased of Lindsey a large amount of bills of exchange on a mercantile house, of which about the sum of \$20,000 was unpaid, and the bills protested. Subsequently a settlement was made with the firm, and payment received in several promissory notes, all of which were indorsed by Lindsey. These notes being dishonored at maturity were duly protested, and judgments were recovered against the several parties liable thereon. Lindsey proposed to take the judgments and give his note for \$20,000 if Rogers would make a new advance to him of \$10,000. Rogers accepted this proposition, and, the judgments being in the possession of a bank, gave to Lindsey the following writing: "The president or cashier of the Planters' and Merchants' Bank will please hold subject to the order of Mr. J. G. Lindsey all the debts referred to in the inclosed letter from Mr. McFarlin," the list of debts so referred to being the judgments already mentioned. It was held that this transaction did not vest in Lindsey the property in the judgments, but only an authority to control their settlement and collection so that the proceeds might be applied in payment of the note. *Rogers v. Lindsey*, * 13 How., 441.

§ 1146. Note by one of two owners of a boat in name of both—Sale by one to the other, and agreement by latter to pay the debts.—A. and B. were owners of a steamboat, the one owning three-fourths and the other one-fourth. They were not partners, never had any partnership name for transacting the business of their boat, and were not accustomed to sign notes for each other. A. gave a note in the name of both for a balance due by the boat and the owners for the non-delivery of goods. B. was aware of the making of the note and the consideration for which it was given, and made no objection. B. afterwards bought A.'s share and agreed to pay the "debts and liabilities of the boat." It was held that B. was liable for the debt. *Newell v. Nixon*, * 4 Wall., 572.

§ 1147. Contract for the sale of pine land and building a mill—Parol modification—Lien for advances.—S. contracted in writing with B. to sell him certain pine lands at a specified price per acre, and the pine on certain other lands at a certain price per thousand feet of stumpage. B. agreed to build on one of the forty acre tracts, to be selected by him, a mill worth at least \$9,000. S. agreed to convey to B. the tract on which the mill should be built, but B. was to have the privilege of mortgaging the mill tract to some third party for \$6,500, and was to give S. a second mortgage thereon to secure the performance of the contract. By exhibiting his contract to H., B. secured advances from him to aid him in building the mill, and after the mill was built gave H. a deed of the mill tract as security. After the contract was made with S. the parties thereto agreed orally that B. might build his mill on any one of three designated forty acre tracts, and that he might purchase the two at a price different from that named in the written contract. The mill was built on one of the three tracts designated, but was never conveyed by S. to B. In an action by H. to declare and enforce his lien it was held, (1) That the parol modification did not affect B.'s right to take any forty acre tract mentioned in the contract for the mill site, whether it was one he was to buy or one from which he was simply to buy the pine. (2) That as S. had agreed to convey the mill tract to B. when the mill should be built, equity would consider the conveyance as having been made, and would give H. a lien for his advances thereon to the amount of \$6,500, as against S. (3) That as H. had made the advances upon the strength of the contract between S. and B., no subsequent parol modifications of the contract without his knowledge could affect his equities under the contract, whether made before or after he made advances. *Hubbard v. Bellew*, * 10 Fed. R., 849.

§ 1148. Contract by telegraph company with operators of a railroad to furnish a wire for the use of the latter—Sale—Assignment of railroad.—A telegraph company and a state which owned a railroad entered into a contract which provided that the telegraph company should put up a wire on its poles for the exclusive use of the railroad; that it should provide and furnish all necessary batteries and instruments for use in the stations, and should connect them with the wires; that the railroad should have the exclusive use of such wire and instruments, and that the state should pay the company the cost of the wire, in-

struments and connections, and also a certain rate for messages over connecting lines. *Held*, that this contract did not constitute a sale to the state of such wire and instruments, but merely a contract for their exclusive use; also that the assignee of such railroad takes under the contract only the rights of the state. *Western Union Tel. Co. v. Western & Atlantic R'y Co.*, 1 Otto, 299.

§ 1149. Sale of province of Maryland — Contract complete — Vesting of the estate. — During the American Revolution, the heirs and representatives of the proprietor of Maryland entered into an agreement by which, on certain payments to be made to two of the heirs by H., the proprietorship of the province should vest in him; and that, in case he should be restored to the province by the success of the British arms, then he should pay an additional sum to each of such heirs. The agreement further provided that it should be contingent upon its ratification by act of parliament and the royal signature, and such ratification and signature were procured and the first payments made. *Held*, that the contract was complete and binding, being made by British subjects in England, and that as the estate vested on the making of the first payments, and the parties contracted with full knowledge of the declaration of independence by the province, the subsequent payments were not necessary to the completion and fulfillment of the contract. *Cassell v. Carroll*, 11 Wheat., 143.

§ 1150. Sale of lumber — Payment in note and lands — Independent stipulations. — By the terms of a written agreement G. agreed to furnish O. with lumber to the amount of \$10,000, and O. was to give therefor certain lands and a note due on February 15, 1819. One-half of the lumber was to be delivered in 1818, and the balance as required in 1819. Delivery was made up to February 15, 1819, when O. promised to pay in April, and G. extended the time to that date. The note not being then paid, G. refused to deliver any more lumber. The amount of lumber delivered being less than the value of the property conveyed, an action was brought against G. for the balance. *Held*, that the non-payment of O.'s note was no defense. O. had performed his part of the contract, and the conditions could not be held to be mutual and dependent. From the very nature of the case the payment of the note could not be a condition precedent, for the lumber might all have been demanded before the 15th of February, 1819. Where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other. *Held*, also, that the parol enlargement of the time for the payment of the note could not change the nature of the original agreement. *Goldsborough v. Orr*, 8 Wheat., 220.

§ 1151. Agreement as to the fixing of price by referees. — The parties to a contract for the sale of land agreed that each party should choose a man to fix a price for the land, and that if they should disagree they should call in a third, who, together with the other two, should agree on a price for the land. The two having disagreed, they called in a third, who, with one of the others, fixed a price. *Held*, that the price thus fixed was binding on the parties, and that the intention of the parties evidently was that the price should be fixed by two of them if a third was called in, and that any other construction would defeat the intention of the parties, which obviously was that the price was to be fixed at all events. *Hobson v. M'Arthur*, 16 Pet., 192.

§ 1152. Ratification by purchaser at foreclosure sale of the contract of the mortgagor. — A railway company, after a mortgage upon its property was given, contracted with a telegraph company to give it the exclusive right to maintain a line upon its right of way. The mortgage was foreclosed and the road sold. The purchaser continued to use the telegraph lines in the same manner as before and by its acts ratified the contract. *Held*, that the rights of the telegraph company were not affected by the foreclosure and sale. *Western Union Tel. Co. v. Atlantic & Pacific Tel. Co.*, 7 Biss., 370.

§ 1153. Place of shipment of goods bought held immaterial. — A contract made in St. Louis for the sale of pig iron prescribed that it should be shipped from Glasgow. *Held*, in an action for the price, that it was immaterial that it was shipped from Leith, instead of Glasgow. *Pope v. Filley*, * 3 McC., 190.

§ 1154. Sale of goods — Parol evidence — Custom — Understanding of merchants. — Where a contract for the sale of goods provided that they should be shipped "as soon as possible," parol evidence is inadmissible to vary the language so that it shall read "as soon as possible by sail," and parol proof of the custom of shipping by sail, unless steam is specified, is inadmissible, as is also proof of the understanding of the contract by merchants at the port of shipment. *Ibid*.

§ 1155. Agreement as to the purchase and sale of land. — The owners of certain land entered into a contract with J. by which he was to purchase an undivided one-half thereof for \$5,299.40, payable in four years without interest. He was to pay one-half of all taxes, etc., and was to divide the land into lots and sell the same, and deliver the proceeds to the owners till his debt to them was paid. when he was to receive a deed of his share, and he was then to go on and sell and share the proceeds equally with the former owners. *Held*, that until J. had

delivered to the owners double the said sum of \$5,292.40 he had no right to claim a moiety of the proceeds. *Buckingham v. Jackson*,* 4 Biss., 295.

§ 1156. Agreement between two to purchase the property of a third.—An agreement between two parties to purchase property of a third is at most an agreement to negotiate for the purchase of the property. It is not an agreement which can give either party a right to the property till it is consummated by purchase. *First National Bank v. Bissell*, 2 McC., 79.

§ 1157. Agreement among several to purchase or sell property on joint account.—If two or more parties agree among themselves to purchase property for their joint account, and the purchase is accordingly made by one or more of them on behalf of all, the liability of each to pay his share of the purchase money, and his right to an interest in the property, is absolute. And also if two or more persons enter into a contract with another to purchase property, and all matters are fully arranged in the agreement, the equal right of all vendees to proceed in the execution of the contract may be conceded. *Ibid.*

§ 1158. Agreement to deliver goods at any of certain ports—Failure of purchaser to elect.—By contract A. agreed to deliver to B. salt at a certain price, at any point between X. and Y., on Red river, which B. might designate. *Held*, that under the contract, if B. designated no place for the delivery of the salt, it might be made at any point between the two places mentioned. *Hartfield v. Patton*, *Hemp.*, 270.

§ 1159. Contract to deliver property upon failure of promisee to recover in a certain suit.—A. by his written contract promised to deliver certain tobacco in case property mentioned in a certain conveyance, concerning which a certain suit was pending, was not recovered by the promisee. *Held*, that the promise meant that A. should deliver the tobacco on the termination of the suit spoken of, if the property should not be recovered thereby. *Ferguson v. Harwood*, 7 Cr., 414.

§ 1160. Contract to sell a vessel held to be executory, and to pass only an equitable title. A contract which provided that N. agreed to sell and convey a vessel to K. or any one whom K. should designate, and that the vessel should be fitted out in a certain way, and that her condition should be approved by A., was held to be an executory contract, and it was held also that K. obtained only an equitable title to the vessel. *The Propeller S. C. Ives*, *Newb.*, 209.

§ 1161. Contract not vesting any interest in land.—An agreement between A. and B. concerning certain lands provided that on making certain payments within a period named B. might become equally interested in them. *Held*, that the contract did not vest in B. any interest or estate in the lands. It merely pointed out a way in which he might acquire an interest, but, not having complied with the requirements pointed out, all his right under the contract ceased. *Richardson v. Hardwick*, 16 Otto, 254.

§ 1162. Agreement for the sale of wood—Question as to the passing of title.—A., having a contract with B. for the sale of wood to the latter, borrowed money of C. to enable him to get it out. After getting out some of the wood A. and C. entered into an agreement by which the time of payment on the loan was extended, an additional sum was loaned, and C. agreed to receive in return therefor a certain quantity of wood, provided B. would buy it of him at the price which he allowed A. B.'s assent being procured, A. delivered the wood on B.'s premises, but B. did not accept it, and it was levied on by creditors of A. *Held*, that under the contract the title of the wood on its being delivered on B.'s premises passed at once to C. *National Bank v. Dayton*, 12 Otto, 60.

§ 1163. Notes for purchase money delivered to third person until the vendor makes the title good.—Parties to a sale of personal property by an agreement in writing stipulated that certain notes given for the purchase price should be delivered to a third party, and if the vendor should make good title to the property, which was then claimed by V., then the notes should be delivered to him, but if otherwise, delivered back to the vendee. *Held*, that this agreement was a special warranty against the claims of V., and that the purpose of the parties in depositing the notes with a third party was to prevent their negotiation before maturity, and thereby save the defendant any defense he might have against their payment growing out of the failure of consideration or breach of warranty. Any other construction destroys the mutuality and the reciprocal character of the agreement, and places it in the power of the vendee to postpone indefinitely the payment of the notes. *Cheatham v. Wilbur*,* 1 Dak. T'y., 344.

§ 1164. Purchase of stock and agreement to pay par value and dividends earned up to a certain date—Executory.—A contract was made to purchase bank stock at par and to pay in addition thereto such sums as the stock should have earned in dividends up to the time of purchase, estimated at three per cent. *Held*, that as to the dividends the contract remained executory, even after payment of the par value and the three per cent. advance, and that if the stocks earned no dividends, then the three per cent. paid could be recovered back. *Riggs v. Tayloe*, 2 Cr. C. C., 692.

§ 1165. **Promise by grantee to indemnify grantor and pay certain debts of the latter—Alternative contract.**—An agreement by a person to whom property has been conveyed, to indemnify the grantor and pay certain debts which he owes, must be construed to be not an agreement to do one or the other, but an agreement to indemnify by paying the debts as agreed. *Hood v. Spencer*, 4 McL., 172.

§ 1166. **Agreement to sell goods on commission—Statute of frauds.**—A. wrote to B. offering to sell his goods for a commission of ten per cent., provided the arrangement could be made for two years. B. replied by letter that he would give him seven and a half per cent. on all goods he should sell and on all trade he could make for B. A. thereupon proceeded to obtain orders for B.'s goods, which the latter filled. A. did not devote himself exclusively to the sale of B.'s goods, but sold goods of the same kind for other parties. A. terminated the agreement and B. sued for the balance of commissions. *Held*, (1) that the agreement was not within the statute of frauds, because the letters of the parties constitute a contract in writing; (2) that A. was not bound to devote himself exclusively to the sale of B.'s goods; and (3) that A. was entitled to commissions on all sales made through his influence, whether made by him in person or not. *Norton v. The American Ring Co.*, * 1 Fed. R., 684.

§ 1167. **Contract for sale of canal boat and shipment of engine.**—M., the master of a canal boat, agreed with B., the owner of an engine, that he would sell him the canal boat and carry his engine from Philadelphia to New York for \$1,000. On arrival of the boat at New York M. was unable to make a good legal title to the boat, and refused to deliver the engine till B. should pay freight; but the court held that B. was entitled to the engine free of any charge of freight. *Canal Boat Excelsior*, * 2 Ben., 434.

§ 1168. **Limitations as to time and place of payment—Note given for the original consideration.**—It seems that limitations in a contract as to the time and place of payment govern in a suit on the original consideration, though a note has been given therefor; but where there is no proof as to these conditions, they are supposed to be the same as those mentioned in the note. *Brown v. Noyes*, 2 Woodb. & M., 83.

§ 1169. **Manufacture of cars for railroad company—Title remaining in vendor till payment—Mortgage.**—A. sold cars to a railway company with the agreement that they were to remain his property till fully paid for. Prior to such contract with A. the railway company had mortgaged all its property, and all its to be acquired property. *Held*, that the lien of the mortgage did not attach to the cars, and that his claim for payment was not subordinate to the lien of the mortgage. *Fosdick v. Schall*, 9 Otto, 249; *Fosdick v. Car Co.*, id., 256.

§ 1170. **Contract to do work and receive pay in bonds—Loan—Usury.**—A canal company in embarrassed circumstances made a contract with V. by which he was to do certain work, and receive in payment certain bonds of the company, which in terms provided that they were a lien on the property of the company, and it was agreed that if the bonds were not delivered paid, V. might have a receiver appointed. *Held*, that though the work was only estimated to cost one-half of the face of the bonds, and though the company, in an action for the appointment of a receiver, charged that the arrangement with V. was only a cover for a loan, and that having made one hundred per cent. profit the transaction was usurious, yet the court held that as there was no loan there could be no usury, and that as no fraud or overreaching was shown the contract was valid and would be enforced as made. *White Water Valley Co. v. Vallette*, 21 How., 420.

§ 1171. — **foreclosure of mortgage upon road—Renting of cars by receiver.**—A., a manufacturer of cars, contracted with a railroad company to sell it a certain number of cars on credit, and the contract provided that until paid for the cars were to remain the property of A. Before the contract the company had mortgaged all its property and all its to be acquired property. The mortgagee having brought suit to foreclose, a receiver was appointed. Needing the cars to operate the road, the receiver agreed to pay A. a certain rent therefor, which was paid. A. finally intervened in the suit, as the mortgagee claimed the cars. The property was sold, except the cars, and A. applied to the court for the rent of the cars from the time of sale up to the time when rent was paid by the receiver, to be paid out of the fund in court. *Held*, that the cars were subject to be reclaimed by A.; that the lien of the mortgage did not attach to them; that it was proper for the receiver to rent the cars, but that A. could not recover rent from the time of sale up to that time, and that he had no lien on the fund in court, for as to it he was only a general creditor. *Fosdick v. Schall*, 9 Otto, 249.

6. *Conflict of Laws. Lex Loci Contractus.*

SUMMARY — *Bond made in New York in reference to a matter pending in Louisiana*, § 1172.— *Judgment and execution*, § 1173.— *Marriage contracts*, § 1174.— *Rate of interest*, § 1175.— *Contract to be partly performed in different states*, § 1176.— *Sales of goods*, § 1177.— *Repayment of advances; par of exchange*, § 1178.— *Suit for a debt payable in another country*, § 1179.— *Money advanced to be paid in another state*, § 1180.

§ 1172. In any forum a contract is governed by the law with a view to which it was made. So in a suit upon a bond to save defendant harmless from an appeal bond upon which he was surety, said appeal bond having been filed in a suit pending in Louisiana, but the bond itself executed in New York, it was held that the bond sued on was made with reference to Louisiana as the place for its fulfillment; and that the validity of its consideration must be determined by the law of that state. *Pritchard v. Norton*, §§ 1181-87.

§ 1173. The laws of the place where judgment is given control the execution which issues on that judgment, although the contract on which the judgment was recovered was made in another state. *Mathuson v. Crawford*, §§ 1188-89.

§ 1174. It seems that the law of the place of performance determines the validity of a marriage contract, and, held, that the place where the parties are to be domiciled is the place of performance. So, where defendant, a citizen of Mobile, Alabama, and his mother's half-sister became engaged to be married while the latter was temporarily visiting Mobile, and both parties intended that the marriage ceremony should be performed in New York, the plaintiff's home, but defendant failed to keep his promise, in an action for the breach the jury were instructed that while the parties could not lawfully marry in Alabama, and their promises to marry would be void, yet they could lawfully marry in New York, and if by the terms of their promises the promises were to be fulfilled by a marriage in New York, then the promises were valid. Held, that these instructions were erroneous. *Campbell v. Crampton*, §§ 1190-94.

§ 1175. A citizen of one state may loan money to a citizen of another state, and contract for the rate of interest allowed by the law of the latter, although the place of payment is elsewhere. So where a citizen of New York loaned money to a citizen of Nebraska at a rate of interest allowed by the laws of that state, but forbidden by the laws of New York, which loan was secured by mortgage on Nebraska lands, and payment was made in New York, it was held that the contract was to be governed by the laws of Nebraska and was valid. *Kellogg v. Miller*, §§ 1195-98.

§ 1176. A contract made in one state, to be partly performed there and partly in other states, is governed by the law of the place where it is made. So where a contract, relating to railroad and steamboat property in the Gulf States, was made in New York, and was to be partly performed in New York and partly in the different states where the property was situated, it was held that the contract was to be governed by the law of New York. *Morgan v. New Orleans, etc., R. Co.*, §§ 1199-1202.

§ 1177. Sales of goods are to be accounted for at the place where they are made or are authorized to be made. *Grant v. Healey*, §§ 1203-1206.

§ 1178. The plaintiffs at Trieste, Austria, advanced money to the defendants at Boston, in consideration of which the defendants shipped a cargo from Boston to the plaintiffs at Trieste for sale. The cargo failed to bring the amount of the advance, and the plaintiffs having sued the defendants for the balance and recovered a verdict against them, the court held that as the advance was made in Boston the implied contract was that it should be repaid in Boston, and that the plaintiffs were entitled to the balance due at the par of exchange, and not at the actual rate of exchange between Boston and Trieste at the time of the verdict. *Ibid.*

§ 1179. Whenever a debt is made payable in one country, and is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay. *Ibid.*

§ 1180. Where money is advanced for a person in another country, the implied understanding is to replace it in the country where it is advanced, unless that conclusion is repelled by the agreement of parties or other controlling circumstances. *Ibid.*

[NOTES.—See §§ 1207-1299.]

PRITCHARD v. NORTON.

(16 Otto, 124-141. 1882.)

ERROR to U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—Action on an indemnity bond, executed by defendant and another, to save harmless plaintiff's intestate as surety on an appeal bond for a railroad corporation. The suit in which the appeal bond was filed was in a court of the state of Louisiana. The defense was that the bond sued on was executed in New York, and was without consideration, and for that reason was void, by the law of that state. The court below charged the jury that the consideration and validity of the bond depended on the law of New York, and not on that of Louisiana, and that by that law it was competent to inquire into the consideration of the bond. There was judgment for the defendant, and a writ of error sued out by plaintiff.

Opinion by MR. JUSTICE MATTHEWS.

It is claimed on behalf of the plaintiff that by the law of Louisiana the pre-existing liability of Pritchard as surety for the railroad company would be a valid consideration to support the promise of indemnity, notwithstanding his liability had been incurred without any previous request from the defendant. This claim is not controverted, and is fully supported by the citations from the Civil Code of Louisiana of 1870, arts. 1893-1960, and the decisions of the supreme court of that state. *Flood v. Thomas*, 5 Mart., N. S. (La.), 560; *N. O. Gas Co. v. Paulding*, 12 Rob. (La.), 378; *N. O. & Carrollton R. Co. v. Chapman*, 8 La. Ann., 98; *Keane v. Goldsmith*, 12 id., 560. In the case last mentioned it is said that "the contract is, in its nature, one of personal warranty, recognized by articles 378 and 379 of the Code of Practice." And it was there held that a right of action upon the bond of indemnity accrued to the obligee when his liability became fixed as surety by a final judgment, without payment on his part, it being the obligation of the defendants upon the bond of indemnity to pay the judgment rendered against him, or to furnish him the money with which to pay it.

The single question presented by the record, therefore, is whether the law of New York or that of Louisiana defines and fixes the rights and obligations of the parties. If the former applies, the judgment of the court below is correct; if the latter, it is erroneous. The argument in support of the judgment is simple, and may be briefly stated. It is that New York is the place of the contract, both because it was executed and delivered there, and because no other place of performance being either designated or necessarily implied, it was to be performed there; wherefore the law of New York, as the *lex loci contractus*, in both senses, being *lex loci celebrationis* and *lex loci solutionis*, must apply to determine not only the form of the contract, but also its validity.

On the other hand, the application of the law of Louisiana may be considered in two aspects: as the *lex fori*, the suit having been brought in a court exercising jurisdiction within its territory and administering its laws; and as the *lex loci solutionis*, the obligation of the bond of indemnity being to place the fund for payment in the hands of the surety, or to repay him the amount of his advance, in the place where he was bound to discharge his own liability. It will be convenient to consider the applicability of the law of Louisiana, first as the *lex fori*, and then as the *lex loci solutionis*.

§ 1181. *Procedure is determined by the law of the forum; rights of parties under the substance of the contract by the law of the contract.*

1. The *lex fori*. The court below, in a cause like the present, in which its jurisdiction depends on the citizenship of the parties, adjudicates their rights precisely as should a tribunal of the state of Louisiana according to her laws; so that, in that sense, there is no question as to what law must be administered. But in case of contract, the foreign law may, by the act and will of the parties, have become part of their agreement; and in enforcing this, the law of the forum may find it necessary to give effect to a foreign law, which, without such adoption, would have no force beyond its own territory. This, upon the principle of comity, for the purpose of promoting and facilitating international intercourse, and within limits fixed by its own public policy, a civilized state is accustomed and considers itself bound to do; but in doing so, nevertheless adheres to its own system of formal judicial procedure and remedies. And thus the distinction is at once established between the law of the contract, which may be foreign, and the law of the procedure and remedy, which must be domestic and local. In respect to the latter the foreign law is rejected; but how and where to draw the line of precise classification it is not always easy to determine.

The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract.

§ 1182. — *authorities examined, and discussion of the principle.*

The rule deduced by Mr. Wharton, in his Conflict of Laws, as best harmonizing the authorities and effecting the most judicious result, and which was cited approvingly by Mr. Justice Hunt in *Scudder v. Union Nat. Bank*, 91 U. S., 406, is that "obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law." This, it will be observed, extends the operation of the *lex fori* beyond the process and remedy, so as to embrace the whole of that residuum which cannot be referred to other laws. And this conclusion is obviously just; for whatever cannot, from the nature of the case, be referred to any other law, must be determined by the tribunal having jurisdiction of the litigation, according to the law of its own locality.

Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum; but whether the foreign assignment on which the plaintiff claims is valid at all, or whether it is valid against the defendant, goes to the merits and must be decided by the law in which the case has its legal seat. Wharton, Conflict of Laws, secs. 735, 736. Upon that point Judge Kent, in *Lodge v. Phelps*, 1 Johns. Cas. (N. Y.), 139, said: "If the defendant has any defense authorized by the law of Connecticut, let him show it, and he will be heard in one form of action as well as in the other."

It is to be noted, however, as an important circumstance, that the same claim may sometimes be a mere matter of process, and so determinable by the law of

the forum, and sometimes a matter of substance going to the merits, and therefore determinable by the law of the contract. That is illustrated in the application of the defense arising upon the statute of limitations. In the courts of England and America, that defense is governed by the law of the forum, as being a matter of mere procedure; while in continental Europe the defense of prescription is regarded as going to the substance of the contract, and therefore as governed by the law of the seat of the obligation. "According to the true doctrine," says Savigny, "the local law of the obligation must determine as to the term of prescription, not that of the place of the action; and this rule, which has just been laid down in respect to exceptions in general, is further confirmed, in the case of prescription, by the fact that the various grounds on which it rests stand in connection with the substance of the obligation itself." Private Inter. Law, by Guthrie, 201. In this view Westlake concurs. Private Inter. Law (ed. 1858), sec. 250. He puts it, together with the case of a merger in another cause of action, the occurrence of which will be determined by the law of the former cause (*Bryans v. Dunseth*, 1 Mart., N. S. (La.), 412), as equal instances of the liability to termination inherent by the *lex contractus*. But notwithstanding the contrary doctrine of the courts of England and this country, when the statute of limitations of a particular country not only bars the right of action, but extinguishes the claim or title itself, *ipso facto*, and declares it a nullity, after the lapse of the prescribed period, and the parties have been resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case, it must be held, as it was considered by Mr. Justice Story, to be an extinguishment of the debt, wherever an attempt might be made to enforce it. Conflict of Laws, sec. 582. That rule, as he says, has in its support the direct authority of this court in *Shelby v. Guy*, 11 Wheat., 361-371; its correctness was recognized by Chief Justice Tindal in *Huber v. Steiner*, 2 Bing. N. C., 202, 211; and it is spoken of by Lord Brougham in *Don v. Lippmann*, 5 Cl. & F., 1, 16, as "the excellent distinction taken by Mr. Justice Story." *Walworth v. Routh*, 14 La. Ann., 205. The same principle was applied by the supreme court of Ohio in the case of *The P. C. & St. L. R'y Co. v. Hine*, 25 Ohio St., 629, where it was held that under the act which requires compensation for causing death by wrongful act, neglect or default, and gives a right of action provided such action shall be commenced within two years after the death of such deceased person, the proviso is a condition qualifying the right of action, and not a mere limitation on the remedy. *Bonte v. Taylor*, 24 id., 628.

The principle that what is apparently mere matter of remedy in some circumstances, in others, where it touches the substance of the controversy, becomes matter of right, is familiar in our constitutional jurisprudence in the application of that provision of the constitution which prohibits the passing by a state of any law impairing the obligation of contracts. For it has been uniformly held that "any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution." *McCracken v. Hayward*, 2 How., 608, 612 (Const., §§ 1656-58); *Cooley*, Const. Lim., 285. Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving only those which

are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice. Cooley, Const. Lim., 362-369.

The general rule, as stated by Story, is that a defense or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated. Conflict of Laws, sec. 331. Thus infancy, if a valid defense by the *lex loci contractus*, will be a valid defense everywhere. Thompson v. Ketcham, 8 Johns. (N. Y.), 189; Male v. Roberts, 3 Esp., 163. A tender and refusal, good by the same law, either as a full discharge or as a present fulfillment of the contract, will be respected everywhere. Warder v. Arell, 2 Wash. (Va.), 282. Payment in paper-money bills, or in other things, if good by the same law, will be deemed a sufficient payment everywhere. 1 Brown, Ch., 376; Searight v. Calbraith, 4 Dal., 325; Bartsch v. Atwater, 1 Conn., 409. And, on the other hand, where a payment by negotiable bills or notes is, by the *lex loci*, held to be conditional payment only, it will be so held even in states where such payment under the domestic law would be held absolute. So, if by the law of the place of a contract equitable defenses are allowed in favor of the maker of a negotiable note, any subsequent indorsement will not change his rights in regard to the holder. The latter must take it *cum onere*. Evans v. Gray, 12 Mart. (La.), 475; Ory v. Winter, 4 Mart., N. S. (La.), 277; Chartres v. Cairnes, id., 1; Story, Conflict of Laws, sec. 332.

§ 1183. *Lex fori determines form of action. Authorities examined.*

On the other hand the law of the forum determines the form of the action, as whether it shall be *assumpsit*, covenant or debt. Warren v. Lynch, 5 Johns. (N. Y.), 239; Andrews v. Herriot, 4 Cow. (N. Y.), 508; Trasher v. Everhart, 3 Gill & J. (Md.), 234; Adams v. Kers, 1 Bos. & Pull., 360; Bank of United States v. Donnally, 8 Pet., 361; Douglas v. Oldham, 6 N. H., 150. In Le Roy v. Beard, 8 How., 451, where it was held that *assumpsit* and not covenant was the proper form of action brought in New York upon a covenant executed and to be performed in Wisconsin, and by its laws sealed as a deed, but which in the former was not regarded as sealed, it was said by this court that it was so decided "without impairing at all the principle, that, in deciding on the obligation of the instrument as a contract, and not the remedy on it elsewhere, the law of Wisconsin, as the *lex loci contractus*, must govern." It regulates all process, both mesne and final. Ogden v. Saunders, 12 Wheat., 213 (Constr., §§ 1940-2003); Mason v. Haile, id., 370; Beers v. Houghton, 9 Pet., 329; Von Hoffman v. City of Quincy, 4 Wall., 535 (Constr., §§ 1877-82). It also may admit, as a part of its domestic procedure, a set-off or compensation of distinct causes of action between the parties to the suit, though not admissible by the law of the place of the contract. Story, Conflict of Laws, sec. 574; Gibbs v. Howard, 2 N. H., 296; Ruggles v. Keeler, 3 Johns. (N. Y.), 263. But this is not to be confounded, as it was in the case of Second National Bank of Cincinnati v. Hemingray, 31 Ohio St., 168, with that of a limited negotiability, by which the right of set-off between the original parties is preserved as part of the law of the contract, notwithstanding an assignment. The rules of evidence are also supplied by the law of the forum. Wilcox v. Hunt, 13 Pet., 378; Yates v. Thompson, 3 Cl. & Fin., 544; Bain v. Whitehaven, etc., R'y Co., 3 H. of L. Cas., 1; Don v. Lippmann, 5 Cl. & Fin., 1. In Yates v. Thompson, *supra*, it was decided by the house of lords that in a suit in a Scotch court, to adjudge the succession to personalty of a decedent domiciled in England, where

it was admitted that the English law governed the title, nevertheless it was proper to receive in evidence, as against a will of the decedent, duly probated in England, a second will which had not been proved there and was not receivable in English courts as competent evidence, because such a paper according to Scottish law was admissible. In *Hoadley v. Northern Transp. Co.*, 115 Mass., 304, it was held that if the law of the place, where a contract signed only by the carrier is made for the carriage of goods, requires evidence other than the mere receipt by the shipper to show his assent to its terms, and the law of the place where the suit is brought presumes conclusively such assent from acceptance without dissent, the question of assent is a question of evidence and is to be determined by the law of the place where the suit is brought. In a suit in Connecticut against the indorser on a note made and indorsed in New York, it was held that parol evidence of a special agreement, different from that imputed by law, would be received in defense, although by the law of the latter state no agreement different from that which the law implies from a blank indorsement could be proved by parol. *Downer v. Cheseborough*, 36 Conn., 39. And upon the same principle it has been held that a contract, valid by the laws of the place where it is made, although not in writing, will not be enforced in the courts of a country where the statute of frauds prevails, unless it is put in writing. *Leroux v. Brown*, 12 C. B., 801. But where the law of the forum and that of the place of the execution of the contract coincide, it will be enforced, although required to be in writing by the law of the place of performance, as was the case of *Scudder v. Union National Bank*, 91 U. S., 406, because the *form* of the contract is regulated by the law of the place of its celebration, and the *evidence* of it by that of the forum.

Williams v. Hainca, 27 Ia., 251, was an action upon a note executed in Maryland, and, so far as appears from the report, payable there, where the parties thereto then resided, and which was a sealed instrument, according to the laws of that state, in support of which those laws conclusively presumed a valid consideration. By the laws of Iowa, to such an instrument the want of consideration was allowed to be proved as a defense. It was held by the supreme court of that state, in an opinion delivered by Chief Justice Dillon, that the law of Iowa related to the remedy merely, without impairing the obligation of the contract, and, as the *lex fori*, must govern the case. He said: "Respecting what shall be good defenses to actions in this state, its courts must administer its own laws and not those of other states. The common law rules do not so inhere in the contract as to have the portable quality ascribed to them by the plaintiff's counsel, much less can they operate to override the plain declaration of the legislative will." The point of this decision is incorporated by Mr. Wharton into the text of his *Treatise on the Conflict of Laws*, sec. 788, and the case itself is referred to in support of it. He deduces the same conclusion from those cases, already referred to, which declare that *assumpsit* is the only form of action that can be brought upon an instrument which is not under seal, according to the laws of the forum, although by the law of the place where it was executed, or was to be performed, it would be regarded as under seal, in which debt or covenant would lie, on the ground that a plea of want or failure of consideration is recognized as a defense in all actions of *assumpsit*. Wharton, *Conflict of Laws*, sec. 747.

§ 1184. *The question of consideration is one of substance, and is determined by the law of the seat of the obligation.*

If the proposition be sound, its converse is equally so; and the law of the

place where a suit may happen to be brought may forbid the impeachment of a contract, for want of a valid consideration, which, by the law of the place of the contract, might be declared invalid on that account. We cannot, however, accept this conclusion. The question of consideration, whether arising upon the admissibility of evidence or presented as a point in pleading, is not one of procedure and remedy. It goes to the substance of the right itself, and belongs to the constitution of the contract. The difference between the law of Louisiana and that of New York, presented in this case, is radical, and gives rise to the inquiry, what, according to each, are the essential elements of a valid contract, determinable only by the law of its seat; and not that other, what remedy is provided by the law of the place where the suit has been brought to recover for the breach of its obligation.

On this point what was said in *The Gaetano & Maria*, 7 P. D., 137, is pertinent. In that case the question was whether the English law, which was the law of the forum, or the Italian law, which was the law of the flag, should prevail, as to the validity of a hypothecation of the cargo by the master of a ship. It was claimed that because the matter to be proved was, whether there was a necessity which justified it, it thereby became a matter of procedure, as being a matter of evidence. Lord Justice Brett said: "Now, the manner of proving the facts is matter of evidence, and, to my mind, is matter of procedure, but the facts to be proved are not matters of procedure; they are matters with which the procedure has to deal."

§ 1185. *A contract is governed by that law with a view to which it is made. Authorities reviewed.*

It becomes necessary, therefore, to consider the applicability of the law of Louisiana as — 2. *The lex loci solutionis.*

The phrase *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat., 1, 48, where he defined it as a principle of universal law,—"The principle that in every forum a contract is governed by the law with a view to which it was made." The same idea had been expressed by Lord Mansfield in *Robinson v. Bland*, 2 Burr., 1077, 1078. "The law of the place," he said, "can never be the rule where the transaction is entered into with an *express* view to the law of another country, as the rule by which it is to be governed." And in *Lloyd v. Guibert*, Law Rep., 1 Q. B., 115, 120, in the court of exchequer chamber, it was said that "It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, by what general law it is just to presume that they have submitted themselves in the matter." *Le Breton v. Miles*, 8 Paige (N. Y.), 261.

It is upon this ground that the presumption rests that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention. So, Phillimore says: "It is always to be remembered that in obligations it is the will of the contracting parties, and

not the law, which fixes the place of fulfillment — whether that place be fixed by *express words* or by *tacit implication* — as the place to the jurisdiction of which the contracting parties elected to submit themselves.” 4 Int. Law, 469. The same author concludes his discussion of the particular topic as follows: “As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted, either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements.” 4 Int. Law, sec. DCLIV, pp. 470, 471.

This rule, if universally applicable, which perhaps it is not, though founded on the maxim *ut res magis valeat, quam pereat*, would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld. At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent. It was expressly referred to as a decisive principle in *Bell v. Packard*, 69 Me., 105, although it cannot be regarded as the foundation of the judgment in that case. *Milliken v. Pratt*, 125 Mass., 374. If now we examine the terms of the bond of indemnity, and the situation and relation of the parties, we shall find conclusive corroboration of the presumption that the obligation was entered into in view of the laws of Louisiana.

§ 1186. *A liability contracted in Louisiana, to be discharged there, is governed by the law of that state, and so are subsidiary and auxiliary obligations.*

The antecedent liability of Pritchard, as surety for the railroad company on the appeal bond, was confessedly contracted in that state, according to its laws, and it was there alone that it could be performed and discharged. Its undertaking was that Pritchard should, in certain contingencies, satisfy a judgment of its courts. That could be done only within its territory and according to its laws. The condition of the obligation, which is the basis of this action, is, that McComb and Norton, the obligors, shall hold harmless and fully indemnify Pritchard against all loss or damage arising from his liability as surety on the appeal bond. A judgment was, in fact, rendered against him on it in Louisiana. There was but one way in which the obligors in the indemnity bond could perfectly satisfy its warranty. That was, the moment the judgment was rendered against Pritchard on the appeal bond, to come forward in his stead, and, by payment, to extinguish it. He was entitled to demand this before any payment by himself, and to require that the fund should be forthcoming at the place where otherwise he could be required to pay it. Even if it should be thought that Pritchard was bound to pay the judgment recovered against himself, before his right of recourse accrued upon the bond of indemnity, nevertheless he was entitled to be reimbursed the amount of his advance at the same place where he had been required to make it. So that it is clear, beyond any doubt, that the obligation of the indemnity was to be fulfilled in Louisiana, and consequently, is subject, in all matters affecting its construction and validity, to the law of that locality.

§ 1187. — *authorities cited.*

This construction is abundantly sustained by the authority of judicial decisions in similar cases. In *Irvine v. Barrett*, 2 Grant's (Pa.) Cas., 73, it was decided that where a security is given in pursuance of a decree of a court of

justice, it is to be construed according to the intention of the tribunal which directed its execution, and, in contemplation of law, is to be performed at the place where the court exercises its jurisdiction; and that a bond given in another state, as collateral to such an obligation, is controlled by the same law which controls the principal indebtedness. In the case of *Penobscot & Kennebec Railroad Co. v. Bartlett*, 12 Gray (Mass.), 241, the supreme judicial court of Massachusetts decided that a contract made in that state to subscribe to shares in the capital stock of a railroad corporation established by the laws of another state, and having their road and treasury there, is a contract to be performed there, and is to be construed by the laws of that state. In *Lanusse v. Barker*, 3 Wheat., 101, 146, this court declared that "where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place."

The case of *Cox v. United States*, 6 Pet., 172, was an action upon the official bond of a navy agent. The sureties contended that the United States were bound to divide their action and take judgment against each surety only for his proportion of the sum due, according to the laws of Louisiana, considering it a contract made there, and to be governed in this respect by the law of that state. The court, however, said: "But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the treasury department at the seat of government; and the navy agent is bound by the very terms of the bond to pay over such sum as may be found due to the United States on such settlement; and such paying over must be to the treasury department, or in such manner as shall be directed by the secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the city of Washington, and the liability of the parties must be governed by the rules of the common law." This decision was repeated in *Duncan v. United States*, 7 Pet., 435.

These cases were relied on by the supreme court of New York in *Commonwealth of Kentucky v. Bassford*, 6 Hill (N. Y.), 526. That was an action upon a bond executed in New York conditioned for the faithful performance of the duties enjoined by a law of Kentucky authorizing the obligees to sell lottery tickets for the benefit of a college in that state. It was held that the stipulations of the bond were to be performed in Kentucky, and that, as it was valid by the laws of that state, the courts of New York would enforce it, notwithstanding it would be illegal in that state.

Boyle v. Zacharie, 6 Pet., 635, is a direct authority upon the point. There Zacharie and Turner were resident merchants at New Orleans, and Boyle at Baltimore. The latter sent his ship to New Orleans consigned to Zacharie and Turner, where she arrived, and, having landed her cargo, the latter procured a freight for her to Liverpool. When she was ready to sail she was attached by process of law at the suit of certain creditors of Boyle, and Zacharie and Turner procured her release by becoming security for Boyle on the attachment.

Upon information of the facts, Boyle promised to indemnify them for any loss they might sustain on that account. Judgment was rendered against them on the attachment bond, which they were compelled to pay, and to recover the amount so paid they brought suit in the circuit court for Maryland against Boyle upon his promise of indemnity. A judgment was rendered by confession in that cause, and a bill in equity was subsequently filed to enjoin further proceedings on it, in the course of which various questions arose, among them, whether the promise of indemnity was a Maryland or a Louisiana contract. Mr. Justice Story, delivering the opinion of the court, said: "Such a contract would be understood by all parties to be a contract made in the place where the advance was to be made, and the payment, unless otherwise stipulated, would also be understood to be made there;" "that the contract would clearly refer for its execution to Louisiana."

The very point was also decided by this court in *Bell v. Bruen*, 1 How., 169 (§§ 282-286, *supra*). That was an action upon a guaranty written by the defendant in New York, addressed to the plaintiffs in London, who, at the latter place, had made advances of a credit to Thorn. The operative language of the guaranty was, "that you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty." The court said: "It was an engagement to be executed in England, and must be construed and have effect according to the laws of that country," citing *Bank of United States v. Daniel*, 12 Pet., 54. As the money was advanced in England, the guaranty required that it should be replaced there, and that is the precise nature of the obligation in the present case. Pritchard could only be indemnified against loss and damage on account of his liability on the appeal bond, by having funds placed in his hands in Louisiana wherewith to discharge it, or by being repaid there the amount of his advance. To the same effect is *Woodhull v. Wagner*, Bald, 296.

We do not hesitate, therefore, to decide that the bond of indemnity sued on was entered into with a view to the law of Louisiana as the place for the fulfillment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration, should be determined by the law of Louisiana, and not that of New York. For error in its rulings on this point, consequently, the judgment of the circuit court is reversed, with directions to grant a new trial.

New trial ordered.

MATHUSON v. CRAWFORD.

(Circuit Court for Indiana: 4 McLean, 540-544. 1849.)

Opinion by the COURT.

STATEMENT OF FACTS.—This case is submitted to the court on the following facts: The judgment upon which the land in question was sold was for a note in Cincinnati, dated on the 5th day of September, 1839, executed by the defendant to Caroline White, etc. The judgment was rendered in Indiana, 7th day of October, 1841, and was replevied by Amos S. Wells, on the 23d day June, 1842, *fi. fa.* issued and delivered to the sheriff, and on the 12th July, 1842, the land was valued under the provisions of the statute at \$1,200; on the 15th of August, 1842, the land was offered for sale and a return made, "no sale for want of bidders." On the 3d of July, 1844, the plaintiff's lessor purchased the land for \$161, without regard to the appraisement laws. He, the lessor of the

plaintiff, then being the owner of the judgment by assignment. On the 28th day of December, 1846, the sheriff made a deed for the land. It is now worth \$800. The question which arises from the above facts is, whether the sale made by the sheriff of the land in question, without regard to the valuation laws, is void.

The statute of Indiana approved 13th February, 1841, provides that no lands shall be sold for less than one-half their value, and that to be determined by appraisers under oath. This land sold for \$160, less than half its appraised value, and less than half its real value as agreed. At the time the law required real estate to sell for its full value. Revised Code of 1843, p. 1044. This case is supposed to have been decided by this court in the case of *Smith v. Atwood*, 3 McL., 545. In that case a motion was made to set aside the return of the marshal, and that he be directed to collect the money under the laws of Pennsylvania, on the ground that the note on which the judgment was entered was made in Pennsylvania. The court overruled the motion. That was the decision given in the case referred to.

§ 1188. *A contract must be enforced according to the remedies existing at the time and in the state when and where suit is brought.*

The case now before us calls upon the court to decide whether the laws of Ohio, where this note was made, shall control the execution on a judgment rendered in Indiana. And it must be admitted that the doctrine laid down in the case of *McCracken v. Hayward*, 2 How., 608 (Const., §§ 1656-58), sustains the position taken, that the laws of Ohio must govern. In that case the court says, "the obligation of the contract between the parties was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages on the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant, till the judgment was satisfied pursuant to the existing laws of Illinois. Those laws (that is the laws of the remedy), giving those rights, were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth, in its stipulations, in the very words of the law relating to judgments and executions."

No one can mistake the principle here laid down. It incorporates the remedy into the contract, as constituting an essential part of it. This being the rule, in regard to the remedy, we are not to look to the laws in force at the time it is actually sought, but we must refer back to the date of the contract, and inquire what laws were then in force. The legislature may have repealed them, but the simple act of making the contract keeps them in force, as a remedy, in defiance of legislative power. This, looking to the remedy only, is a startling position; and if it have no other merit, is certainly novel. We know, practically, that some of our state legislatures make, almost annually, alterations in remedial laws. How these different modes would work, all remaining in force as laws of contracts, remains to be seen. It would, certainly, greatly increase the perplexities of all sheriffs and marshals, and others who are called upon to perform similar duties. But the principle does not end here. The contract brings into any state where suit may be brought upon it, the remedy which the law gave in the state where it was entered into. This is clearly within the decision. And this places the law of the remedy not only above the legislative control of the state where the suit is brought, but the contract brings into the state new remedies of other states, never having been recognized in the state where they are to be enforced. And in carrying out such a principle it might happen, and no doubt would occur, that the means

of giving effect to a foreign remedy, legalized by the contract, do not exist in the state. Will the foreign law, brought into a state by the contract, enable the court or the parties to institute the necessary agencies to give it effect?

The case in Illinois where the contract was made and enforced gave some plausibility to the principles laid down in the decision; but it must be seen by every one who examines the subject, that the principle cannot be carried out. It is impracticable, and cannot be enforced in numerous cases. In the present case the laws of Ohio cannot be recognized in Indiana, in giving a different remedy from the existing law here.

§ 1189. *What is meant by the law of the contract.*

No difficulties arise in giving effect, in any state, to what is properly called the law of the contract, in contradistinction to the law of the remedy. The above decision confounds the two, which are distinct in their nature and obligation, and treats them as one. In this, in my judgment, the error of the decision consists. In the case before us, the note was given to a firm in Cincinnati, and payment was to be made there. We look to Ohio for the rate of interest, and also, if there were indorsements, to the demand of payment and protest, and notice required by the law of Ohio. But as the remedy has been sought in Indiana, the laws of Indiana must govern. Not the laws in force at the date of the contract, for it having been made in Ohio, by no possible construction could have had any reference to the laws of Indiana. Those laws are invoked for the first time in bringing the suit, and the law in force, regulating execution at the time judgment was rendered, must govern the case.

CAMPBELL v. CRAMPTON.

(Circuit Court for New York: 18 Blatchford, 150-163. 1880.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—The plaintiff having recovered a verdict for \$10,000 for breach of contract of marriage, the defendant now moves for a new trial, alleging error in the rulings upon the trial.

The plaintiff is a half-sister of the defendant's mother. She was temporarily residing at Mobile, Alabama, which was the domicile of the defendant, when the marriage engagement took place. Subsequently the plaintiff returned to the state of New York. The evidence authorized the jury to find that, at the time of the engagement to marry, the parties did not contemplate an early marriage; that it was not until after the plaintiff had returned to the state of New York that any definite plan as to the time or place of the marriage was entertained; and that then it was contemplated that the parties should be married at some convenient future time, in the state of New York. No question was raised upon the trial, of an intent to marry in New York for the purpose of evading the laws of Alabama.

By the statutes of Alabama, marriage between a man and the sister of his mother is declared to be incestuous and void, and such persons who marry or who cohabit together are declared guilty of crime and punishable by imprisonment. By the statutes of New York, marriages between parents and children, including grandparents and grandchildren of every degree, ascending and descending, and between brothers and sisters of the half as well as of the whole blood, are declared to be incestuous and absolutely void.

The jury were instructed that, while the parties could not lawfully contract marriage in the state of Alabama, and the promises for such a marriage would

be void, they could lawfully marry in the state of New York, and if, by the terms of their promises of marriage, the promises were to be fulfilled by a marriage in New York, the agreement was valid, and the plaintiff, upon proving a breach, could recover damages. If this instruction was erroneous, the motion for a new trial must prevail. This ruling involves several novel questions of law, which could not be satisfactorily considered upon the trial. Some of these questions arise under that difficult and perplexing branch of jurisprudence which relates to the conflict of laws of different states, as to which it was well remarked by Porter, J., in *Saul v. His Creditors*, 5 Mart. (La.), N. S., 569: "Our former experience has taught us that questions of this kind are the most embarrassing and difficult of decision that can occupy the attention of those who preside in courts of justice."

§ 1190. *Is the validity of a contract determined by the law of the place where the contract is made, or by that of the place where it is to be performed? Authorities reviewed.*

The first question which the instructions present is, whether the agreement of the parties is controlled by the law of Alabama or by that of New York. As the statute of Alabama declares a marriage between persons related as are the parties void and criminal, if the law of Alabama controls, no agreement, having such a marriage as its consideration, can be enforced. The ruling upon the trial proceeded upon the theory that the agreement was governed by the law of New York, because the promises were to be fulfilled in New York.

It would seem that the question whether the validity of a contract made in one place and to be performed in another is to be determined by the law of the place where the contract is made, or by the law of the place of performance, could not, at this day, be a doubtful or open one. There is, certainly, very high authority to sustain the ruling on the trial. In Story's *Conflict of Laws*, § 242, the rule is stated thus: "Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; for, as we shall presently see, in the latter case, the law of the place of performance is to govern." Again, the learned author says (§ 280): "The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But, when the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity with the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance." In *Andrews v. Pond*, 13 Pet., 65, the doctrine is briefly stated thus: "The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance." On the other hand, the rule is laid down in a very recent case (*Scudder v. Union National Bank*, 91 U. S., 406), as follows: "Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where suit is brought." The question in that case was, whether a parol promise, made in Illinois, to accept a bill payable in Missouri, was a contract governed by the law of Illinois or Missouri; and it was held to be an Illinois contract and governed by the law of that state. The court says, that

the contract to pay the bill was a different contract from that of acceptance. The parol promise, being valid by the law of Illinois, was valid everywhere. This was all it was necessary to decide, and, while the statement of the general principles of the law relative to contracts made in one state to be performed in another is entitled to great respect, from the high authority of the court from which it was enunciated, it is not controlling upon the present question, and will be found quite inadequate in its application to a great variety of cases which present questions of the conflict of laws. So far as the validity of a contract depends upon the formalities requisite to its binding force, the general rule expressed by the text writers is, that the test depends upon the law of the place where the contract is made. Westlake, art. 175. An illustration is the case of an unstamped contract made in a country where a stamp is required. Even in this case the authorities conflict, and Judge Story says it might be different if the contract were payable in another country where no stamp is required. Story's Conflict of Laws, § 260, and notes. Wharton (Conflict of Laws, 1st ed., § 401) states the general rule to be, that obligations, in respect to their mode of solemnization, are subject to the *locus regit actum*. The validity of a contract may depend upon the capacity of the parties, or the forms of authentication, or the nature of the consideration; and it certainly cannot be accepted as an universal criterion, that the validity or invalidity of a contract is to be determined by the law of the place where the contract is made. As respects the capacity of parties, the law of domicile may dominate the law of the place of the contract, when rights of person, as distinct from rights of property, are concerned (2 Parsons on Cont., 5th ed., 572 to 574, and notes), and, as respects the consideration, a contract may be invalid by the law of the place of the making, because prohibited by the local law, and yet be valid when to be performed in another place or where brought in question elsewhere. In disposing of the many vexed questions that arise under the qualifications of the general rules, the courts are frequently obliged to fall back upon the principle, that only such claims will be regarded as having a legal foundation as are maintainable in the place where the suit is brought. Wharton, § 401, o.

In the present case, the question arises, whether the validity of the contract, as respects the capacity of the parties to it, depends upon the law of Alabama, where the contract was made, or of New York, where it was to be performed. Although the laws of Alabama do not in terms incapacitate persons related as are these parties from agreeing to marry each other, the statute does incapacitate them from contracting the marriage relation. Neither party could acquire any rights, or be subjected to any liabilities, by the agreement, because of the statutory disability. To all intents and purposes the agreement was void because of the disability of the parties by the laws of Alabama, unless it is saved because it was to be performed in New York.

As to the capacity of parties to enter into a contract, it must be accepted as the general rule that the law of the place where the contract is made must be the test. Story's Conflict of Laws, § 103. The right of every state to prescribe the conditions which determine the personal *status* of its own citizens is unquestioned (1 Burge's Col. & For. Laws, 196), but the most contradictory opinions prevail as to the extraterritorial operation of these conditions. By some of the authorities it is held that, where a statute of domicile confers, abridges or destroys capacity, whether this capacity be generally for the possession of rights or specially for the exercise of business, then such *status* attaches to the subject wherever he may stray, and is to be regarded as con-

clusive by all foreign courts. Wharton, § 91; 2 Parsons on Cont. (5th ed.), 572; Story's Conf. of Laws, § 65. But the result of the English and American authorities is to the contrary, and the incapacity of the domicile of the party is not permitted to shield him from obligations which he could otherwise lawfully assume at the place where they are incurred. Story's Conf. of Laws, §§ 101, 102; Wharton, § 115.

That this contrariety of opinion still exists is shown by a very recent case in England (*Sottomayer v. De Barros*, L. R., 5 Prob. Div., 94), in which Sir James Hannen takes occasion to criticise the views expressed by the lord justices, in the court of appeal, in the same case (L. R., 3 Prob. Div., 1), upon an appeal from the decision of Sir R. Phillimore. L. R., 2 Prob. Div., 81. Sir James Hannen says: "The lord justices appear to have laid down as a principle of law, a proposition which was much wider in its terms than was necessary for the determination of the case before them. It is thus expressed: 'It is a well-recognized principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicile;' and again, 'As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile.' It is, of course, competent for the court of appeal to lay down a principle which, if it forms the basis of a judgment of that court, must, unless it be disclaimed by the house of lords, be binding in all future cases. But I trust that I may be permitted, without disrespect, to say that the doctrine thus laid down has not hitherto been 'well recognized.' On the contrary, it appears to me to be a novel principle, for which, up to the present time, there has been no English authority. What authority there is seems to me to be the other way. Thus, in the case of *Male v. Roberts*, 3 Esp., 163, the contract on which the defendant was sued was made in Scotland. The defense was that the plaintiff was an infant. But Lord Eldon held the defense bad, saying: 'If the law of Scotland is that such a contract as the present could not be enforced against an infant, that should have been given as evidence. The law of the country where the contract arose must govern the contract.' Sir E. Simpson, in the case of *Scrimshire v. Scrimshire*, 2 Hagg. Cons., 413, when dealing with the subject, says: 'These authorities show that all contracts are to be considered according to the laws of the country where they are made. And the practice of civilized countries has been conformable to this doctrine, and by the common consent of nations has been so received.' This is the view of the subject which is expressed by Burge, vol. I, ch. 4, p. 132, and by Story, *Conflict of Laws*, sec. 103; and Sir C. Cresswell in *Simonin v. Mallac*, 2 Sw. & Tr., 77, says: 'In general, the personal competency of individuals to contract has been held to depend on the law of the place where the contract was made.' If the English reports do not furnish more authority on the point, it may, perhaps, be referred to its not having been questioned. I cannot but think, therefore, that the learned lords justices would not desire to base their judgment on so wide a proposition as that which they have laid down with reference to the personal capacity to enter into all contracts."

Upon principle, no reason can be alleged why a contract void for want of capacity of the party at the place where it is made should be held good because it provides that it shall be performed elsewhere, and nothing can be found in any adjudication or text book to support such a conclusion. It is a solecism to speak of that transaction as a contract which cannot be a contract because of the inability of the persons to make it such.

§ 1191. *As to "place of performance" of the marriage contract.*

When the authorities which declare that the obligation, interpretation, nature and validity of a contract made in one place, which is to be performed in another, are to be determined by the law of the place of performance, are examined, it will be found that the term "validity" refers to the conditions of the contract and the extent and nature of its obligation, as to which the agreement will be upheld or defeated according to the sanctions or the prohibitions of the law of the place where the parties have located the transaction. But, if it should be conceded that the law of the place of performance of the contract is the law which determines its validity in all respects, the question then arises, whether the place of performance of an agreement to marry is the place where the marriage is to be solemnized, or whether it is not that place where the parties are to reside and discharge their marital relations. The instructions on the trial assumed that the place of solemnization was the place of performance.

The word marriage is used in two different senses—the one denoting the act of entering into the marriage relation; the other the relation itself. In the latter sense, it is defined as the civil *status* of one man and one woman united in law for life, under the obligation to discharge to each other, and to the community, those duties which the community by its laws imposes. 1 Bishop on Marr. and Divorce, § 3. The general rule is, undoubtedly, that a marriage good by the law of the place of solemnization is good everywhere. It is unnecessary to refer to the exceptions, such as polygamous or incestuous marriages. The rule rests upon considerations of policy. "From the infinite mischief that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages shall be good or not according to the laws of the country where they are made." "By observing this law no inconvenience can arise; but infinite mischief will ensue if it is not." *Scrimshire v. Scrimshire*, 2 Hagg. Cons., 417, 418.

§ 1192. — *the place where the parties are to be domiciled is the "place of performance."*

The question here is not, whether the place of solemnization of a marriage controls the *status* of the parties, but whether the place of solemnization is the place of performance of an agreement to marry. The promise is to enter into a relation to which the state where the parties are to be domiciled can attach its own conditions, both as to the creation and duration of the relation. If the parties here contemplated making Alabama their domicile, their promise to marry could not be substantially fulfilled without abandoning their intention; because in Alabama they would have been not only social outlaws but criminals. It cannot be said that the domicile which the parties to an agreement of marriage contemplated is not one of the material elements of the transaction in view. On the contrary, it is of the very essence of the contract; and when it is found that the parties cannot enter into the marriage relation without expatriating themselves, it would seem that either party would be justified in receding from the arrangement. It is, therefore, the most reasonable conclusion, that the place where the parties are to be domiciled is the place of performance of the marriage contract, both because the substantial consequences

of the act to be performed are fixed by the law of the domicile, and because the presumed intention of the parties to the agreement cannot otherwise be effectuated. It will thus be seen, that whether the validity of the agreement depends upon the law of the place where the contract was made, or that of the place where it was to be performed, the ruling at the trial cannot be upheld.

If these conclusions are correct, it is unnecessary to decide whether or not an agreement to marry between persons related as are the parties is one which will be enforced by the law of this state. But as this point has been fully argued by counsel, and will quite probably require decision upon another trial, in view of some evidence offered on the former trial, it is proper that it be considered now.

§ 1193. *What marriages are void for consanguinity.*

It is insisted, for the defendant, that if the agreement between the parties is a New York contract, yet it cannot be enforced, first, because a marriage between the parties would have been a voidable marriage, which either party could procure to be annulled at any time during the lives of both; and, second, if the marriage would not have been a voidable one, an agreement to marry between persons related as are the parties is contrary to public policy, because offensive to decency and the purity of domestic life, and, therefore, will not be enforced. The case is to be considered as though the parties were nephew and aunt; as relatives of the half blood are, equally with those of the whole blood, included in those degrees of consanguinity within which marriages are deemed incestuous. *Horner v. Horner*, 1 Hagg. Cons., 353; *Regina v. Brighton*, 1 Best & S., 447; *People v. Jenners*, 5 Mich., 318; 1 Bishop on Marr. and Divorce, § 317. Marriages between persons in the direct lineal line of consanguinity, and between brothers and sisters in the collateral line, are incestuous and void, as against the law of nature. *Sutton v. Warren*, 10 Metc., 451; *Hiram v. Pierce*, 45 Me., 367; *Wightman v. Wightman*, 4 Johns. Ch., 343. In the last cited case Chancellor Kent expressed the opinion, that, in the absence of legislation, it could not be maintained that marriages between persons of a remote degree of consanguinity can be declared void. A marriage between nephew and aunt was prohibited by the canon law of England, and this prohibition was incorporated into various statutes of Henry VIII., and the distinction between void and voidable marriages has become crystallized into the later law of England. Such marriages, while not void, were voidable by the sentence of the ecclesiastical courts, pronounced during the life-time of both parties. Whether this distinction has ever obtained in our own country is an open question, but that it has never obtained in this state is authoritatively settled. The commentators recognize it as a part of the body of law brought to the colonies by our ancestors and adopted by us; but, in *Burtis v. Burtis*, 1 Hopk., 557, the question was examined by the chancellor, in the light of the provincial history of New York, and he concluded that the law of England concerning divorces and matrimonial causes was never adopted in the colony of New York, in fact or practice, and was never the law of the colony, and that the statutes of the state were clearly original regulations, intended to authorize divorces in cases in which no divorce could before be obtained, and he says: "To consider these statutes as an adoption of the English law of divorces would be a violent perversion of the language and intention of the legislature." This case is followed by *Palmer v. Palmer*, 1 Paige, 276, to the effect that the court of chancery has no power to decree a dissolution of the marriage contract except in the special cases provided for by statute, and has never been questioned by the

courts of this state. See, also, *Perry v. Perry*, 2 Paige, 501. It must be held, therefore, that the consanguinity of the parties would not render their marriage a voidable marriage in this state. But it by no means follows that an agreement to marry between persons thus related will be tolerated. It is one thing to adjudge that, after marriage, the consanguinity of the parties cannot be invoked to annul the marriage, and quite another to decide whether an agreement for marriage between persons so nearly related should be sanctioned. In the one case the bastardizing of the issue and the unsettling of successions would furnish decisive reasons why the marriage should not be annulled. When the parties have not consummated their agreement these reasons cannot apply.

§ 1194. *Whether an agreement to marry between nephew and aunt contrary to morality.*

Notwithstanding the extensive research of counsel no case has been found which determines whether an agreement for a marriage between a nephew and aunt is obnoxious, as contravening morality or public policy. Such marriages are expressly prohibited by the civil law, by the laws of England, and by the statutes of many of our own states. Where such marriages are prohibited the question would not arise, because it would not be attempted to recover damages for the breach of an unlawful contract; and it is not improbable that the question has not been presented to the courts of the states where there is no statutory prohibition, because such marriages are felt to be so unnatural and revolting that they have been very rare, and but few persons have been found willing to contemplate such a union. The peculiar circumstances of the present case went far to justify the jury in an attempt to punish the defendant. He was a man of education, a physician of prominence, many years the senior of the plaintiff, and, having overcome her scruples against the engagement, held her to her promises until she had lost her youth and health and sacrificed her prospects in life; and the jury, doubtless, were satisfied that she brought this action rather to punish him for his selfish and dishonorable treatment than to obtain pecuniary recompense for her own injury. These considerations, of course, can have no influence here, and her case must stand or fall by the inflexible rules which, while they may be harsh in the particular case, are, nevertheless, the universal test.

The fact that marriages between persons so related are so commonly prohibited by legislation in those communities which are among the most advanced in moral and intellectual progress must be deemed high evidence of the generally prevailing public sentiment on the subject. Whether this sentiment finds its origin in the mandate of divine law, or the belief that such unions are a violation of the physical laws of nature, or in the conviction that to tolerate such alliances would impair the peace of families and lead to domestic licentiousness, its existence must be acknowledged and traced to some or all of these sources. The statutes of Henry VIII., prohibiting such marriages, are but a reaffirmation of the Levitical law. *Regina v. Chadwick*, 12 Jur., part 1, 174. While the Levitical law is not binding as a rule of municipal obedience, it has been judicially declared to be a moral prohibition, and, as such, binding upon all mankind (*Harrison v. Burwell*, 2 Vent., 9), and it is now incorporated into the statutes of England, by the act of 5 and 6 William IV., ch. 54. In Illinois, it is held that such a marriage "is prohibited by the laws of God," within the meaning of a statute of that state. *Bonhan v. Badgley*, 2 Gilm., 622. In *Parker's Appeal*, 44 Penn. St., 309, 312, the court, while holding that such a marriage was not void under the laws of Pennsylvania, took occasion

to say: "We cannot refrain from stating that such connections are destructive of good morals and should be frowned upon by the community."

Between what degrees of consanguinity the line is to be found which determines what marriages are unobjectionable and what are not to be tolerated, it is not necessary to decide; but the better opinion would seem to be, that marriages should not be sanctioned in any nearer degree than that of cousins german. A marriage between uncle and niece, or nephew and aunt, would certainly shock the sentiment of any enlightened community; and this, in the absence of any other test of the propriety or decency of things, should be accepted as controlling. It can hardly be doubted that, if the parties here had become husband and wife, they would have been regarded as joined in an unnatural union, and as victims of a corrupted moral taste, to be pitied and avoided, if not as objects of detestation. In this view, the plaintiff may consider herself fortunate that she has been saved from such a future by the selfish and perfidious conduct of the defendant.

A new trial is granted.

KELLOGG v. MILLER.

(Circuit Court for Nebraska: 2 McCrary, 395-403. 1891.)

STATEMENT OF FACTS.—This was a suit to foreclose a mortgage. The defense was usury. The facts were that the money was borrowed in New York, at ten per cent. interest, which was in that state a usurious rate of interest, but it was a lawful rate in Nebraska. The contract was that the loan should be secured by mortgage on Nebraska lands. The mortgage in question was duly executed, in pursuance of this contract.

Opinion by McCRARY, J.

By the law of New York a contract for the payment of more than seven per cent. per annum interest on money borrowed is absolutely void. If, therefore, the contract sued on in this case is a New York contract, and to be governed by the New York statute, it cannot be enforced. If, on the other hand, it is a Nebraska contract, and to be governed by the Nebraska statute, it is valid. To aid us in the determination of the question, what law shall be applied, we have the following undisputed facts:

1. That complainant is, and was at the time of the contract, a resident and citizen of the state of New York, and that defendant is, and was at said time, a resident and citizen of Nebraska.
2. That the terms of the loan were agreed upon in New York, and it was there agreed that it should be secured by mortgage upon lands in Nebraska and by bond, both to be executed in Nebraska.
3. That afterwards the bond and mortgage were executed by respondents, J. G. Miller and wife, in Nebraska, and sent by mail to R. H. Miller, in Le Roy, New York, by whom they were at that place delivered to complainant.
4. The money was actually paid to respondent, Jason G. Miller, through his agent in New York.
5. The bond stated on its face no place of payment.
6. The loan was made with the understanding that the bond and mortgage would be executed in Nebraska, and that the interest should be according to the law of Nebraska.

§ 1195. *A rule for the construction of contracts as to the place where made and where to be executed.*

It is to be observed, in the first place, that the law will not so construe a contract as to make it void if it will reasonably bear a different construction

making it valid; and the defense of usury, especially where the penalty is the forfeiture of the whole debt, must be established by a clear preponderance of testimony. 1 Jones on Mortgages, sec. 643, and cases cited. It is not to be doubted that a contract fairly and honestly made between a citizen of Nebraska and a citizen of New York, whereby the latter agrees to loan to the former a sum of money at a rate of interest lawful in Nebraska, to be secured by mortgage upon lands in Nebraska, and to be performed in and governed by the law of that state, is a valid contract, even if actually executed in New York. "Where the contract is made in one place and is to be performed in another place, . . . the law of this last place must determine the force and effect of the contract, for the obvious and strong reason that parties who agreed that a certain thing should be done in a certain place intended that a legal thing should be done there, and therefore bargained with reference to the laws of the place, not in which they stood, but in which they were to act." Parsons, Mercantile Law, p. 321.

§ 1196. *The contract in this case was to be performed in Nebraska.*

This rule applies here, if we may assume that the contract was to be performed in Nebraska; and that it was to be performed there seems to be clear in view of the following facts: (1) No place of performance is named. (2) The obligor resided there. (3) The land mortgaged is situated there; and (4) The bond and mortgage were executed there.

Says the same author: "If the contract be made by letter or by separate signatures to an instrument, the contract is then made where that signature is put to it, or that letter is written, which in fact completes the contract." Although certain preliminary negotiations were had in New York, yet the contract was consummated, so far as Miller was concerned, when he executed the bond and executed, acknowledged and recorded the mortgage in Nebraska, and deposited them in the postoffice directed to his brother in New York, to be by him delivered to complainant. That is the place where the signature was put to these papers which in fact completed the contract. It is said that the delivery was in New York, and that the contract was not consummated until the papers were delivered. But the proof shows that the parties agreed that the bond and mortgage should be executed in Nebraska; that the mortgage should be recorded there, and that after recording the papers should be sent to New York to the complainant. Under these circumstances, I think that a delivery of the mortgage to the recorder for record was a sufficient delivery to the grantee. *Cooper v. Jackson*, 4 Wis., 537; *Marterman v. Chich*, 23 Ill., 72; *Hedge v. Drew*, 12 Pick., 141; *Jackson v. Cleveland*, 125 Mich., 94; *Boody v. Davis*, 20 N. H., 140.

§ 1197. *As a general rule parties may agree as to what law shall govern their contract.*

But it is not necessary to place the decision of the case upon the ground that the contract was to be performed in Nebraska. It is now well settled by authority, as it is certainly well supported by reason, that a citizen of one state may loan money to a citizen of another state, and contract for the rate of interest allowed by the law of the latter, especially in a case like the present, where the money is to be used in the latter state, and is secured by a mortgage upon lands located there; and this notwithstanding the place of payment may be elsewhere. This doctrine constitutes an exception to the general rule that the law of the place where the contract is made is to govern in enforcing and expounding it. Thus in the case of *Arnold v. Potter*, 22 Ia., 194, it was held that it is

competent for citizens of different states, who are parties to a promissory note, to contract in good faith for the rate of interest, and with reference to the law, of the state where the maker resides and where the property mortgaged to secure the note is situated, although the note is in terms payable in a state different from the residence of either, and the rate of interest reserved is greater than the legal rate of the state where the note is made or where by its terms it is payable.

In that case Wright, J., said: "The general rule is well settled that the law of a place where a contract is made is to govern in enforcing or expounding it, unless the parties provide for its execution elsewhere; in which case it is to be governed by the law of the latter place. The parties may, however, if it is made in one place to be executed in another, stipulate that it shall be governed by one or the other." And again: "Nor do we hold that a citizen of one state could make his note in another to a resident there, payable in a third, with interest as allowed in a fourth. But what we do hold is, that if A. of Iowa, in good faith, borrows money of B. of Illinois, gives security on land in Iowa, and they in good faith agree that the law of Iowa shall govern, that a note given in pursuance of said contract in Illinois, bearing the interest allowed by our laws, would not be usurious." And the same rule is laid down by Chancellor Kent, who says: "The general doctrine is, that the law of the place where the contract is made is to determine the rate of interest where the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on land in another state, *unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest.*" 2 Kent, Com. (12th ed.), 460. And see *Newman v. Kershaw*, 10 Wis., 333; *Vliet v. Camp*, 13 Wis., 221. Lord Mansfield laid down the rule in these words: "The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." *Robinson v. Bland*, 2 Burr., 1077, 1078.

§ 1198. — *but good faith is necessary.*

In applying this rule in this case there is but a single question of fact to be considered, and that is the question of good faith. Did the parties in good faith agree that this loan should be made according to, and be governed by, the law of Nebraska? As already said, the law will presume an honest intent, unless there is something in the nature of the transaction or in the proof to establish the contrary. The usury law of New York is a statute highly penal in character, and a purpose to violate it will not be presumed in the absence of clear proof. So far from showing clearly a purpose on the part of complainant to violate that statute, I think the contrary appears. That the parties both understood that they were contracting with reference to the law of Nebraska is affirmatively shown by the testimony. In the course of the negotiations reference was continually had to the law of Nebraska relating to interest. The borrower lived there and represented to complainant that a loan at ten per cent. under the laws of Nebraska would be lawful. Advice was taken as to the proper mode of contracting under that law, and out of abundance of caution it was decided that Miller should return to Nebraska and there execute the bond and mortgage and have the latter recorded, after which he was to forward them by mail to complainant in New York. Respondent, J. G. Miller, himself admits in testimony that he informed complainant that the legal rate of interest in Nebraska was ten per cent., and that complainant informed him that he wanted to make the contract so as to be sure of that rate of interest. When

we bear in mind that the parties had, under the circumstances in which they were placed, a perfect right to adopt the law of either state, provided only they did so in good faith, and that they were so advised, it is difficult to see what sufficient motive they could have had to resort to any device or to act in bad faith. Men do not ordinarily prefer to violate a penal statute and run the risk of the confiscation of valuable property, when a safe, convenient and honest way of proceeding is open before them.

It only remains to consider some facts not enumerated above, and upon which counsel for respondents relies. It appears that at the time of the original agreement the complainant advanced to Miller \$4,500, on which interest at ten per cent. was charged from January 30, 1871, to March 15, 1871. It is insisted that as to this sum there was usury under the law of New York, and that inasmuch as the \$4,500 went into the mortgage debt and into the bond, it makes the whole bond usurious. But it is clear that there was in reality but one transaction, to wit: A loan of \$15,000 to a citizen of Nebraska, to be secured upon land in that state, and to bear ten per cent. per annum interest according to the law of that state. This being so, the fact that pending the preparation and execution of the necessary papers, and their transmission from Nebraska to New York, the complainant advanced a portion of the loan at the rate of interest agreed upon, was not a violation of the usury laws of New York.

I hold that, according to the evidence and the law, the entire transaction from the beginning was conducted with reference to the law of Nebraska relating to interest, and must be judged by that law alone. This renders it quite unnecessary to go into the question whether ten per cent. interest was actually paid in New York upon the sum advanced on the loan, or any part of it; because if it is so, it does not render the contract usurious. The exceptions to the master's report are overruled, and decree will be entered for complainant in accordance with the said report.

MORGAN v. NEW ORLEANS, MOBILE & TEXAS RAILROAD COMPANY.

(Circuit Court for Louisiana: 2 Woods, 244-254. 1876.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—The contract in this case was made for the purpose of putting an end to a ruinous competition which was being carried on between the two parties to it, in the freight and passenger business between Mobile and New Orleans, and for uniting their interests in that business and in a projected railroad business between New Orleans and Texas. The complainant Charles Morgan was, and had long been, engaged in running a line of steamers between Mobile and New Orleans, the line being supplemented by a short railroad running from Lake Pontchartrain to the latter place, called the Pontchartrain Railroad, of which he owned the majority of the stock. He also owned a railroad called the Opelousas road, which ran from the Mississippi river opposite New Orleans to the Atchafalaya river at Brashear City, where it connected with a line of steamers running to Galveston and other places on the Texan coast, being connected with the city of New Orleans by means of a ferry at that place. The complainant also had a charter for a continuation of his railroad from Brashear City westwardly and northwesterly to the Texas state line. The railroad company, at the time of the contract, had recently completed a railroad between Mobile and New Orleans, on which the opposition before referred to was maintained against the steamboat business of the complainant;

and they had procured a charter for a railroad from New Orleans to the state line of Texas, and expected to obtain a charter for a continuation of the said road to Houston in that state; and had actually constructed a road west of the Mississippi from opposite New Orleans, as far as Donaldsonville.

Under these circumstances, it became evidently the interest of the parties in some way to compose their differences, and not to continue an opposition which must result in loss to them both. The transportation route between Mobile and New Orleans, being divided between two powerful interests, could not be a very valuable property to either of them unless some amicable arrangement could be made. By the agreement in question, an attempt was made to form such an arrangement. The general nature of it was as follows: Morgan, on his part, agreed to convey to the railroad company and the company agreed to purchase the property which he had in the line between Mobile and New Orleans, for the sum of \$797,800, namely, certain wharves and wharf property at Mobile, two steamers, the *Laura* and the *Frances*, and his Pontchartrain railroad stock, amounting to five thousand and seventy-eight shares, out of seven thousand and five hundred shares, which constituted the whole capital. He further agreed to convey to the company, for the sum of \$250,000 and interest thereon from April 15, 1870, his railroad rights and partly constructed road between Brashear City and Vermillionville, about sixty miles, and from thence west and north to the Texas line and to Red river; the company agreeing to complete said road by the time it should complete its main line from Vermillionville to the city of Houston. Morgan further agreed to subscribe to the stock and securities of the railroad company the sum of \$1,258,000, on the same terms as the other subscribers thereto had done, and the price of the property above named was to be taken as payment of his subscription as far as it would go; the balance to be paid by him in cash. The securities to be received by him for his said subscription were to be \$899,000 first mortgage bonds of the company on its road west of the Mississippi, and \$359,000 of second mortgage bonds guarantied by the state of Louisiana. He was also to receive (like the other subscribers) income bonds and stock of the company of each, to the amount of his subscription. It was also stipulated in the agreement that Morgan should have for the sum of \$250,000 cash, that portion of the Pontchartrain railroad running along the levee in New Orleans, and the new depot thereto attached. The purpose of the agreement was declared to be to put an end to the opposition in the passenger and freight business between Mobile and New Orleans, and to concede the whole business to the company; and Morgan agreed to take off his boats within fifteen days, and not to run or be concerned in steamboats on that line for fifteen years thereafter. It was further agreed that the gross receipts of the through business by railroad between New Orleans and Houston should, on the completion of the railroad through to the latter city, for seven years thereafter, be stocked and divided between the parties according to the length of railroad owned by each, namely, Morgan's road from New Orleans to Brashear City, and the company's road from New Orleans to Houston, including the branch from Brashear to Vermillionville.

The agreement was made and executed in the city of New York, where Morgan and the officers and most of the directors of the company resided; and immediately after it was made, measures were taken to execute it and carry it into effect; and in the course of the following January, February and March almost every article was executed. Morgan subscribed the requisite amount to

the securities of the company, in New York, namely, the sum of \$1,258,000, and received the bonds and certificate of stock which the agreement called for, and conveyed and transferred to the company the several pieces of property which he was to convey and transfer, namely, the wharves and wharf property in Mobile, the steamers *Laura* and *Frances*, the Pontchartrain railroad stock, and the railroad property and rights northwest of Brashear City; and paid the cash balance required to make up his subscription; and he also received a conveyance of the Pontchartrain railroad track along the levee in New Orleans, and paid for it the sum of \$250,000 in cash. In fact, within three months from the time of making the agreement, everything was done to effect a complete execution of it, except the construction by the company of the railroad to Houston, including the branch road from Brashear to Vermillionville.

In addition to this, the firm of C. A. Whitney & Co., of New Orleans, who were the general agents of the complainant in that city, and had managed for him the business between Mobile and New Orleans, and were still managing his line between New Orleans and Texas, were appointed as the agents of the railroad company, and acted as such for several months, namely, from the date of the agreement in December, 1871, until the latter part of the following April, and Morgan and three or four persons named by him were elected directors of the company in place of others who resigned. In the summer of 1872, the complainant changed the gauge of his road from New Orleans to Brashear City, so as to correspond with that of the defendants, and to be thus prepared for the through business to Houston, and in July he received one instalment of interest on the bonds received by him. The defendants on their part, during the spring and summer of 1872, did some work on the line of road between Brashear City and Vermillionville, but never laid any rails there, and entirely suspended operations before the 1st of September; and nothing further has ever been done on that branch, nor has the road been completed from Donaldsonville to Vermillionville, nor has any part of it been constructed between Vermillionville and Houston. The time when, by the act granting state aid to the company (on which great reliance was placed), and when, by express agreement with the state of Louisiana, the railroad company was to complete its road to the state line, was the 7th of May, 1873; and it was to complete the line to Houston within six months thereafter if the requisite legislation could be obtained from the legislature of Texas.

In consequence of the failure of the company to furnish funds to pay its debts in Louisiana, and to go on with the work of construction of the railroads in contemplation, Whitney & Co. resigned the agency of the company in the latter part of April, 1872, and they and Morgan resigned their position as directors. But no formal demand to have the agreement rescinded was made by the complainant until he filed the bill in the present case, which was on the 30th of May, 1873, shortly after the expiration of the time for completing the road to the Sabine river.

The bill states, and it is not denied, that the company failed to pay interest on its securities as early as October, 1872, and that the trustees of the first mortgage of the road between Mobile and New Orleans had taken possession thereof, and had received the sanction of the court thereto; and that proceedings had been commenced for a sale of the franchises and property west of the Mississippi.

By an amended bill, it is stated that James A. Raynor and Edwin D. Morgan were in possession of the company's road east of the Mississippi, claiming to be

in possession as trustees under their first mortgage on that part; and that Frank M. Ames was in possession of the road west of the Mississippi, under a like claim, as trustee under the first mortgage on that part; and they were made parties to the bill, and have severally put in answers setting up their respective claims under said mortgages.

The bill, after setting out most of the foregoing facts, alleges, by way of gravamen, that in the negotiation which took place in New York preliminary to the making of the contract, certain statements and representations were made to the complainant by a committee of the directors of the company, respecting the condition of its affairs, which he was assured were accurate and true, but which he has since discovered to have been false. The bill states that the committee referred to exhibited to the complainant a certain paper (which is referred to as Exhibit E), containing a statement of the condition of the company at that time, showing that the assets of the company then in its possession and available for the construction and equipment of the main line of road to be built from New Orleans to Houston, Texas, and of the branch from Brashear City to Vermillionville, amounted to the sum of \$7,551,000, being composed of \$4,255,000 of bonds of the company at par, \$1,140,000 of Louisiana state bonds, at eighty cents on the dollar, and \$1,500,000, second mortgage bonds, at sixty cents on the dollar, and a balance of \$488,000 of first mortgage bonds in the Calcasieu division, all being subject to an amount of \$1,404,000 that would be due to original subscribers to a certain fund of "two millions of dollars." Also, that the committee exhibited to the complainant another paper (which is referred to as Exhibit F), which was represented to contain new subscriptions of sums of money to be applied to the construction and equipment of the said main line from New Orleans to Houston; that it had sixty-six names, with an amount affixed to each name, making a total of \$1,895,700; and that the subscribers were represented to be, with two or three exceptions, possessed of large means, and able and willing to pay; and that the committee represented that the subscriptions were made in good faith, to furnish the funds required to construct and equip the said railroad west of the Mississippi, and that with the said assets in hand and said subscriptions, if the complainant also became a subscriber for a liberal amount upon the same terms as the other subscribers, the company would have ample means to construct and equip the said railroads and have them in operation at the period contemplated by the charter.

The bill alleges that the representations were not true, and were made in bad faith, to deceive the complainant and induce him to act, in relation to said proposed arrangement, in error of facts as to the condition of the company in regard to the possession of the means requisite for the construction and equipment and putting in operation of the said railroads, and in regard to the immediate intent of the company to prosecute and complete the same. The Exhibits E and F were produced in the evidence taken in the cause, and are before the court.

The fact that after the agreement was made very little of these large amounts of money was forthcoming, even to pay the floating debt of the company, and that very little was expended during the following season on the works, and that the company was obliged absolutely to suspend operations in October, 1872, was sufficient, if the complainant understood the representations as stated by the bill, to raise in his mind the strongest suspicions that he had been deceived and duped. The answers furnish but little light on the subject. They are not sworn to, and consequently are not evidence. Those of the trustees of the sev-

eral mortgages are filed by them as such trustees, and claim that they are not affected by any rights of the complainant growing out of the transactions between him and the company. The evidence is more to the point.

§ 1199. *To justify the rescission on grounds of fraud of a partly executed contract, proofs of fraud must be very clear and promptly presented.*

In charges of this kind, laid as a ground for setting aside a contract where many things have been performed on both sides, and where a rescission would involve the upsetting of many large and important transactions, the proof must be very clear indeed of fraudulent misrepresentation or concealment to justify a court in applying the judicial knife to the case. It must be clear that there has been such a misstatement of the facts as to mislead the injured party, and to induce him to enter into the transaction; and he must be prompt to avail himself of the objection as soon as it is discovered. He must not wait to experiment and see whether it may not, after all, turn out well. Acquiescence for a little time, in such cases, is condonation. I am not satisfied that there was any such misrepresentation of facts in this case as, under the circumstances, entitles the complainant to set aside the contract.

The next question is, whether the complainant is entitled to have the contract rescinded on account of non-performance by the railroad company of their part of it. The demand for rescission on this ground rests upon the peculiar law of the state of Louisiana before referred to. If the contract is to be governed by that law, I should have no hesitation in saying that the complainant is entitled to the relief which he asks. The building of the railroad beyond Brashear City, so as to give the complainant a through connection between his Opelousas road and Texas, was undoubtedly a material consideration with him, amongst the other considerations moving to the contract. The contract was a commutative one. In that respect it fully met the definition of the Louisiana code, which declares (art. 1768): "Commutative contracts are those in which what is done, given or promised by one party is considered as equivalent to or a consideration for what is done, given or promised by the other."

§ 1200. *A contract, as a general rule, is to be governed by the law of the place where it is made.*

It becomes material, therefore, to ascertain whether the contract is to be governed by the law of Louisiana. The general rule is, that a contract is to be governed as to its interpretation, its nature, its obligation, and its performance or dissolution, by the law of the place where it is made or entered into. In other words, *lex loci contractus est lex contractus*.

§ 1201. — *a contract made in one country, to be performed in another, is governed by the law of the place of performance.*

The first and principal exception to this rule is, that if the contract is made in one state or sovereignty, and is to be performed in another state or sovereignty, it is to be governed by the law of the place of performance, because it will be presumed that the parties had the laws of the latter place in view when they entered into the contract. The rule and the exception have been fully discussed and commented upon by Mr. Justice Story in his Conflict of Laws, and by many other writers on private international law, and it is unnecessary to review those discussions here. In this case the contract was made in New York by persons who resided there. The railroad company, it is true, was a corporation originally chartered by Alabama, and subsequently capacitated by the laws of Louisiana and Texas to exercise all its faculties in those states; but its directors and officers mostly resided in New York and other northern states,

and its principal office was in New York, and the meetings of its directors were usually held there. In this case all the negotiations which led to the contract were carried on in New York, and the contract itself was concluded and executed there.

But, on the other hand, the interests, operations and property, which formed the principal object of the contract, were located in the southern states bordering on the Gulf of Mexico, to wit: Alabama, Mississippi, Louisiana and Texas, and largely in the state of Louisiana. The contract was made with reference to these interests, operations and property, but its direct object, that is, the things stipulated and agreed to be done and performed, were to be, or might be in part, done and performed in New York as well as in the states referred to. This will appear when we look at the contract a little more particularly.

It is altogether a personal contract, providing for the doing of certain acts on the one side and on the other. Its object was a settlement of controversies, and a discontinuance of business opposition between the parties. It is evident that many of the acts stipulated to be done could be, and in fact were, done in the city of New York. There Morgan executed and delivered to the company the various deeds and transfers of property which he had agreed to do; the conveyances of the property in Mobile, the bills of sale of the steamers, the transfer of Pontchartrain Railroad Company stock, the conveyance of the railroad rights north and west of Brashear City. There he made his stipulated subscription to the securities of the railroad company. There the company delivered to him the said securities, namely, the bonds and certificates of stock. But the discontinuance of the steamboat business between Mobile and New Orleans and the delivery of the property consequent upon the said conveyances were done in Alabama and Louisiana; and the building and completion of the railroad beyond Brashear City were necessarily to be done in the latter state.

§ 1202. *A contract made in one state, to be partly performed there and partly in other states, is governed by the law of the place where it was made.*

Now, by what law is such a contract to be governed, where it is executed in one state, and is partially to be performed in that state and partially in other states? I have no difficulty in saying that the conveyances and transfers to be made in pursuance of the contract were to be made in conformity with the laws of the states respectively in which the property, when consisting of realty, or subject to local law, was situated. And such conveyances and transfers, when executed, would be governed by the *lex rei sitæ*. But that does not answer the question as to what law the principal contract is to be governed by. In Louisiana, non-performance of a material stipulation renders the whole contract liable to be dissolved. But no one would apply that rule of Louisiana law to a contract not subject to its dominion, even though the breach should occur in Louisiana. The fact, therefore, that one of the acts to be performed in this case—the construction of the railroad—was to be performed in Louisiana, will not help to resolve the question unless we can affirm that the entire contract is to be governed by Louisiana law. Does the fact that a portion of the contract must necessarily be performed in Louisiana subject it to that condition? If that does, then the like fact that a portion of the contract is necessarily to be performed in Alabama would subject it to Alabama law, and make it an Alabama contract.

In this embarrassment, I do not know that I can do better than to fall back on the general rule that a contract is to be governed by the law of the place where it is made. The presumption that where a contract is to be performed

in a different jurisdiction, the parties must be intended to have in view, the laws of the latter, seems to be repelled when the performance is to take place in several different jurisdictions. For when there are two equal and opposite presumptions, neither of them can prevail. The present case is still stronger; for much of the contract was performable, and actually performed, in the place where it was made. I do not mean to say that where the main and principal part of a contract is to be performed in a state different from that in which it is made, the presumption will not arise that it is made in reference to the laws of such place of performance, even though some minor and incidental parts are required to be performed in still different states. Such may, very possibly, be the result in many instances that may occur. When they happen they will be governed by the force of their own circumstances. But I do not see that I am called upon to apply any such exceptional rule in this case. The building of the railroad in question was a very important consideration, it is true; but the contract embraced many other considerations equally important, that were not necessarily to be performed in Louisiana.

The conclusion, therefore, to which I am forced to come is, that the principal contract, made on the 12th of December, 1871, between the complainant and the New Orleans, Mobile & Texas Railroad Company, was a New York contract, governed, as to its nature and obligation, by the laws and jurisprudence of the state of New York; and as by these laws and jurisprudence, so far as appears, no such dissolving consequence follows from a non-performance of part of the contract as is claimed in this case, the claim is untenable and the relief must be refused. As no relief can be granted on either of the grounds laid in the bill of complaint, the same must be dismissed with costs.

GRANT v. HEALEY.

(Circuit Court for Massachusetts: 3 Sumner, 523-529. 1839.)

STATEMENT OF FACTS.—This was a suit for a balance on account of an advance made by plaintiffs through their agent at Boston to defendant, to reimburse plaintiffs, who were merchants at Trieste, Austria. Defendant shipped them a cargo of sugar, which, by reason of the low price of that article in the market when it arrived, failed to meet the advance by a large amount. The verdict was for plaintiffs, and now the case comes up on the question whether defendant should be charged for the balance at the par of exchange or the actual rate of exchange between Boston and Trieste at the time of the verdict.

Opinion by STORY, J.

Upon this point I have wished for a little time for reflection, although at the argument I ventured to express what was the inclination of my opinion. In all cases which respect the daily transactions of commercial men, I feel a great desire not to interfere with the known and settled habits of business; and should rather incline to follow the usage, if any, than to form a new rule of my own. No settled usage has been shown; and, therefore, the rule must be settled upon principle.

§ 1203. *Measure of recovery where the creditor is obliged to sue in one country for money payable in another.*

I take the general doctrine to be clear, that whenever a debt is made payable in one country, and it is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay; for then, and

then only, is he fully indemnified for the violation of the contract. In every such case, the plaintiff is therefore entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to or subtracted from the amount, as the case may require, in order to replace the money in the country where it ought to be paid. It seems to me that this doctrine is founded on the true principles of reciprocal justice.

The question, therefore, in all cases of this sort, where there is not a known and settled commercial usage to govern them, seems to me to be rather a question of fact than of law. In cases of accounts and advances, the object is to ascertain where, according to the intention of the parties, the balance is to be repaid, whether in the country of the creditor, or that of the debtor. In *Lanusse v. Barker*, 3 Wheat., 101, 147, the supreme court of the United States seem to have thought that where money is advanced for a person in another state, the implied understanding is to replace it in the country where it is advanced, unless that conclusion is repelled by the agreement of the parties, or by other controlling circumstances. Mr. Justice Baldwin decided the same point in *Woodhall v. Wagner*, 1 Bald., 296, 302.

§ 1204. — *the money sued for in the case at bar, being advanced in Boston, should be paid in Boston, in the absence of any contract to the contrary.*

Governed by this rule, the money being advanced in Boston, so far as it was not reimbursed out of the proceeds of the sales at Trieste, would seem to be proper to be repaid in Boston. In relation to mere balances of account between a foreign factor and a home merchant, there may be more difficulty in ascertaining where the balance is reimbursable, whether it is where the creditor resides or where the debtor resides.

§ 1205. *As to place of performance in case of advances and sales of goods.*

Perhaps it will be found, in the absence of all controlling circumstances, the truest rule and the easiest in its application, that advances ought to be deemed reimbursable at the place where they are made, and sales of goods to be accounted for at the place where they are made or they are authorized to be made. See Story on Conflict of Laws, secs. 283-285; *Bainbridge v. Wilcocks*, 1 Baldw., 536. Thus, if a consignment is made in one country for sales in another country, where the consignee resides, the true rule would seem to be to hold the consignee bound to pay the balance there, if due from him, and if due to him on advances there made, to receive the balance from the consignor there. The case of *Consequa v. Fanning*, 3 Johns. Ch., 587, 610, which was reversed in 17 Johns., 511, proceeded upon this intelligible ground, both in the court of chancery and in the court of errors and appeals, the difference between these learned tribunals not being so much in the rule, as in its application to the circumstances of that particular case.

I am aware that a different rule in respect to balances of account and debts due and payable in a foreign country was laid down in *Martin v. Franklin*, 4 Johns., 125, and *Scofield v. Day*, 20 Johns., 102; and that it has been followed by the supreme court of Massachusetts, in *Adams v. Cordis*, 8 Pick., 260. It is with unaffected diffidence that I venture to express a doubt as to the correctness of the decisions of these learned courts upon this point. It appears to me that the reasoning in 4 Johns., 125, which constitutes the basis of the other decisions, is far from being satisfactory. It states very properly that the court have nothing to do with inquiries into the disposition which the creditor may make of his debt, after the money has reached his hands; and the court

are not to award damages upon such uncertain calculations as to the future disposition of it. But that is not, it is respectfully submitted, the point in controversy. The question is whether, if a man has undertaken to pay a debt in one country, and the creditor is compelled to sue him for it in another country, where the money is of less value, the loss is to be borne by the creditor, who is in no fault, or by the debtor, who, by the breach of this contract, has occasioned the loss. The loss, of which we here speak, is not a future contingent loss. It is positive, direct, immediate. The very rate of exchange shows that the very same sum of money paid in the one country is not an indemnity or equivalent for it when paid in another country, to which, by the default of the debtor, the creditor is bound to resort. Suppose a man undertakes to pay another \$10,000 in China, and violates his contract; and then he is sued therefor in Boston, when the money, if duly paid in China, would be worth at the very moment twenty per cent. more than it is in Boston; what compensation is it to the creditor to pay him the \$10,000 at the par in Boston? Indeed, I do not perceive any just foundation for the rule, that interest is payable according to the law of the place where the contract is to be performed, except it be the very same on which a like claim may be made as to the principal, viz., that the debtor undertakes to pay there, and, therefore, is bound to put the creditor in the same situation as if he had punctually complied with his contract there.

§ 1206. — *what usage has done as to bills of exchange.*

It is suggested that the case of bills of exchange stands upon a distinct ground, that of usage; and is an exception from the general doctrine. I think otherwise. The usage has done nothing more than ascertain what should be the rate of damages for a violation of the contract generally, as a matter of convenience and daily occurrence in business, rather than to have a fluctuating standard, dependent upon the daily rates of exchange, exactly for the same reason, that the rule of deducting one-third new for old is applied to cases of repairs of ships, and the deduction of one-third from the gross freight is applied in cases of general average. It cuts off all minute calculations and inquiries into evidence. But in cases of bills of exchange drawn between countries where no such fixed rate of damages exists, the doctrine of damages, applied to the contract, is precisely that which is sought to be applied to the case of a common debt due and payable in another country; that is to say, to pay the creditor the exact sum which he ought to have received in that country. This is sufficiently clear from the case of *Mellish v. Simeon*, 2 H. Black., 378, and the whole theory of re-exchange.

My brother, the late Mr. Justice Washington, in the case of *Smith v. Shaw*, 2 Wash., 167, 168, in 1808, which was a suit brought by an English merchant on an account for goods shipped to the defendants' testator, where the money was doubtless to be paid in England, and a question was made, whether, it being a sterling debt, it should be turned into currency at the par of exchange, or at the then rate of exchange, held that the debt was payable at the then rate of exchange. To which Mr. Ingersoll, at that time one of the ablest and most experienced lawyers at the Philadelphia bar, of counsel for the defendant, assented. It is said that the point was not started at the argument, and was settled by the court suddenly, without advancing any views in the support of it. I cannot but view the case in a very different light. The point was certainly made directly to the court, and attracted its full attention. The learned judge was not a judge accustomed to come to sudden conclusions, or to decide any point which he had not most scrupulously and deliberately considered.

The point was probably not at all new to him; for it must frequently have come under his notice in the vast variety of cases of debts due on accounts by Virginia debtors to British creditors, which were sued for during the period in which he possessed a most extensive practice at the Richmond bar. The circumstance that so distinguished a lawyer as Mr. Ingersoll assented to the decision is a farther proof to me that it had been well understood in Pennsylvania to be the proper rule. If, indeed, I were disposed to indulge in any criticism, I might say that the cases in 4 Johns., 125, and 20 Johns., 101, 102, do not appear to have been much argued or considered; for no general reasoning is to be found in either of them upon principle, and no authorities were cited. The arguments and the opinion contain little more than a dry statement and decision of the point. The first and only case in which the question seems to have been considered upon a thorough argument is that in 8 Pick., 260. I regret that I am not able to follow its authority with a satisfied assent of mind.

But in the present case it strikes me that the circumstances do not require me to dispose of the more general question, although it is impossible not to feel that it is fully before the court. My opinion is, that, in the present case, the advances being made in Massachusetts, if the goods sent to Trieste did not fully reimburse the amount, the balance was properly due and payable in Massachusetts. There is not the slightest evidence to prove that the advances were to be repaid at Trieste, if the consignment did not fully reimburse them. In truth, neither party contemplated the probability, I had almost said the possibility, of the fund not being more than adequate to repay all the advances. The contract, then, appears to me to be in substance this, that the creditors shall be at liberty to reimburse themselves from the proceeds of the sales at Trieste, for the advances. Any personal obligation to repay the advances in any other manner was not stipulated for. The parties left the rest to the silent operation of law. And my judgment is, that upon the just principles of law, applied to the contract, the advances, so far as they should not be reimbursed out of the sales of the cargo, were payable, not at Trieste, but at Boston, the place where they were made. In this view of the matter, I remain of the opinion, which was intimated at the argument, that the plaintiffs are entitled only to the balance due at the par of exchange.

§ 1207. *Lex loci contractus*.—The *lex loci contractus* must be resorted to in order to ascertain the meaning of every agreement made abroad. *Adams v. Story*, 1 Paine, 100.

§ 1208. The laws and usages of foreign countries where contracts are made and to be executed, which respect their validity, construction and discharge, are regarded in this country as rules of decision. *Willings v. Consequa*,* *Pet. C. C.*, 301.

§ 1209. A contract for the sale of a vessel was made in Louisiana, where the vessel then was, and where it was to be delivered to the purchaser. *Held*, that the contract being made in Louisiana was to be governed by the law of Louisiana and not by the law of New York, where the vendor resided. *Bulkley v. Honold*, 19 *How.*, 392.

§ 1210. Where a contract is designed to be performed within the state in which it is made, the *lex loci contractus* must be understood as entering into and controlling the effect of its stipulations. *Withers v. Greene*, 9 *How.*, 221.

§ 1211. Contracts are governed by the laws of the country where they are made; but where a note for so much money, made in a foreign state, and payable in sugar, is sued on in the United States courts, the judgment must be for money. *Courtois v. Carpentier*,* 1 *Wash.*, 377.

§ 1212. The law of a country where a contract is made is the law of the contract wherever performance is demanded, and the same law which creates the discharge will be regarded if it operate a discharge of the contract. A debt contracted in one country cannot be discharged by the bankrupt laws of another country. *Green v. Sarmiento*, *Pet. C. C.*, 75.

§ 1213. In respect to its construction and force, a contract is to be governed by the law of the country or state in which it is executed, unless it shall appear from the tenor of such contract that it was entered into with a view to the law of some other state. So where a note

§§ 1214-1227. CONTRACTS.—CONSTRUCTION AND INTERPRETATION.

was given in Michigan, payable in New York, at a rate of interest which was lawful in Michigan but unlawful in New York, and the note was secured by a mortgage on land in Michigan, it was held that the contract was a Michigan contract and consequently lawful. *Fitch v. Reimer*, 1 Biss., 333. See § 1223.

§ 1214. The legality of a contract made in one state, to be executed in another, depends upon the *lex loci contractus*, and if void where entered into it is void everywhere. *Andrews v. Pond*, 13 Pet., 78.

§ 1215. Those laws which in any manner affect a contract, whether in its construction, in the modes of discharging it, or which control the obligation which the contract imposes, are essentially incorporated into the contract itself. The contract is the law which the parties impose upon themselves, subject, however, to the paramount law—the law of the country where it is made. Contracts thus made and thus regulated may be enforced by foreign tribunals, according to their own modes of proceeding, and such tribunals aim only to give effect to the contracts according to the laws which gave them validity. *Camfranque v. Burnell*, 1 Wash., 341; affirmed, *Golden v. Prince*, 3 Wash., 315.

§ 1216. The law of the place where a contract is made enters into and becomes a part of the contract. So, where a contract was made in Virginia for the sale of land therein, which was valid under the statute of frauds as then existing and interpreted in that state, the fact that the land was afterwards set off and became a part of Kentucky, and that the law in the latter state would not hold such a contract to be valid, has no effect on the contract, even when suit thereon is brought in the latter state. *Caldwell v. Carrington*, 9 Pet., 103.

§ 1217. A contract for the acceptance and honor of a bill of exchange is to be governed by the law of the place where it is made. *Townsley v. Sumrall*, 2 Pet., 181.

§ 1218. — *rate of damages.*—The rate of damages to be recovered for the breach of a contract is a part of the right to which the injured party is entitled, and is totally distinct from the remedy provided for enforcing it. In the former case the law of the place where the contract is made or broken is to prevail, and in the latter it is the law of the place where the remedy is provided. *Consequa v. Willings*, Pet. C. C., 230.

§ 1219. — *assignment.*—Though it is true that every contract in its creation and performance is to be governed by the law of the place where it was entered into, yet where such contract is assigned in another state, the law of such state governs as to the validity of the assignment. Every assignment is a new contract and is to be governed by the law of the place where it is made. *McClintick v. Cummins*, 3 McL., 161; *Dundas v. Bowler*, 3 McL., 399.

§ 1220. — *judgment.*—The law of the country where a contract is made is the rule of the contract wherever performance is demanded, and the same law which creates the charge will be regarded if it operates a discharge of the contract. A judgment on a contract in a court of competent jurisdiction extinguishes the contract, and thereafter the law of the state in which the judgment was rendered is the law of the contract. *Green v. Sarmiento*, 3 Wash., 18.

§ 1221. — *contract by agent.*—Where a contract is made by an agent, the law of the place of the contract prevails, and this rule applies whether the contract was made by an agent acting under authority, or whether his act was subsequently ratified by the principal. *Van Reimsdyk v. Kane*, 1 Gall., 377.

§ 1222. — *right of creditor to priority.*—Speaking generally, the law of the place where the contract is made is the law of the contract, that is, it is the law by which the contract is expounded; but the right of a creditor to priority forms no part of the contract itself. *Smith v. Union Bank of Georgetown*, 5 Pet., 523.

§ 1223. — *taking of foreign security.*—The law of the place where a contract is entered into governs the validity of the contract, although it is agreed that security thereon shall be given by a mortgage upon lands in another state. The mere taking of foreign security does not alter the locality of the contract. *DeWolf v. Johnson*, 10 Wheat., 383. See § 1213.

§ 1224. — *lex fori.*—Personal contracts are to have the same validity, interpretation and obligatory force in every other country which they have in the country where they are made or are to be executed, but remedies on such contracts are to be regulated and pursued according to the law of the place where the action is instituted and not by the law of the place where the contract is made. *Le Roy v. Crowninshield*, 2 Mason, 157.

§ 1225. As to the obligation of contracts and their discharge, the laws of a foreign country where they were made may govern, but as to the remedy and the forms of proceedings the law of the forum must prevail. *Webster v. Massey*, 2 Wash., 157.

§ 1226. Where a contract is made in New York and suit is brought upon it in Louisiana, its interpretation and validity are to be governed by the laws of New York, the remedy upon it by the laws of Louisiana. *Wilcox v. Hunt*,* 13 Pet., 378.

§ 1227. — *place of performance.*—All contracts between private parties are made with reference to the law of the place where they are made or are to be performed. Their con-

structive validity and effect are to be governed by the place where they are made and are to be performed, if that is the same. Those laws enter into and become a part of the contract. *Brine v. Insurance Co.*, 6 Otto, 637.

§ 1228. — *lex fori* — Place of performance.— Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place where the contract is to be performed. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence and statutes of limitation, depend upon the law of the place where the suit is brought. *Scudder v. Union National Bank*, 1 Otto, 412.

§ 1229. Valid where made, valid everywhere.— Except for the constitutional prohibition, any state might act upon the contracts of its citizens wherever made, and discharge them and deny a right of action on them in its courts, but the validity of a contract made outside its territory, if good by the *lex loci contractus*, would be valid everywhere. So a statute discharging contracts or denying suits upon them, unless it makes particular mention of foreign contracts, does not include them. *Suydam v. Broadnax*, 14 Pet., 74.

§ 1230. Contracts valid where made are generally valid everywhere; and the remedies are the same whether the suit is brought in the district where the contract was made, or in another district of the same circuit, or in any other federal court having jurisdiction. *Green v. Collins*, 8 Cliff., 494 (§§ 845-856).

§ 1231. A contract illegal where made is illegal everywhere. *In re Conrad*,* 8 Phil., 150.

§ 1232. When a contract is good where it is made, it is good everywhere; and it seems that a contract which is void by the law of the place where it is made is void everywhere. *Lamb v. Bowser*, 7 Biss., 319.

§ 1233. Law of place of performance.— A contract made and to be performed in a certain country derives its character and obligation from the laws of such country, and may be dissolved by them. *Osborn v. Nicholson*, 1 Dill., 283.

§ 1234. When an instrument is executed in one country with reference to the law or judicial proceedings of another, it must be executed with all the formalities prescribed in the country in which it is to take effect for the purposes declared by the law. *Harman v. Harman*, Bald., 180.

§ 1235. Where a party makes a contract in one state which is to be executed in another, he is bound by the laws of the state in which the contract is to be executed, and is bound to know them. As to such laws, the same rule applies as to the laws of his own state, that ignorance thereof does not excuse. *Payson v. Withers*, 5 Biss., 278.

§ 1236. The law of the place of the contract determines the nature, the obligation and interpretation of the contract. But when the contract is to be performed in a different place from that in which it is made, the law of the place of performance, in conformity with the presumed intention of the parties, determines the nature, obligation and interpretation of the contract. A defense or discharge, good by the law of the place of the contract, is good wherever the contract is sought to be enforced; but where the place of performance is not the place where the contract was made, the defense or discharge is valid or invalid according to the law of the place of performance. So where bonds issued by a Canadian corporation were made payable in New York it was held that as New York was the place of performance of the contract, the contract was to be governed by New York law, and that a Canadian law which impaired the obligation of the contract was not a good defense, in New York, to an action for interest due on the bond. *Gebhard v. Canada Southern R'y Co.*, 17 Blatch., 417.

§ 1237. The laws which exist at the time and place of the enforcement of a contract and where it is to be performed enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment. *Walker v. Whitehead*, 16 Wall., 317.

§ 1238. A bill was drawn by a party in another place on himself at Philadelphia, and accepted by him at that place. Held, that the bill, being payable in Philadelphia, had in contemplation the laws of Pennsylvania and must be governed by them. *Golden v. Prince*, 3 Wash., 315.

§ 1239. By a contract between the builders of certain cars and a purchaser, certain payments of cash were to be made on the delivery of the cars and certain notes given, and until the notes were paid it was agreed that the title to the cars should remain in the builder, and that upon default in the payment of any of the notes the builders should have the right to seize the cars and sell them. The contract was made in Ohio, and the payments were made and the notes delivered in that state. The cars were to be used in Kentucky and were seized there as provided in the contract. Held, that the law of the place of performance of the con-

tract was to govern, and as the seizure was to be made in Kentucky, that was the place of performance of the contract, and as the contract was void as against creditors and subsequent purchasers, under the laws of Kentucky, for want of registration, the builders had no right of seizure thereunder, as against such creditors and purchasers. *Hart v. Barney & Smith Manuf'g Co.*, 7 Fed. R., 549.

§ 1240. The holder of a draft in Illinois, which was payable in North Carolina, sent it to a bank in North Carolina for collection. The bank acknowledged the receipt of the draft, and informed the holder that it had been credited to his account and entered for collection. The bank then sent the draft to A., who collected it and failed before remitting it. In an action against the bank for the proceeds of the draft, it was held that the contract between the holder and the bank was complete when the bank answered the letter of the holder, and that being also to be executed in North Carolina, the contract as to its form and legal effect was to be governed by the law of North Carolina. *Kent v. Dawson Bank*, 18 Blatch., 237.

§ 1241. The merchantable quality of goods which a party agrees to sell and deliver in a particular place is to be determined by the laws of that place. *Ladd v. Dulany*,* 1 Cr. C. C., 588.

§ 1242. When bills are drawn for discount, the law of the place where they are to be discounted governs. They have no validity till discounted, and consequently the law of the place where they are discounted governs the rights of the parties. *Orr v. Lacy*, 4 McL., 251.

§ 1243. If a contract is not usurious where it is made payable, it is not void for usury unless it appears that the insertion of that particular place of payment was a mere shift or device to evade the usury laws of the place where the contract was made. *Junction Railroad Co. v. Bank of Ashland*, 12 Wall., 229.

§ 1244. The law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed by the law of the place where it is to be executed. So where nothing appeared on the face of the bond of a navy agent to show where it was executed, and as it was undoubtedly to be executed at the seat of government, it was held that the contract was to be executed at Washington, and that the liability of the parties must be governed by the rules of the common law. *Cox v. United States*, 6 Pet., 208; *Duncan v. United States*, 7 Pet., 449.

§ 1245. Where bills of exchange payable in London are accepted on a promise to provide funds there for their payment, such an agreement is governed by the law of England as to the obligation of the parties, the rates of interest, and the rules for its computation. *Bainbridge v. Wilcocks*, Bald., 537.

§ 1246. — *lex loci*.—Any interpretation or construction of a contract applicable or incidental to its performance should be governed by the law of the place of performance; and such matters of construction or interpretation as go to the execution and validity of a contract are determined by the laws of the place where the contract was made. *Howenstein v. Barnes*, 5 Dill., 484.

§ 1247. As a general rule, the validity, nature, interpretation and obligations of contracts are to be governed by the *lex loci contractus*, if the contract is to be performed there, but if it is to be performed in another place, then it is to be governed by the law of the latter place; but in some cases other considerations may intervene. *Pope v. Nickerson*, 3 Story, 474.

§ 1248. The validity of a contract is to be decided by the law of the place where it was made, unless it was agreed, either expressly or tacitly, that it should be performed in some other place; then the law of the place of performance governs its validity, nature, obligation and interpretation. *Green v. Collins*, 3 Cliff., 494 (§§ 345-356).

§ 1249. — *Indorsement*.—Where a note is made in one state, but is payable and indorsed in another state, then the law of the latter state governs the rights of the parties. The law of the place where a contract is to be performed, and not the place where it is executed, is the law which affects its obligation. The indorsement of a note subjects the indorser to the obligations imposed by the law where the indorsement is made. *Brabston v. Gibson*, 9 How., 277.

§ 1250. *Lex fori*.—Where a right exists under a contract the remedy is to be pursued according to the *lex fori*. *Hinkley v. Marean*, 3 Mason, 89.

§ 1251. The law of the place where a contract is made is to govern as to the nature, validity and construction of the contract, but as to the form of the action, or the remedy by which a contract is to be enforced, a different rule prevails, that the recovery must be sought and the remedy pursued according to the *lex fori* and not according to the *lex loci contractus*. *Van Reimsdyk v. Kane*, 1 Gall., 375.

§ 1252. Though a deed is good and sufficient, by the law of Wisconsin, which is only sealed with a scrawl, yet where an action is brought in New York on such a deed for the breach of

covenants therein, the action must be in *assumpsit* as on an unsealed instrument, as by the law of New York such scrawl is insufficient as a seal. *Le Roy v. Beard*, 8 How., 464.

§ 1253. Under the law of Louisiana a contract under seal is of no greater dignity than one without a seal, and those who sue on foreign contracts in that state must abide the consequences of these rules. *Wilcox v. Hunt*,* 13 Pet., 378.

§ 1254. S. and S. executed in Pennsylvania certain promissory notes to defendants, A. & Co., upon which suit was brought in the United States circuit court in Indiana. Judgment was entered for plaintiffs and execution issued, which was levied on real estate of defendants. Upon a motion made to set aside the return of the marshal and to direct him to collect the money under the laws of Pennsylvania (which were different from those of Indiana) it was held that the remedy is not a part of the contract, and that the law of Pennsylvania cannot regulate the sale of real estate in Indiana by execution or otherwise. *Smith v. Atwood*,* 8 McL., 545.

§ 1255. *Lex fori* and *lex loci* agreeing, and differing with law of place of performance.—A bill of exchange was drawn in Illinois upon a firm in Missouri, and was verbally accepted by a member of the firm then present. In a suit thereon in Illinois, it was held that the law of Illinois should govern and control the liability of the drawees. Where the *lex fori* and the *lex loci* agree, and differ from the law of the place of performance, the former prevails. *Scudder v. Union National Bank*, 1 Otto, 411.

§ 1256. *Lex rei sitæ* governs contracts as to real estate.—The title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. *McCormick v. Sullivan*, 10 Wheat., 202.

§ 1257. A title to or an interest in land can only be acquired or lost pursuant to the law of the state in which the land is situated. *Kerr v. Moon*, 9 Wheat., 571.

§ 1258. No title to lands can be acquired or passed unless according to the laws of the state where they are situated. *Clark v. Graham*, 6 Wheat., 579.

§ 1259. The rule that a contract shall be judged by the law of the place in which it is made is not applicable to real estate, which can be conveyed only according to the law of the place where it is situated. *Northwestern Mutual Life Ins. Co. v. Overholt*, 4 Dill., 293.

§ 1260. Where land is the subject of a contract, the law of the place where it is situated governs its descent, alienation and transfer, and the effect and construction of conveyances. *Brine v. Insurance Co.*, 6 Otto, 636.

§ 1261. Statute of limitations, which one governs.—The statute of limitations of the place where the contract is made does not govern in an action in another forum, but the statute of limitations of the forum in which the suit is brought must govern. *Egberts v. Dibble*, 3 McL., 57; *Jones v. Hays*, 4 McL., 523; *Ames v. Le Rue*,* 2 McL., 216; *McCluny v. Silliman*, 8 Pet., 276.

§ 1262. The statute of limitations of the place where a contract is made cannot be pleaded in bar of an action instituted in another forum where the period of limitation is greater. *Townsend v. Jemison*, 9 How., 418.

§ 1263. Under the law of the state in which a note was given and payable it was given the same effect as to remedies on it as a specialty, and the statute of limitations was the same in reference to it as to sealed instruments. Suit was brought on it in another state in which the difference between sealed and unsealed instruments was observed, and a shorter period of limitation of actions on such notes was prescribed. Held, that though the law of the state in which the instrument was made gave the same remedy on it as on a specialty, it was still an unsealed contract, and as the remedies on a contract are to be governed by the *lex fori*, the statute of limitations of the latter state must be applied. Though the nature, validity and interpretation of the contract may be the same in both states, yet the mode in which the remedy is to be pursued, and the time within which suit must be brought, will depend upon the *lex fori*. *Bank of United States v. Donnelly*, 8 Pet., 371.

§ 1264. A contract, as to its intent and meaning, must be construed according to the law of the country where it is made or is to be executed. If action is brought thereon in another forum the *lex loci* applies only to the nature, validity and construction of the contract, and not to the form of the action, the course of judicial proceedings or the time when the action must be commenced; these are governed by the *lex fori*. The statute of limitations is a matter pertaining to the remedy, and is applied by courts of the United States according to the law under which the court sits. *Nicolls v. Rodgers*, 2 Paine, 438.

§ 1265. The statute of limitations of the place where the contract is made, and where the parties continue to reside, governs, though suit be brought in another state. *Gilpin v. Plummer*, 2 Cr. C. C., 56.

§ 1266. Where the *lex contractus* leaves any right of action, foreign courts may enforce that right according to their own local remedies and modes of proceeding. Where no right

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of action exists by the *lex contractus*, foreign courts do not enforce the original obligation, because it is gone, and to enforce it would be to create a new obligation, and not to recognize a subsisting one. This is true of the statute of limitations of the place of contract, where it has actually and completely run against a contract. The laws extinguish the remedy in every form at the option of the debtor, and this right or presumption of extinction ought to go with him everywhere, and be recognized everywhere. *Le Roy v. Crowninshield*, 2 Mason, 172.

§ 1267. Interest, governed by what law.—Where a contract is silent as to the rate of interest, and is in terms made payable in another state, the implication of the law is that the parties contemplated that the laws of the other state as to the rate of interest should apply. *Rogers v. Lee County*, 1 Dill., 530.

§ 1268. If a contract is made in one place and is to be performed in another, it is to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher rate without incurring the penalties of usury. *Andrews v. Pond*, 13 Pet., 78.

§ 1269. In a suit upon a contract the rate of interest is to be determined by the *lex fori*, where no rate is fixed by the contract, and no place is designated for the performance of the contract. *Goddard v. Foster*,* 17 Wall., 123.

§ 1270. Where a contract for the payment of money is made, the rate of interest reserved may either be that of the place where the contract is made or where it is to be performed, according as the parties may agree; and if the rate fixed is that of the place of performance, and it is higher than that of the place where the contract was entered into, still the contract is not exposed to the imputation of usury unless it was the intention of the parties to thereby evade the penalties imposed for usury by the law of the place of contracting. *Miller v. Tiffany*, 1 Wall., 310.

§ 1271. The interest to be allowed in an action against a person who promised to accept a bill, and who has failed to do so, is the interest of the place where the promise was made and where it was to be performed, and not of the place where the bill was drawn. *Boyce v. Edwards*, 4 Pet., 123.

§ 1272. The rate of interest on a settled account will be that allowed by the *lex loci contractus* and not by the law of the place where suit is brought. *Jaffray v. Dennis*, 2 Wash., 253.

§ 1273. Capacity to contract, governed by what law.—Where the party contracting resides in the state in which the contract is executed and in which it is to be performed, then the law of such state governs the capacity of the party to enter into the contract. So where a married woman in New York, who was operating a distillery in that state on her own account, entered into a bond to the United States conditioned on her performance of certain acts in and about her distillery, which were to be executed in New York, it was held that as she had capacity to enter into such bond under the law of New York the bond was valid. *United States v. Garlinghouse*, 4 Ben., 201.

§ 1274. The law of the domicile of the party does not govern the contract, and determine his rights and obligations. They depend upon the law of the place where the contract was made, or where it is to be executed. So a contract made in Chili for the transportation of goods to England by the master of a ship, of which the owners resided in Maryland, was held to be governed by the general commercial law, and not by the common law. *Naylor v. Baltzell*, Taney, 61.

§ 1275. Transfer of stock.—Unless there is something to prevent, in the statute law or the decisions of the state in which a corporation is situated, a transfer of its stock which is good under the law of the place of the owner's domicile is good everywhere, at least as to the equitable title. *Black v. Zacharie*, 8 How., 513.

§ 1276. Existing law a part of the obligation.—The municipal law of the state which binds the parties to perform their agreement constitutes the obligation of a contract. Those laws existing at the time of the contract must govern and control the contract in every shape in which it is intended they should bear on it, whether they affect the validity or the construction of the contract. *Sawyer v. Parish of Concordia*, 12 Fed. R., 756.

§ 1277. The sureties on a replevin bond entered into under a state statute, which gives it the effect of a judgment, are entitled to have their land sold according to the laws in force at the time the bond was entered into. *Stockwell v. Kemp*, 4 McL., 81.

§ 1278. Place of performance.—Plaintiff, a resident of B., consigned a vessel to defendants, residents of N. While the vessel was at N., she was attached as the property of plaintiff, and to dissolve the attachment defendants became security for plaintiff, who subsequently promised to indemnify them for any loss sustained by them on that account. Defendants were afterwards obliged to pay the debt for which they had become security. In an action

by them to recover from plaintiff, *held*, that the contract of indemnity was to be performed at N., the residence of defendants. *Boyle v. Zacharie*,* 6 Pet., 635.

§ 1279. Notes drawn in one state to be discounted in another — Usury.—C. in Philadelphia, wishing to raise money, made an arrangement with F. in New York by which S. of Philadelphia was to draw notes, which were to be indorsed by C., and by him sent to New York and discounted by F. The notes were drawn and dated at Philadelphia and signed by S. and indorsed by C. They were then sent to F. at New York, and by him discounted at a usurious rate, and the money was remitted to S. *Held*, that the contract was to be governed by the law of New York, and that being illegal and void there, it was illegal and void everywhere. *In re Conrad*,* 8 Phil., 147.

§ 1280. Notes drawn and payable in New York, but discounted and indorsed in Rhode Island — Mortgage — Usury.—H., a resident of New York, in pursuance of a previous arrangement made by A., in his behalf, with a bank in Rhode Island forwarded to A. five notes signed by himself in New York, and payable in New York. In pursuance of an arrangement between them, A. and B. indorsed three of the notes, and two of them were discounted at the bank, and their face was paid to H., and the third was retained as interest on the other two. For the indorsements A. and B. each received one of the remaining notes, and H. executed to A. a chattel mortgage to secure A. and B. from liability on their indorsements. All the notes were dishonored, and A. and B. were properly charged as indorsers. In a suit by A. and B. for the proceeds of the property mortgaged, it was held that the validity of the notes was to be determined by the law of Rhode Island and not of New York, and that the transaction was not void for usury. *Providence County Savings Bank v. Frost*, 8 Ben., 294.

§ 1281. Bill drawn in Ohio for accommodation of acceptor in New York, and negotiated by him in latter state.—A., in Ohio, for the accommodation of B., in New York, drew a bill on B. which he indorsed and sent to B. B. accepted it, and negotiated it to a third party at a usurious rate of interest. *Held*, that the law of New York governed the negotiation of the bill, and that as an illegal rate of interest was received the contract was void. *Davis v. Clemson*, 6 McL., 625.

§ 1282. Bill drawn in one state on a person in another — Suit by drawee against the drawer.—A bill of exchange was dated and drawn in Memphis on a person in New Orleans. In a suit by the drawee against the drawer it was held that the contract was made at Memphis and not at New Orleans, and that if void by the law of Tennessee, no recovery could be had thereon. *Davidson v. Lanier*, 4 Wall., 457 (BILLS AND NOTES, §§ 1319-24).

§ 1283. Letter of credit by English firm, dated and signed by agent in Boston.—A letter of credit was dated at Boston and signed by the agent of a firm in England, authorizing a draft on them and promising that they duly honor such draft when presented. *Held*, that this contract was made in Massachusetts, and not in England, and that the rights, duties and obligations of the parties under it are determined by the law of Massachusetts. *Russell v. Wiggin*, 2 Story, 220.

§ 1284. Application for insurance made in one state and forwarded to the company in another — Policy issued in the latter.—An application for insurance on property in Indiana was made in Indiana and forwarded with the premium to the office of the insurance company in Illinois, and the policy was mailed to the insured from the office of the company. *Held*, that the contract was completed on the deposit of the policy in the postoffice, and that being made in Illinois, and being valid there, it was valid in Indiana, though the company and its agent were acting in Indiana in violation of the laws of that state. *Lamb v. Bowser*, 7 Biss., 316, 377.

§ 1285. Representations made in New York — Insurance in Boston.—The owner of a ship wrote from New York, where the ship then was, to an insurance company in Boston and described the condition of his ship and asked for insurance. Relying on his representations, the vessel was insured by the Boston company. *Held*, that in construing the terms of the representations, they should be construed according to their use and meaning in New York, where the representations were made, and not in Boston. *Hazard v. New England Marine Ins. Co.*, 8 Pet., 581.

§ 1286. Sale in one state where the goods are to be carried into another in violation of its laws.—In an action to recover the price of goods sold, it is no defense that the vendor knew that they were purchased to be sold in another jurisdiction, in violation of the law of that jurisdiction, provided it was not a part of the contract that they should be used for that purpose, and also provided that the vendor did not agree to do anything in aid or furtherance of the unlawful design. *Green v. Collins*, 3 Cliff., 494 (§§ 845-356).

§ 1287. A sale of liquors in Rhode Island, which the vendor knows are intended by the vendee to be carried into Massachusetts, is therefore valid, and the seller may recover thereon in the United States courts in Massachusetts, notwithstanding a statute of the latter state

providing that no action shall be maintained for the price of liquors sold in any other state to be brought into that state. *Ibid.*

§ 1288. Warrant to confess judgment in any court in Ireland for a sum due in British sterling.—A person being indebted to another for a certain sum in British sterling gave a bond and warrant of attorney to confess judgment in any court in Ireland. *Held*, that though the kind of sterling was not mentioned in the bond or warrant of attorney, it was to be British sterling, but that the interest allowed should be Irish interest, as the amount was payable in Ireland. *Bushby v. Camac*, 4 Wash., 296.

§ 1289. Separation of Alexandria from Virginia — Effect on existing contracts.—The separation of Alexandria from Virginia had no effect on contracts existing between individuals of the two jurisdictions. So a contract of insurance on a house in Alexandria made before the separation remained good, though by the constitution of the insurance company it could only insure buildings in Virginia. Such separation could only affect future and not existing contracts. *Korn v. Mutual Assurance Society*, 6 Cr., 199.

§ 1290. Agreement made in New Hampshire to ship goods from Boston.—B., a resident of Boston, being in Dover, agreed to sell D., a resident of Dover, certain merchandise, and to ship the same to him on his return to Boston. B. did as promised, delivering the merchandise to a common carrier in Boston. *Held*, that the agreement was executory as made in New Hampshire, and that the sale was made in Massachusetts, where it was completed, and not in New Hampshire. *Sortwell v. Hughes*, 1 Curt., 245.

§ 1291. Lottery drawn in one state on land in another.—Under a lottery scheme a piece of land lying in New Jersey was drawn and a conveyance executed. *Held*, that as all lottery transactions were prohibited by the statute of New Jersey there was no consideration for the conveyance, and that this was true although the lottery was drawn in Pennsylvania, where it was legal. *Ridgeway v. Underwood*, 4 Wash., 183.

§ 1292. Mortgage of land in Michigan — Interest payable in New York — Usury — Foreclosure.—A person residing in Michigan borrowed money, and executed and delivered a bond and mortgage in that state on land therein to secure the payment thereof. The interest was payable in New York and was at a rate greater than that allowed in New York, but was lawful in Michigan. In a suit to foreclose the mortgage it was held that the contract was valid and that the interest reserved was lawful. Where the legal interest stipulated to be paid is higher where the contract is entered into than at the place of payment, the higher rate will be presumed to be within the intention of the parties. If the transaction is *bona fide* and not with intent to evade the law against usury, and the law of the place of performance allows a higher rate of interest than that permitted at the place of the contract, the parties may lawfully stipulate for the higher interest. But the transaction must be *bona fide* and not a mere cloak for usury. *Fitch v. Remer*, 1 Flip., 16.

§ 1293. Sale — Intention of vendee to use the property in another state and in violation of its laws.—Where a contract of sale is completed in one state with knowledge that the vendee intends to use the property in another state in a way that will subject him to a penalty, such a contract is not void, and will support an action for the purchase price in the state whose laws were intended to be violated. *Sortwell v. Hughes*, 1 Curt., 246.

§ 1294. New York contract — Discharge under Maryland insolvent law.—A resident of Baltimore purchased goods in New York, and in settlement of his account transmitted to his attorney in New York certain notes of his made in Baltimore, but payable in New York. *Held*, that the contract was a New York contract and governed by New York law, and that a discharge under the insolvent law of Maryland could not be set up as a defense to an action on the notes. *Cook v. Moffat*, 5 How., 307.

§ 1295. Contract in one state for the conveyance of land in another — Vendor's lien.—A contract and conveyance was made in Massachusetts of land in Georgia, which was silent as to the lien of the vendor for purchase money. *Quære*, whether, as the laws of Massachusetts gave the vendor no such lien, he could claim such a lien, provided the laws of the place where the land was situated would give it. It seems the more reasonable rule that the rule of law should prevail that the contract was to be construed according to the place where it was executed. *Gilman v. Brown*, 1 Mason, 219.

§ 1296. Contract by citizen with foreigner in foreign country — Void if prohibited by state — But valid elsewhere.—Unless restrained by constitutional prohibitions a state may act upon contracts made by its citizens in every country, and consequently may discharge them by general laws. But such is not the operation of jurisdiction on contracts made by a citizen with a foreigner in a foreign country. If, in such cases, the legislature, by positive laws, nullifies such contracts, they cannot be enforced in its tribunals, but elsewhere they retain the original validity they had by the *lex loci contractus*. But if a statute be general, without a direct reference to foreign contracts, its construction should not be extended to them. *Van Reimsdyk v. Kane*, 1 Gall., 377.

§ 1297. *Bond by public officer — Scrawl seal allowed by local law.*— Though by common law a sealed instrument must be sealed with wax or some like substance, yet by the legislation of most of the states a scrawl has been substituted. A bond was executed in Illinois by a receiver of public money, who was required by law of congress to give a bond. *Held*, that as the law of Illinois allowed a scrawl seal, and that especially as the obligor meant the scrawl for a seal, the bond was a bond within the meaning of the statute. *United States v. Stephenson*, 1 McL. 402.

§ 1298. *Lien upon vessel under local law — Subsequent mortgage in the state where she is enrolled.*— A lien upon a steamboat arising under the local law of one state does not take precedence in a United States court of a subsequent mortgage executed according to United States laws at the port in another state where the vessel was enrolled. *Underwriters' Wrecking Co. v. The Katie*, 8 Woods, 182 (§§ 1648-49).

§ 1299. *Unauthorized contract of corporation in foreign state — Action in latter state to recover money paid thereon.*— A Wisconsin corporation made in Oregon a contract of insurance which it had no right to do under the laws of that state. Payment of the policy was obtained by fraud, and action was brought in the federal courts of the district of Oregon to recover back the money so paid. It was held, that the action could be maintained. *Northwestern Mutual Life Ins. Co. v. Elliott*, 7 Saw., 17 (§§ 756-760).

7. *As Affected by Custom and Usage.*

[See USAGE AND CUSTOM.]

SUMMARY — *Not admissible to vary contract*, § 1800. — *Custom as to filling orders for goods*, § 1801. — *Notice necessary*, § 1802.

§ 1800. No usage can be proved to vary the effect of a written contract which is clear. Certain evidence held insufficient to show a general usage. *Oelricks v. Ford*, §§ 1803-1805.

§ 1801. The defendants, manufacturers, took more orders than they could fill immediately. It was their custom to enter these orders as taken and deliver at intervals different proportions of the goods ordered, and this custom was known to plaintiffs at the time they gave their orders. In an action for failure to deliver the goods ordered at the agreed time, it was held that the custom of defendants was admissible to show the real contract between the parties. *Bliven v. New England Screw Co.*, §§ 1806-1808.

§ 1802. A special and particular usage is not binding upon a party who has no knowledge of it. *National Bank v. Burkhardt*, §§ 1809-13.

[NOTES.— See §§ 1814-1826.]

OELRICKS v. FORD.

(28 Howard, 49-63. 1859.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.— This is a writ of error to the circuit court of the United States for the district of Maryland. The suit was brought by Ford against the defendants in the court below upon the following contract:

“BALTIMORE, November 7, 1855.

“For and in consideration of one dollar, the receipt whereof is hereby acknowledged, I have this day purchased from J. W. Bell, agent for Benjamin Ford, New York, for account of Oelricks & Lurman, Baltimore, ten thousand barrels superfine Howard Street or Ohio flour, deliverable, at seller's option, in lots of five hundred barrels, each lot subject to three days' notice of delivery, and payable on delivery, at the rate of nine dollars and twenty-five cents per barrel, viz.:

“2,000 barrels, seller's option, all December, 1855.
“4,000 “ “ “ January, 1856.
“4,000 “ “ “ February, 1856.
“10,000

“L. E. BALLARD, Broker.

“Approved:

“OELRICKS & LURMAN.”

The two thousand barrels deliverable in December were delivered, accepted, and paid for, as per contract. The four thousand barrels to be delivered in each of the months of January and February were duly tendered to the defendants, and payments demanded, and which were refused. The only objection to the acceptance of the flour at the time tendered was the refusal of Ford to a demand made upon his agent to deposit \$5,000 in one of the banks in Baltimore to secure the punctual delivery of the flour at the time mentioned. This demand for a deposit of money was denied by the plaintiff on the ground that the contract contained no such stipulation.

After much testimony given by both parties on the trial, on the subject of a usage among the dealers in flour in the city of Baltimore to demand on time contracts a deposit of money (or margin, as it is called), and the right to rescind the contract if refused, the court charged the jury that if they shall find, from the evidence, the defendants entered into the contract given in evidence, and that the plaintiff offered to deliver the flour therein mentioned according to its terms, and that when the offer was made he had the requisite quantity of flour to comply with the contract, and could have delivered it if the defendants had been willing to receive it, and that they had refused, then the plaintiff was entitled to recover. The court further instructed the jury that the rule of damages was the difference between the contract price of the flour and the market value in the city of Baltimore on the several days of the tenders, with interest on this sum, in the discretion of the jury. The jury found for the plaintiff.

§ 1303. *A general usage was not established by the evidence.*

One of the principal grounds of objection to the ruling of the court is its refusal to submit the question of usage, which was the subject of evidence on the trial, to the jury. The witnesses introduced by the defendants to prove the usage speak in a very qualified manner as to its existence, as well as to the instances in which they have known it to have been adopted or acquiesced in; and all of them admit they have no knowledge that it was general among the dealers. Some of them state that they recognized and had acted upon a custom in their own business, under which either party to the contract might require a margin to a reasonable amount, to be put up to secure the performance, and that the contract might be rescinded if the party refused; that they could not say such was the general custom; that different persons have different customs; some consider there is such a usage, and some do not. One witness states that he had at all times in his business considered it to be a right which might be exercised by either party to a time contract, whenever he apprehended a risk; that if the party was solvent, he supposed there was no right to demand it; another, that in his business he had always considered such contracts to be subject to the right of either party to demand the margin; that the occasion of exercising it was rare, as contracts made by his house were made with responsible persons; that he did not know that this was a general usage in Baltimore. The broker who negotiated the contract for the defendants states that he considered it a clearly understood right of both parties to such contracts to demand a margin to a reasonable amount; that he entertained the belief, from conversations with various merchants on the subject; that he recollected but one instance where, when the demand was made, the margin was put up, which was a margin of twenty-five cents on the barrel in a contract for five hundred barrels. There were ten witnesses, flour merchants for many years in the city, who state that they knew of no such usage.

It will thus be seen, from a careful analysis of the evidence, that the defendants wholly failed to prove any general or established usage or custom of the trade in Baltimore, as claimed in the defense. Every witness called on their behalf fails to prove facts essential to make out the custom in the sense of the law; on the contrary, most of them expressly disprove it. They express opinions upon the subject of a margin as a right to be exercised in their own business, but admit that it is not founded upon any general usage; and none of them speak of its having been claimed or exercised in his own business but in one or two instances. Whether a usage or custom of the kind set up existed in the trade in Baltimore was a question of fact to be proved by persons who had a knowledge of it from dealing in the article of flour. Opinions of persons as to what rights they might exercise in their own business in respect to time contracts fall far short of any legal proof of the fact, especially when they admit that there was no general usage of the kind known to them.

Then, as to the precise limit or character of the custom claimed, the opinions of the witnesses are various and indefinite. The margin, they say, must be reasonable, but the pretended usage contains no rule by which a reasonable margin may be determined. It is said the amount may be referred to merchants. But there is no evidence that this is a part of the custom, or that any such mode of adjusting it ever occurred in the trade. Some of the witnesses state that the margin must be a sum of money sufficient to make the party safe according to the state of the market. One states that, at the time the demand was made in this case for a margin, flour had fallen, and the price lower than the price in the contract; yet this, in his judgment, did not affect the right to make the demand, as the general opinion among dealers was, that the price would advance; that there were great fluctuations in the price, and that, in such a condition of things, a reasonable margin would depend upon the extent and character of the fluctuations, and upon the speculative ideas of the future value of flour.

The broker of the defendants, who purchased this flour, states his view of the reasonableness of the margin, which is the difference between the intrinsic value of the flour and its speculative value; by intrinsic value he says he means the cost of the production, and by speculative value the price at which it was rating above its intrinsic value; and to a question what, in his opinion, would be a reasonable margin under the custom, when flour in the market was lower than the contract price, he answered that he considered the demand reasonable in this case, because he believed flour was going up to \$12 per barrel. It would be difficult to describe a custom more indefinite and unsettled.

§ 1304. *Where a written contract is explicit and free from ambiguity parol evidence is not admissible to show a usage varying or adding to its effect.*

But, independently of the total insufficiency of the evidence to establish the usage, we are satisfied, if it existed, the proof would have been inadmissible to affect the construction of the contract. This proof is admissible in the absence of express stipulations, or where the meaning of the parties is uncertain upon the language used, and where the usage of the trade to which the contract relates, or with reference to which it was made, may afford explanation and supply deficiencies in the instrument. Technical, local or doubtful words may be thus explained. So where stipulations in the contract refer to matters outside of the instrument, parol proof of extraneous facts may be necessary to interpret their meaning. As a general rule there must be ambiguity or uncertainty upon the face of the written instrument, arising out of the terms used

by the parties, in order to justify the extraneous evidence, and, when admissible, it must be limited in its effect to the clearing up of the obscurity. It is not admissible to add to or engraft upon the contract new stipulations nor to contradict those which are plain. 2 Kent, Com., p. 556; 3 id., p. 260 and note; 1 Greenl. Ev., sec. 295; 2 Cr. & J., 249, 250; 14 How., 445.

Applying these principles to the contract before us, it is quite clear that the proof of the usage attempted to be established was inadmissible, and should have been rejected. There is no ambiguity or uncertainty in its terms or stipulations, and the condition sought to be annexed was not by way of explanation or interpretation, but in addition to the contract. The plaintiff agrees to deliver a given number of barrels of flour on certain days at the price of \$9.25 per barrel, in consideration of which the defendants agree to receive the flour and pay the price. This is the substance of the written contract. But the defendants insist that, besides the obligations arising out of the written instrument, the plaintiff is under an additional obligation to give security whenever called upon for the faithful performance; and this by the deposit in bank of the sum of \$5,000. The written instrument bound only the personal responsibility of the plaintiff; the parol evidence seeks to superadd, not a responsible name, as a surety, but in effect the same thing, a given sum of money. The parol proof not only adds to a written instrument, but is repugnant to the legal effect of it.

It was also urged on the argument that this contract was entered into between the defendants and the agent of the plaintiff with the understanding at the time that it should be subject to the usage; but the answer to this is that no such usage existed; and if it did, the terms of the contract excluded it. Any conversations and verbal understanding between the parties at the time were merged in the contract, and parol evidence is inadmissible to engraft them upon it. We are satisfied the court below was right in excluding the consideration of the evidence of the usage from the jury: (1) because the usage was not proved; and (2) if it had been, it was incompetent to vary the clear and positive terms of the instrument.

§ 1305. *Where a contract is made by an agent on behalf of his principal, disclosing his name, the principal is the proper party to bring suit.*

An objection has been taken on the argument, which was not presented to the court below, but which, it is insisted, is involved in the exception to the charge; and that is, inasmuch as it appears upon the evidence that the plaintiff was a resident of New York, and the contract made at Baltimore, in the state of Maryland, by an agent, the presumption of law is that the credit was given exclusively to the agent, the principal being the resident of a foreign state; and hence, that the contract, in legal effect, was made with the agent and not with the principal, and the former should have brought the suit. This doctrine is laid down by Judge Story in his work on agency, and which was supposed to be the doctrine of the English courts at the time, and founded upon adjudged cases. Story on Agency, sec. 268 and note; secs. 290, 423. It did not, however, at the time receive the assent of some of the courts and jurists of this country. 2 Kent's Com., pp. 630, 631 and note; 22 Wend., p. 224; 3 Hill, 72. And the doctrine has recently been explained and Judge Story's rule rejected by the English courts. In the case of *Green v. Kope*, 36 Eng. L. & Eq., pp. 396, 399 (1856), the court denied that there was any distinction, as it respected the personal liability of the agent, whether the principal was English or a foreigner. The chief justice observed: "It is in all cases a question of intention from the contract, explained by the surrounding circumstances, such as the

custom or usage of the trade when such exists. No usage," he observes, "was proved in the present case, and I believe none could have been proved." Again, he observed: "It would be ridiculous to suppose that an agent, for a commission of one-half per cent., is to guaranty the performance of a contract for the shipment of one thousand barrels of tar." The case was finally put upon the intent of the parties, as derived from the construction of the contract, and which was that the defendant contracted only as agent, and not to make himself personally liable. Willes, J., doubted if evidence of custom was admissible to qualify the express words of the contract, so as to make the agent liable. See, also, 14 Com. B. R., 390; *Mahoney v. Kekule*, 5 Ell. & Bl., 125, 130.

In the present case the broker's note, and which is approved by the defendants affixing the firm name, is too clear upon the face of it to admit of doubt as to the person with whom the contract was made. The purchase is from "J. W. Bell, agent for Benjamin Ford, of New York," and the case shows that Bell had full authority. The name of the principal is disclosed in the contract, and the place of his residence, as the person making the sale of the flour, through his agent. This fixes the duty of performance upon him, and exonerates the agent. The judgment of the court below is affirmed.

BLIVEN v. NEW ENGLAND SCREW COMPANY.

(23 Howard, 420-435. 1859.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the southern district of New York. According to the transcript the suit was originally instituted in the supreme court of the state of New York by the present plaintiffs, who were citizens of that state; but was afterwards regularly removed, under the twelfth section of the judiciary act, into the circuit court of the United States, because the corporation defendants were citizens of the state of Rhode Island.

It was an action of *assumpsit*, brought to recover damages for the supposed breach of six separate and distinct contracts, in which the defendants, as was alleged in the declaration, stipulated to deliver to the plaintiffs, pursuant to their written orders given at sundry times, certain quantities of screws, usually denominated wood screws, of various sizes and descriptions, as were therein specified. Readiness to perform on the part of the plaintiffs, and neglect and refusal on the part of the defendants to deliver the goods, after seasonable demand, constituted the foundation of the respective claims for damages, as alleged in the declaration. Those claims are set forth in eighteen special counts, to which are also added the common counts, as in actions of *indebitatus assumpsit*. Of the several contracts, the first is alleged to have been made on the 7th day of October, 1852, and the last on the 19th day of April, 1853.

At the May term, 1855, the parties went to trial upon the general issue. To prove the several agreements, the plaintiffs relied on certain correspondence which had taken place between the parties upon this subject, consisting of letters written by the plaintiffs to the defendants, in the nature of orders or requests for the goods, and the replies thereto written by the defendants. As appeared by the proofs, the plaintiffs were merchants, engaged in buying and selling hardware, and the defendants were engaged in manufacturing the description of goods specified in the declaration. They were in point of fact the

sole manufacturers of the article in the United States, and were constantly receiving orders for the article from their customers faster than they could fill them, and for larger quantities than they were able to produce.

Orders had been given for this article by the plaintiffs prior to the date of this controversy; but the evidence in the case does not show when their dealings commenced. Six orders of like import were given by the plaintiffs during the fall of 1852 and the early part of the year 1853 for large quantities of the article, of various sizes and description. This suit was brought to recover damages for not filling those orders, which, it is insisted by the plaintiffs, had been accepted without any reservation. Some of them had been filled in part only, and others had not been filled for any amount when the suit was commenced. It was denied by the defendants that the orders had been accepted without condition. On the contrary, they insisted that the plaintiffs well knew that the supply was greatly less than the demand, and that the orders were only accepted to be filled in their turn, as the defendants were able to produce the article.

To support the first three counts of the declaration, the plaintiffs, among other things not necessary to be noticed, introduced three letters—two from themselves to the defendants, and the reply of the defendants to the same. Reference will only be made to such brief portions of the correspondence as appear to be essential to a proper understanding of the legal questions presented in the bill of exceptions.

Dissatisfaction was first expressed by the plaintiffs in their letter dated on the 30th day of September, 1852. In that communication, they simply refer to the long delay that has occurred in filling their orders, and furnish a memorandum of the amount and sizes of the article claimed by them to be due and not delivered, under their order of the 29th of June of the same year. They state that after three months' delay, only about one and one-fourth per cent. of the same has been filled, and that they have not a gross of screws under an inch in their stock. Request was also made in the same communication that the plaintiffs would send at once all they could of the article, and the balance of the same as soon thereafter as it was possible. That request was, in effect, repeated in another letter, written on the 5th day of October, 1852; and on the 17th day of the same month, the defendants replied, saying that the order referred to would be taken up at the earliest possible day. No further correspondence applicable to the first three counts was introduced by the plaintiffs in the opening of the case.

They then gave evidence to prove the second agreement, as alleged in the fourth, fifth and sixth counts of the declaration. For that purpose, they introduced two letters—one from themselves to the defendants, dated on the 15th day of October, 1852; and the other from the defendants to them in reply, dated on the following day. Their letter to the defendants contained an order for three thousand seven hundred and fifty gross of screws, half to be delivered by the 15th day of March then next, and the other half a month later, subject to the regular discount at the time of delivery. That order was given thus early, as the plaintiffs stated, with a view to avoid thereafter the inconvenience they had suffered from not having their orders filled, and because they anticipated a short supply of the article the next season. In the same letter, they informed the defendants that it was given as an additional order, and requested that those previously sent might be filled without further delay.

To that communication the defendants replied, acknowledging its receipt, and saying that the order had been entered in their books, to be executed at

the times named. They also referred to the previous orders, saying they would do what they could to fill them before navigation closed on the canals; but added that they could only take them up in course, as they had a great many orders from other parties in the same condition.

Evidence was then offered by the plaintiffs to prove the third agreement, as alleged in the seventh, eighth and ninth counts of the declaration. To support those counts, two letters were introduced — one from the plaintiffs to the defendants, dated the 4th day of November, 1852; and the reply of the defendants to the same, which was dated on the 6th day of the same month. By the letter first named, the defendants were furnished with another order of the plaintiffs for an additional quantity of screws, and were requested to place the order in their books, to be filled as fast as possible, at a given rate. Previous orders were also referred to in the same letter, and the plaintiffs complain that they have not been filled in their turn; adding that they have not a gross of gimlet-point screws in their store, and earnestly requested the defendants to send them a lot by steamboat on the following day. Two days afterwards, the defendants acknowledged the receipt of the order, and informed the plaintiffs that it had been entered in their books, to be taken up in course. Those letters constitute the only evidence offered by the plaintiffs in the opening to prove the third agreement.

They then gave in evidence another order from themselves to the defendants, to prove the fourth agreement, as alleged in the tenth, eleventh and twelfth counts of the declaration. It was dated on the 7th day of November, 1852. In the same communication, they stated that they were in great want of a certain description of screws, and expressed the hope that the plaintiffs would send what they could of the article by steamboat without delay, adding: "We have always said, send what you can of our orders as fast as you get a case or two ready, or to that effect." To that letter the defendants replied, under date of the 19th of the same month, saying that the best they could do was to enter the order, to be taken up in course, intimating that perhaps it might be accomplished in about two months.

Similar evidence was given to prove both the fifth and the sixth agreements, as alleged in the six remaining counts of the declaration. Two orders given by the plaintiffs were introduced for that purpose. One was dated on the 10th day of February, 1853, and the other on the 19th day of April, of the same year. They were each for twenty thousand gross of screws; and the defendants were requested to enter the orders in their books, to be filled as soon as possible after they should have completed those previously given. Separate answers were given by the defendants to each of these orders, to the effect that they would be entered in the books of the defendants, to be taken up in course or in their turn, and be filled when they reached them, as far as they should be able to do so, consistently with their obligations to other customers.

No part of the two orders last named had been filled when this suit was commenced. Demand was made of the defendants, on the 30th day of September, 1853, for the delivery of such proportions of the several orders as had not been previously filled. At the same time, the plaintiffs rendered their account, and tendered to the defendants their promissory notes for the respective sums which would become due to the defendants on making such delivery. Such was the substance and effect of the evidence introduced by the plaintiffs in the opening, so far as it is necessary to consider it at the present time. Many other matters

were stated in the correspondence; but as they are not material to this investigation, they are omitted.

To maintain the issue on their part, the defendants, among other things, introduced a letter from the plaintiffs, addressed to them, dated on the 3d day of September, 1852, in which inquiry was made of the defendants why they did not fill the orders given by the plaintiffs. They also stated in the same letter that not a week passed without their hearing of the defendants taking and executing orders from other customers; but admitted in effect that they had long since been given to understand the rule of business adopted by the defendants in that behalf, and only complained that precedence was given to the first orders from other customers. Testimony was also introduced by the defendants, that they had some five hundred customers, and that the orders of the plaintiffs had been taken up and filled in proportion to the orders given by other customers, as the defendants manufactured the article and were able to deliver the goods. To that testimony the plaintiffs objected; but the court overruled the objection, and it was admitted, and the plaintiffs excepted.

All of the orders given by the plaintiffs, except the two last named, were filled in part, and, as the defendants proved, in due proportions to the orders of other customers, as the article was produced. They also proved that when orders were given and accepted without the price of the article being agreed, it was their custom, and according to the usage of their business, to charge at the rates ruling at the time of the delivery; and if during the interval the discount from fixed rates had increased, the purchaser had the benefit of the allowance; but if prices had risen, and the discount was less, then the purchaser paid according to the increased price. To this testimony, as to the usage of the defendants' business, the plaintiffs objected, but the court overruled the objection, and the testimony having been admitted, the plaintiffs excepted. That practice, however, was not applicable to customers who were not duly notified of the usage, but all such had their orders filled at former rates. Orders from other customers were received by the defendants throughout the period of these transactions, but they refused to accept orders from new parties.

§ 1306. *Whether a known usage will justify only a partial filling of an order for goods.*

Proof was also offered by the defendants, tending to show that the profit to the manufacturer was less upon the small sizes of the article than upon the large, and it was admitted by their counsel that the market price of the goods advanced after the orders of the plaintiffs were given. Much additional testimony was introduced on the one side and the other, to which it is not necessary to refer, for the reason that it presents no question for the decision of this court. On this state of facts the presiding justice instructed the jury to the effect that the several contracts for the sale of the goods by the defendants to the plaintiffs were subject to the custom of the defendants to fill the same in part only, and that the plaintiffs, from having been dealers with the defendants, and from the correspondence between them, were chargeable with notice of the defendants' custom to fill their contracts only in the order they were accepted, and in proportion with each other, and not in full, according to the strict terms thereof. Under the rulings and instructions of the court, the jury returned their verdict for the defendants, and the plaintiffs excepted to the instructions. Exception was taken to two of the rulings of the court and to each of the instructions to the jury, but they present only one question for decision,

and therefore may well be considered together. No evidence of general usage or custom in the ordinary sense of those terms was offered in this case, and no question touching the general rules of law upon that subject is presented for the decision of this court. It may also be safely admitted that the custom of a party to deliver a part of a quantity of goods contracted to be delivered, though invariable, cannot excuse such party from a full compliance with his contract, unless some such custom is known to the other contracting party, and actually enters into and forms a part of the contract. Mere knowledge of such a usage would not be sufficient, but it must appear that the custom actually constituted a part of the contract. But when it appears that such custom was well known to the other contracting party as necessarily incident to the business, and actually formed a part of the contract, then it may furnish a legal excuse for the non-delivery of such a proportion of the goods as the general course of the business and the usage of the seller authorize, for the reason that such general usage, being a part of the contract, has the effect to limit and qualify its terms. *Linsley v. Lovely*, 26 Vt., 137. Customary rights and incidents, universally attaching to the subject-matter of the contract in the place where it was made, are impliedly annexed to the language and terms of the contract, unless the custom is particularly and expressly excluded.

§ 1307. *Parol evidence of a custom, when admissible.*

Parol evidence of custom, consequently, is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage. But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. Omissions may be supplied, in some cases, by the introduction of the custom, but the custom cannot prevail over or nullify the express provisions and stipulations of the contract. 2 Add. on Con., 970. Proof of usage, says Mr. Greenleaf, is admitted either to interpret the meaning of the language of the contract, or to ascertain the nature and extent of the contract, in the absence of express stipulations, and where the meaning is equivocal or obscure. 1 Greenl. Ev., sec. 292. Its true and appropriate office is to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character. *The Reeside*, 2 Sumn., 564. Nothing can be plainer than the proposition that the evidence in the case proved that the supply with the defendants was much less than the demand of their customers. To avoid dissatisfaction, therefore, they were obliged to devise some system which would enable them to do equal justice among those who were properly competing for the article. Accordingly, they adopted a rule to accept all such requests, and to enter the list in a book kept for the purpose, and to fill them as far as possible in the order they were received. They had been in business for some time and that rule had become the custom of their trade, and, as such, was well known to the plaintiffs during all the time of these transactions. Many of their orders thus given at short intervals had been expressly accepted to be filled in turn or in course, and the correspondence plainly showed that the plaintiffs well knew what was meant by those terms. Evidence to prove that the orders had been taken up in turn and filled in proportion to the orders given by other customers was therefore admissible, in order to show that the defendants had fulfilled their contract, and done no injustice to the plaintiffs;

and it is equally clear that evidence to show what had been the usage of the defendants' business was also admissible, because that usage constituted an essential part of the several contracts which were the subjects in controversy. *Renner v. Bank of Columbia*, 9 Wheat., 588 (BILLS AND NOTES, §§ 754-759). After what has been remarked, one or two additional observations respecting the instructions given to the jury will be sufficient.

§ 1308. *Written evidence must be construed by the court.*

Written evidence, as a general rule, must be construed by the court, and the first instruction was confined to that purpose. It gives the true exposition of the correspondence, and therefore is not the subject of error. It is insisted by the counsel of the plaintiffs that the second instruction withdrew the evidence of notice from the consideration of the jury. We think not, and for two reasons. In the first place, it was the proper duty of the court to construe the correspondence, and that of itself was sufficient to justify the charge. But the charge must receive a reasonable interpretation. In effect, the jury were told that the evidence, if true, showed that the plaintiffs had notice of the custom of the defendants in regard to the filling of the orders. It did not withdraw the question as to the credibility of the witnesses from the consideration of the jury, and that was all that could properly be submitted to their determination. In view of all the circumstances, we think the exceptions must be overruled. The judgment of the circuit court is therefore affirmed with costs. (a)

NATIONAL BANK v. BURKHARDT.

(10 Otto, 686-693. 1879.)

ERROR to U. S. Circuit Court, Southern District of Ohio.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—On the 23d of February, 1875, Burkhardt, the defendant in error, executed, for the benefit of John Cinnamon, an instrument to the bank whereby he stipulated "to guaranty and make good to said bank any sum or sums which may hereafter be held against the said John Cinnamon, to an amount not exceeding \$50,000," and notice "from time to time of the amount and extent of such indebtedness" was waived. As originally drawn, the guaranty included Cinnamon's existing as well as his future liabilities. Burkhardt refused to sign it, unless what related to the former was stricken out. This was done by the vice-president of the bank, and Burkhardt thereupon signed and delivered the instrument. This was in the afternoon of the day above named.

The only controversy between the parties, as the case is presented here, relates to a check for \$10,997, drawn by Cinnamon upon the bank, in favor of Evans, Lippincott & Co. It appears by the bill of exceptions that the check was presented to the bank by the payees on the day of its date, the 23d of February, 1875, and that the bank "gave evidence tending to show that when the check was so handed in it was without the pass-book, and was placed aside by the receiving teller for examination after the close of banking hours before it should be credited; that the receiving teller had been instructed by the cashier not to credit Cinnamon's account with checks left until after the close of bank hours, when the account was examined and found good; that when the checks of Cinnamon were left on that day, the depositors were informed that they would not be passed to their credit unless found good after the close

of bank hours; that there was at the time, and for a long time had been, a notorious usage in Cincinnati in receiving checks from depositors on them, and that this usage peculiarly applied to large banks, like the First National, by which checks left in the bank in the morning by depositors were held until after close of the bank, subject to be returned in the afternoon if found, upon balancing the accounts, not to be good; that such had been the usage in the First National Bank since its organization in 1861, and that it was a bank of \$1,500,000 capital; and that such usage was general and notorious among the customers of the bank." And that the "defendant thereupon gave evidence tending to show that no such usage existed, and to contradict all the evidence of plaintiff in relation thereto, and in reference to any notice to the depositors in regard to Cinnamon's check as testified to by the plaintiff, and tending to show that Evans, Lippincott & Co. had no knowledge or understanding in regard to said check, except that it was received on deposit, and as a deposit, when it was left with the bank."

If the check were to be considered as received on deposit when it was left with the teller, and Cinnamon was the debtor of the bank and the bank his creditor from that time, then the transaction was not within the guaranty, and Burkhardt was not liable. If, on the other hand, the bank had the right to hold the check until after bank hours, and then to make its election, and to credit the depositor and charge Cinnamon with the amount, as was done, the check was covered by the guaranty, and the bank was entitled to recover. These alternatives were the hinges of the controversy upon the trial.

The question presented was decisive of the case. Its solution was for the jury under instructions from the court. It is insisted by the plaintiff in error that the court erred in the instructions given. The general charge embraced topics not brought before us, doubtless for the reason that, with respect to them, both parties acquiesced in the findings of the jury. The charge was full and able. In our judgment, it was correct in everything it touched upon, and it covered the entire case.

Having given such a charge, the court was not bound to give any further instructions, and it would have been as well if the judge had declined to give those submitted by the plaintiff in error. It appears that they were seven in number. Only the last four are in the record. They affirm or deny, with only a change of phraseology, what has been said in the charge already given. The jury was properly cautioned not to be misled or confused by them. There is danger of both in such cases.

The first of these special charges, as we find them in the record, was given as asked for without qualification. Nothing need, therefore, be said in relation to it. The second one, with the addition made to it by the court, is as follows: "That if checks of John Cinnamon on the bank were left at the bank on the 23d of February, 1875, but were not passed upon by the receiving teller, or received as a deposit, nor entered in any pass-book or other book of the bank to the credit of the parties leaving them, but were laid aside for examination until after bank hours, when an examination could be made to see whether Cinnamon's account was good, then they did not become a debt of Cinnamon to the bank until they were so passed upon and entered." This charge the court gave, adding, "If it was handed in as a deposit, it became a deposit at the time it was received. Taking the surrounding circumstances into consideration, if it was received by the teller as a deposit, it became a deposit. That I give you, for it has these words in it, 'or received as a deposit.'"

§ 1309. *In law a day is usually an indivisible unit. Exception to the rule.*

For most purposes the law regards the entire day as an indivisible unit. But when the priority of one legal right over another, depending upon the order of events occurring on the same day, is involved, this rule is necessarily departed from. Thus, where a mortgage took effect from the time it was deposited for record on a particular day, and a judgment became a lien upon the premises on the same day, proof was received to show that the mortgage was deposited before the court sat, and it was held that the mortgage must be first satisfied. *Follett v. Hall*, 16 Ohio, 111. A like inquiry is involved in this case.

§ 1310. *If the holder of a check deposits it and demands that he be credited with the amount, and the demand is agreed to by the bank, the indebtedness of the bank to him for the amount becomes fixed.*

In Morse's well-considered work on banking, p. 321, it is said: "But if at the time the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit, as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable." We regard this as a sound and accurate exposition of the law upon the subject, and it rests upon a solid basis of reason. The authority referred to sustains the text. When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned. It was well said by an eminent chief justice: "If there has ever been a doubt on this point, there should be none hereafter." *Oddie v. National City Bank of New York*, 45 N. Y., 735.

We see no objection to the amendment made by the court to the instruction under consideration. It was correct in point of law, and it was proper to prevent any misunderstanding by the jury. It told them tersely and clearly, as the principal charge had done, that if the check was offered and received as a deposit it was a deposit, and it followed as matter of law that the bank was bound accordingly.

§ 1311. *Whether a check was offered and received as a deposit is a question for the jury.*

Whether there had or had not been a consummated deposit was the ultimate fact to be found by the jury. The evidence is not, and should not have been, set forth in the bill of exceptions. All on the subject to be found there is that the parties gave evidence tending to prove what they respectively claimed. What that evidence was we do not know, and it is in no wise necessary that we should be advised upon the subject. The facts and circumstances, whatever they were, and the probative force and weight of each one, were exclusively for the consideration of the jury. The evidence may have been more or less cogent on either side, and more or less characterized in parts or in its entirety

by internal conflicts and contradictions, or by other neutralizing qualifications. With all this we have nothing to do. The subject is beyond the sphere of our power and duties. We sit here to correct the errors committed by the court, if there were any, as disclosed in the record. The verdict, as the case is before us, is as if it were not. If it was wrong, the remedy was with the court below by a new trial. It cannot be administered here.

The third instruction involves substantially the same point as the second. It was given with a like addition, and an exception was taken. What we have said with respect to the second exception applies here.

§ 1312. *A local custom of a bank is not binding upon a depositor without proof that he knew of such custom.*

The fourth and last instruction was, that if, at the bank, there had been for a long time a usage "that the receiving teller entered checks in the pass-book, as they came in, subject to a return of the checks to the depositors if in the afternoon of the day, when the accounts were examined, the checks were found not to be good, and to return the same to the party depositing them, and such were then made good by the depositor, . . . such usage would be a valid and legal usage as between the depositor and the bank."

The court refused to give this charge as asked, but gave it as thus qualified: "Nothing in this case shows that Mr. Evans knew anything about this usage. As to the question of general usage, I have said that it was not competent to change the law in the case, when the deposit was made without anything said about the deposit by the persons receiving the deposit,—the law made that a debt against the bank in favor of the depositor; but if the depositor knows the usage in cases of that kind, why, as a matter of course, it will change it."

The plaintiff in error excepted. The proposition submitted was fatally defective in not including as one of its terms that the depositors knew of the special and particular usage mentioned. Without such knowledge it was entirely ineffectual. The objection of the judge was conclusive. *Moore v. Voughton*, 1 Stark., 396; 1 Chitty, Contr., 84.

The principal charge was full and clear in regard to the general usage or custom insisted upon by the plaintiff in error. Upon that subject the judge, among other things to the like effect, remarked: "It is said by the plaintiff, by way of proof, that although there was no express agreement between Evans, Lippincott & Co., the depositors of this check, and the bank, that it should be returned in case it should not be found good at 3 o'clock, or shortly thereafter, yet that there was a general usage among bankers of the city of Cincinnati of that character, which extended to all their customers, and, therefore, it had become a law. The question of usage, as presented here, is undoubtedly a very important question, and as a general proposition of law every commercial contract is entered into with the understanding that the usage in regard to the particular matter of the contract becomes a part and parcel of the contract itself."

§ 1313. *Where the intent of parties is clear, evidence of a usage to the contrary is immaterial.*

A large part of the able and elaborate argument of the counsel for the plaintiff in error was addressed to this point. In our view, conceding the usage to have been established, it was in no wise material as a factor in the case. The verdict of the jury, by rejecting the claim of the bank touching the check, established the fact that the deposit became complete by the agreement of the parties when the check was handed in. As a necessary consequence, it was

not within the undertaking of Burkhardt. Usage, therefore, could have had no effect upon the rights of the parties, and was immaterial. The result of the case must have been the same as if that subject had not been drawn in question.

A general usage may be proved, in proper cases, to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing. Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law. *Barnard v. Kellogg*, 10 Wall., 390; *Bliven v. New England Screw Co.*, 23 How., 433 (§§ 1306-1308, *supra*); *Collender v. Dinsmore*, 55 N. Y., 200; *Adams v. Goddard*, 48 Me., 212; *Thompson v. Riggs*, 5 Wall., 674; *Dykens v. Allen*, 7 Hill (N. Y.), 497.

These considerations apply to the posture of the case as was found to be by the verdict of the jury, under instructions, properly given by the court. According to those tests, the contract was clear, complete and irrevocable when the check was delivered by one party and received by the other. After that there was nothing left for usage to do. Its aid, when the controversy arose, was invoked too late. If the bank proposed to hold the check on conditions, it was but fair and just to the other party to have said so when it was received, and thus have given him the option, after such notice, to do with it as he might think proper. The saving or loss of the amount to the payees might have depended on the promptitude and energy of their conduct. Delay until after bank hours might have determined the result inevitably against them. It would be contrary to plainest principles of reason and justice to permit a bank, under such circumstances, to shift the burden of the loss from itself to the shoulders of an innocent depositor.

It does not appear by the record that any evidence offered by the bank, touching the general usage, was excluded, and we think what was said by the court in that connection, as well as with respect to the special usage of the institution, was unexceptionable, and was quite as favorable to the bank as it had a right to claim. If either side had ground for complaint, it was not the plaintiff in error.

Judgment affirmed.

§ 1814. Custom is law — Usage of trade.— A contract may be inferred from usage. General custom is a general law, and forms the law of contracts, though it may sometimes be at variance with their terms. The ancient, established, uniform and known custom of persons engaged in any trade makes a law applicable to that trade, though it is not applicable to other trades. It is their way of doing business. It is the rule to which all who enter that trade are supposed to consent. It makes, supplies and construes their contracts. *Wilcocks v. Phillips*, 1 Wall. Jr., 63.

§ 1815. Usage varying the law, and equivalent to a contract.— Principles of law differ in their importance as well as in their origin, and while some of them represent great rules of policy, and are beyond the reach of contravention, others may be changed by parties who choose to contract upon a different footing, and some may be varied by usage, which, if general and long continued, is equivalent to a contract. *Swift v. Gifford*, 2 Low., 113.

§ 1816. Theory on which evidence of usage is received — Usage as to delivery of grain in sacks.— Evidence of a custom or usage is properly receivable to explain the meaning and intention of the parties to a contract, whether written or parol, where the meaning could not be ascertained without the aid of such extrinsic evidence. This evidence is admissible on the theory that the parties knew of the existence of the custom or usage and contracted in reference to it. So where a contract was to deliver so many bushels of barley, but it was not stated whether it was to be in sacks or loose, proof of usage is admissible to show what intention must have been in the minds of the parties at the time of the making of the contract. *Robinson v. United States*, 13 Wall., 365. See § 1830.

§ 1817. When usage may be shown where the contract is written.—Where the terms of a written contract are not clear, a court may resort to usage and the course of dealing to enable it to ascertain what the parties meant by the use of such terms, and no further. *Hening v. United States Ins. Co.*, 2 Dill., 37.

§ 1818. Evidence of usage is not admissible to contradict or vary what is clear and unambiguous, or to restrict or enlarge what requires no explanation. Omissions may be supplied in some cases by such proof, but it cannot prevail over or nullify the express provisions of a contract. So where there is no contract, proof of usage will not make one, and it can only be admitted to interpret the meaning of the language employed by the parties where the meaning is equivocal or obscure. *Savings Bank v. Ward*, 10 Otto, 208.

§ 1819. Where the language of a contract is ambiguous, parol evidence of a usage in reference to which the parties must have been supposed to contract is admissible; but it is not admissible to vary, contradict or defeat express stipulations or provisions restraining or enlarging the customary right. *Hart v. Shaw*, 1 Cliff., 366.

§ 1820. Where the parties express their intention in clear and unambiguous language, courts are bound by what the parties have written. Evidence of usage in such a case cannot be admitted, as the terms of the contract are incapable of any other meaning than that which is plainly expressed by the language which the parties have employed. *Hearn v. Equitable Safety Ins. Co.*, 3 Cliff., 380.

§ 1821. An express contract with an insurance agent as to his compensation cannot be varied by evidence of a general custom. *Stagg v. Insurance Co.*, * 10 Wall., 589.

§ 1822. Usage as to the number of pounds in a ton — Number fixed by law.—Where a contract was made to furnish coal by the "ton," which from times past and up to that time was understood to be two thousand two hundred and forty pounds, it was held that that number of pounds must be furnished notwithstanding the fact that the state had previously fixed the weight of coal at two thousand pounds per ton. *The Miantinomi*, 8 Wall. Jr., 48.

§ 1823. Payment in Confederate currency shown to have been intended.—Where a contract was made within the so-called Confederate States during the war of the rebellion, to pay a certain sum in dollars, without specifying the kind of currency in which it was to be paid, it may be shown by the nature of the transaction and the attendant circumstances, as well as by the language of the contract itself, that payment in Confederate currency was contemplated by the parties. When this fact is shown in an action on the contract, no more can be recovered than the value of that currency in lawful money of the United States. *Rives v. Duke*, 15 Otto, 140.

§ 1824. Measurement of embankment in the ordinary manner presumed to have been intended.—Where a contract for the building of an embankment is made, and it is silent as to the manner in which measurements shall be made, it will be presumed that they were to be made in the ordinary manner, and what this is may be shown by the parties. *Clark v. United States*, * 1 Ct. Cl., 250.

§ 1825. Custom unreasonable and not binding.—A custom "that one who approves certain plans and announces his intention to build in accordance with them, but who never does build or use the plans, shall become liable to the architect for the cost of the plans, is an unreasonable custom and not binding. *Tilley v. County of Cook*, 13 Otto, 155 (§§ 15-19).

§ 1826. Usage of foreign country, where a contract is made and to be executed, binding here, though variant with the law and absurd.—Defendant claimed that certain contracts for teas of a particular quality were afterwards changed into sales by sample, because the supercargoes selected the teas from samples, and the usage of Canton made this a sale by sample. *Held*, that such a usage was entirely at variance with the general principles of law, and was absurd and irrational; but that, being the usage of the foreign country where the contracts were made and to be executed, and which respected their validity and construction, such usage, if proved, is a rule of decision here. *Willings v. Consequa*, * Pet. C. C., 301.

VI. PERFORMANCE AND BREACH.

1. What Constitutes Performance and Breach.

SUMMARY—*Right of seller where buyer becomes insolvent, § 1827.—Agreement to build house on land of another; latent defects in soil, § 1828.—Accepting performance otherwise than as stipulated, § 1829.—Usage as to delivery of grain in sacks, § 1830.—Notice of refusal to continue under the contract, § 1831.—Failure to complete work within the time, § 1832.—Building an embankment; defect in soil, § 1833.—Demand and refusal, § 1834.—Action for not delivering property; tender of property, § 1835.—Oral demand for performance, § 1836.—Failure to commence work on a certain day; forfeiture, § 1837.—Rescission because work was not done "with all reasonable speed," § 1839.—Contract not impossible of performance, § 1839.—Erection of county buildings; dissatisfaction of people no ground for annulment of contract, § 1840.—Termination of contract; value of labor and materials necessary to complete, § 1841.—Rights where contract is broken without cause, § 1842.—Assent to refusal to perform, § 1843.—Notice of an intention not to deliver goods, § 1844.*

§ 1827. Upon the failure of the buyer the seller may withhold the goods until the price is either paid or tendered; but if cash is paid or tendered, or if tender is excused, the seller must deliver the goods. And where neither the insolvent nor his assignees have been able to pay cash since the insolvency and there is no evidence of a waiver by the seller, the latter is not liable for a breach of the contract. *In re Wheeler*, §§ 1845-47.

§ 1828. Where one party makes an absolute contract to build a house on land of the other party, and deliver the house at a fixed time "fit for use and occupation," he is not excused for failure to perform his contract by reason of a latent defect in the soil which caused the house to sink after its completion, and become unfit for occupation at the time fixed for delivery. *Dermott v. Jones*, §§ 1848-50.

§ 1829. A party to a contract imposing mutual obligations may accept as performance by the opposite party some other thing than that specifically designated; and if he does he cannot insist upon an exact performance. Especially is such a fulfillment regarded as sufficient in equity. So where, in execution of a contract between the owners of a mill and a canal company by which a water power was granted by the latter to the former, the aperture or gauge was, under the special direction of the engineer and superintendent of the canal company (the officers charged with the duty), and with their approval, located at the mill wheel, instead of at the canal bank, as provided in the contract, and was afterwards frequently inspected and approved by the officers of the canal company, such location being made at the cost of the mill-owners, and being effectual to carry out the leading purpose of the contract, it was held that this must be considered in equity as intended as an execution of the contract, and binding as such. *Canal Co. v. Ray*, § 1851.

§ 1830. It is competent to show a usage in the grain trade in California to deliver grain in sacks, nothing being said on the subject in a contract to furnish grain. The general usage being established, the parties must be presumed to have known of it, and to have contracted with reference to it. *United States v. Robinson*, §§ 1852-53. See § 1816.

§ 1831. Where certain persons had contracted with the government to furnish all the barley required for certain posts, not exceeding a specified amount; and, before they had fulfilled the contract completely, they gave the government notice that they would furnish no more barley under it, and should regard it as rescinded, and had been notified that they would be held to the contract and charged with the extra price which the government would have to pay in the market, it was held to be a breach of the entire contract, without the government's continuing to make requisitions for barley as needed. *Ibid.*

§ 1832. Where a contract for the performance of work requires that it shall be completed within a certain time, and to secure this a bond with sureties is taken, but the contract declares no penalty and authorizes no right to forfeit or terminate it for failure to complete the work within the prescribed time, the contractor cannot, if permitted to go on in his attempt to complete the contract after the expiration of this time, be required, to his injury and loss, to perform it in a manner not required by the agreement. *Clark v. United States*, §§ 1854-56.

§ 1833. If a contractor, for a certain sum per cubic yard, agrees to build for the government an embankment in such manner and places as directed by the latter, and the place selected is such that a settlement of the foundation causes a shrinkage of the embankment while building, the increased quantity made necessary to be built by the settling is to be taken into consideration in the measurement, and paid for by the government. *Ibid.*

§ 1834. Where a demand for property and its refusal is necessary to complete a cause of action for breach of contract, the fact that the demand is for more property than the plaintiff

is entitled to will not justify the defendant in refusing to deliver what is due, provided it is distinct and clearly distinguishable from that to which the demanding party has no right, and in that case such a demand is sufficient. *Colby v. Reed*, §§ 1357-61.

§ 1335. In an action for breach of contract in not delivering property, the court will not, in the absence of a statute regulating the subject, compel the plaintiff to accept the property in mitigation of damages when tendered in open court. *Ibid*.

§ 1336. To maintain an action for the breach of a contract, an oral demand for performance made upon the defendant is sufficient, unless the contract provides that it shall be in writing. *Ibid*.

§ 1337. In order that a building contract, which provides that work shall be commenced on a certain day, may be properly declared forfeited for a failure to commence on that day, notice of such forfeiture must be given before the work commences. *Cook v. Commissioners of Hamilton Co.*, § 1362.

§ 1338. In order to justify the vacation of a building contract, which provided that the work should be done "with all reasonable speed," on the ground that it had not been performed in that respect, it must be shown that the builder had abandoned the contract, or that he was acting in bad faith after notice. *Ibid*.

§ 1339. A building contract provided for the erection of a court-house and jail on a given lot, at a specified price for each. It was further agreed that if the legislature authorized the erection of the jail on an adjoining lot, it should be so erected without additional charge. The plans according to which the court-house was required to be built provided for a building large enough to occupy the whole lot. *Held*, that the fact that it was impossible to erect both buildings on the lot would not so render the contract impossible of performance that the builders could not recover for work done on the court-house pursuant to the contract. *Ibid.*; *S. C.*, §§ 1333-67.

§ 1340. Where a contract is lawfully entered into for the purpose of erecting county buildings, the fact that the people of the county express themselves as dissatisfied with the contract furnishes no legal reason for its annulment. *Cook v. Commissioners of Hamilton County*, §§ 1363-67.

§ 1341. The rights of parties to a contract become fixed at the time it is terminated. So, where a building contract is terminated by one party, the value of the labor and materials necessary to complete the work must be reckoned as at the time it was so terminated. *Ibid*.

§ 1342. Where a contract is broken without cause, the injured party is placed on the same ground in an action for damages as if he had performed his contract. So, where builders were improperly discharged before the completion of the building they had contracted to erect, it was held that they were entitled to compensation for work done and materials procured at the time they were discharged, and to damages covering the profits of the work. The latter are to be estimated by taking the cost of materials of the kind required and best suited for the purpose, and the cost of construction upon approved methods and with suitable appliances. *Ibid*.

§ 1343. If the promisee of an executory contract for the delivery of goods continuously and uniformly demands the performance of the contract, he cannot, on performance by the promisor, refuse to accept such performance, even though the promisor may have previously repudiated the contract, and notified the promisee of his intention not to perform. But if, upon notice by the promisor that he will not perform, the promisee accepts the situation, and treats the contract as at an end, the promisor cannot afterwards, by changing his mind, compel the promisee to accept performance. *New Brunswick, etc., R'y Co. v. Wheeler*, §§ 1368-69.

§ 1344. When the promisor of an executory contract for the delivery of goods signifies his intention not to perform the contract on his part, the promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the promisor responsible for all the consequences of the non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect to any circumstances which may have afforded him the means of mitigating his loss. *Ibid*.

[NOTES.— See §§ 1370-1417.]

IN RE WHEELER—EX PARTE CARTER.

(District Court for Massachusetts: 2 Lowell, 252-259. 1873.)

STATEMENT OF FACTS.—Thompson, a broker for Carter, agreed to sell to Wheeler iron deliverable in lots at Hoboken, N. J., the sale to be subject to approval of Carter. Before the time for delivery Wheeler failed and made an offer of settlement, which Thompson refused. Another creditor at the meeting offered to take the iron and be responsible for it on Wheeler's account. Thompson refused unless he would be also responsible for an old debt. Wheeler became bankrupt, and Carter offering to prove the old debt the assignees claimed a set-off for breach of the contract of sale, the iron having enhanced in value.

§ 1345. *Facts amounting to a ratification.*

Opinion by LOWELL, J.

It is admitted that a contract was entered into between Wheeler and Thompson and a sufficient memorandum made of it, if the bargain was ever ratified by Thompson's principals. It appears that Thompson wrote them that Wheeler would call on them in Philadelphia; and that he did call, and they told him the order was received and entered on their books. This is a ratification, because they would have no occasion to enter on their books a rejected offer. But, besides this, there is ample evidence that both parties considered it a binding and existing contract in February.

§ 1346. *Vendor may withhold goods, upon failure of buyer, until payment.*

The real question in the case is, whether there has been a breach on the part of Carter & Co. It is agreed that, upon the failure of the buyer, they had the right to withhold the goods until the price should be paid or offered; and that if cash were offered or tendered, or if the want of tender was excused or dispensed with, and the cash was ready for them, they must go on and deliver the iron.

§ 1347. *Time when action may be brought for breach of executory contract. English authorities examined.*

The point of controversy is, whether an offer was made, or if not, whether it was waived. The assignees contend that, before the time for the first delivery came, the sellers rescinded the contract and so left nothing for the buyer to do but to recover his damages. It was decided in the queen's bench in England, in 1853, that if one party to an executory contract repudiates it before the time of performance arrives, the other party may have his action immediately. *Hochster v. De La Tour*, 2 Ell. & B., 678. This was thought, at the time, to be a novel doctrine; but it has been followed by the other courts. *The Danube, etc., Co. v. Xenos*, 13 C. B. (N. S.), 825; *Frost v. Knight*, L. R., 5 Exch., 322; *S. C. in error*, L. R., 7 Exch., 111. The leading case certainly commends itself to the judgment. A courier was engaged in April to serve for three months from the 1st of June; and in May the employer wrote him that he should not make the journey nor need his services. The courier thereupon engaged with another traveler; but the new service was to begin at a later day than the 1st of June, and he sued the former employer in May for the value of the time thus lost, and it was held he might recover his damages. The case was classed with those in which the promisor has incapacitated himself from keeping his engagement; as if, having promised to marry A., he marries B. before the time has come for fulfilling his engagement with A., an action lies at once by the latter.

But it was found that these executory breaches, so to say, could not, in fairness, be made to apply in all cases. In *Avery v. Bowden* and *Reid v. Hoskins*, which were so much alike that they were argued and decided together in the court of error, the facts were, that a charterer was bound to furnish a cargo of grain at Odessa, to be shipped to England, at a time when war between Russia and Great Britain was imminent. The charterer's agent at Odessa notified the master of the vessel, immediately on his arrival at the port, and before he was bound to furnish a cargo, that he should not furnish it; but the master insisted that he would wait during the time allowed by the contract; and before that time had expired war was declared, and performance of the contract became illegal. It was held that no action could be maintained by the ship-owner. 5 Ell. & B., 714, 729; 6 id., 953. Upon a review of the decisions above referred to by Cockburn, C. J., in a recent case, he finds the law of England to be that, when the promisor has announced his intention not to perform the contract, the promisee may treat the notice as inoperative and await the time when the contract is to be executed, and then hold the other party responsible; and in this case he keeps the contract alive for the benefit of both parties, and remains liable to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, but also to take advantage of any supervening circumstances which may justify him in declining to complete it; or he may treat the notice as a breach, and have his action at once. *Frost v. Knight*, L. R., 7 Exch., 112, 113. In Benjamin on Sales, p. 424, the English rule is stated thus: "A mere assertion that the party will be unable, or will refuse, to perform his contract, is not sufficient; it must be a distinct and unequivocal, absolute refusal to keep the promise, and must be treated and acted on as such by the party to whom the promise was made."

I have given the result of these cases, because they go farther than any that I have seen in this country to support the contention of the assignees; and I recognize a certain equity in their claim, which I should be not unwilling to make available, if the law would permit it. But it seems impossible to bring it under even the most advanced of the decisions.

Wheeler had broken his implied obligation to keep his credit good, and was notoriously and deeply insolvent, when the letter of the 23d of February, which is said to be, or to announce, the breach of contract by Carter & Co., was written. There is no satisfactory evidence that he or his assignees have since, at any time, been able or willing to carry out the contract which the law substituted for the original contract, that is, to pay cash on delivery, or that they ever told Carter they were ready. There was some talk about it at the meeting of the creditors at Worcester in February; but no offer was made which Carter & Co. were bound to accept, because the offer was not to pay cash. Judging from the evidence, the letter of Thompson to his principals, in which he writes that Mr. Wheeler says he shall be able to take the iron, refers to this conversation; for there does not appear to have been any other, nor any letters from Wheeler. I consider that the whole meaning of that letter, with the other evidence, is this: that Wheeler hoped to settle with his creditors, and go on in his business, and take the benefit of this valuable contract. But he never was in a position to do so. I agree that, in the letter of 23d February, Thompson, acting for the plaintiffs, and by their authority, undertook to annex a condition to the delivery of the iron, which the law did not impose nor permit; but I regard this as an offer, which, under the circumstances, Wheeler should have taken some notice of, if he intended to insist on the renewal of the contract, or

to hold it to be definitely renounced by Carter. This letter could not have reached him at Worcester until the day before the first lot of iron should have been paid for at Hoboken; and there is no evidence that it affected his conduct in any way. I think it is to be considered as part of an unfinished negotiation to renew the contract, and it certainly is not an unconditional refusal to perform it. We must remember, among the other facts, that it was not at this time apparent how advantageous the contract would be for the buyer.

I feel myself constrained, therefore, to decide against the assignees, for several reasons: 1. The sellers did not make an absolute and unequivocal renunciation of the contract. 2. The buyer did not accept or act upon the notice as being such a renunciation, or inform the sellers that he took it so. 3. It is not proved that the buyer was able and willing to perform his part of the contract. 4. He never notified such readiness. If the case turned merely on the consideration whether the one party or the other was bound to take the first step to reinstate the suspended contract, the judgment ought to be the same. The contract was suspended by the misfortune of Wheeler; and it was for him to give a clear and unequivocal notice of his intention to pay cash, before the sellers would be bound to manufacture the iron, or to send it to Hoboken. It cannot be that Carter & Co. must make an investment of \$16,000 on the chance of an insolvent man becoming solvent, or being able to do by the aid of others what he confessedly could not perform himself. But this is only one of several reasons why the assignees must be held not to have been put by Wheeler, and not to have put themselves, in a position to claim damages on account of this contract.

If it were proved, or could be taken for granted, that the letter prevented Wheeler from attempting to pay for the first cargo or lot of iron, which is perhaps a question of some nicety, yet it surely ought not to affect his assignees. They could not have supposed that they were expected to pay the old debt as a condition precedent to receiving the iron, and they should have made an offer, and put the other party to his election to fulfil or reject. I cannot think, therefore, that in any event the damages could be assessed for the whole value of the contract. But, upon the evidence before me, I decide that there has been no breach at all.

Debt admitted to proof in full.

DERMOTT v. JONES.

(2 Wallace, 1-9. 1864.)

STATEMENT OF FACTS.—Jones sued Miss Dermott in the District of Columbia to recover a sum alleged to be due for the building of a house. It appeared that Jones agreed to build a house for Miss Dermott, on land belonging to her, according to plans and specifications furnished by the architect. He agreed that the work, and the several parts and parcels thereof, should be executed, finished, and ready for use and occupation, and be delivered over, by a certain day. He claimed that he executed the contract as agreed, except as to a deviation made at the request of Miss Dermott. During the progress of the work, however, a portion of the foundation of the house sunk, owing to a latent defect in the soil, and it became necessary to repair the foundation and to rebuild a part of the house at a large expense. The sum thus expended Miss Dermott claimed the right to recoup. The lower court ruled against this claim, and the case was brought here by writ of error.

§ 1348. *The performance of an express contract is not excused except by the act of God, the law or the opposite party.*

Opinion by MR. JUSTICE SWAYNE.

The defendant in error insists that all the work he was required to do is set forth in the specifications, and that, having fulfilled his contract in a workman-like manner, he is not responsible for defects arising from a cause of which he was ignorant, and which he had no agency in producing. Without examining the soundness of this proposition, it is sufficient to say that such is not the state of the case. The specifications and the instrument to which they are annexed constitute the contract. They make a common context, and must be construed together. In that instrument the defendant in error made a covenant. That covenant it was his duty to fulfil, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. *Paradine v. Jane*, Aleyn, 26; *Beal v. Thompson*, 3 Bos. & Pull., 420; *Beebe v. Johnson*, 19 Wend., 500; 3 Comyn's Dig., 93.

§ 1349. — *illustration of the rule. Cases cited.*

The application of this principle to the class of cases to which the one under consideration belongs is equally well settled. If a tenant agree to repair, and the tenement be burned down, he is bound to rebuild. *Bullock v. Dommett*, 6 Term R., 650. A company agreed to build a bridge in a substantial manner, and to keep it in repair for a certain time. A flood carried it away. It was held that the company was bound to rebuild. *Brecknock Co. v. Pritchard*, id., 750. A person contracted to build a house upon the land of another. Before it was completed it was destroyed by fire. It was held that he was not thereby excused from the performance of his contract. *Adams v. Nichols*, 19 Pick., 275; *Bumby v. Smith*, 3 Ala., 123, is to the same effect. A party contracted to erect and complete a building on a certain lot. By reason of a latent defect in soil the building fell down before it was completed. It was held (*School Trustees v. Bennett*, 3 Dutch., 513, a case in New Jersey, cited by counsel) that the loss must be borne by the contractor. The analogies between the case last cited and the one under consideration are very striking. There is scarcely a remark in the judgment of the court in that case that does not apply here. Under such circumstances equity cannot interpose. *Gates v. Green*, 4 Paige, 355; *Holtzapffel v. Baker*, 18 Ves. Jr., 115.

The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated. We are of opinion that the plaintiff below was entitled to recover, but that the court, in denying to the defendant the right of recoupment, committed an error which is fatal to the judgment. We might here terminate our

examination of the case; but as it will doubtless be tried again,—and the record presents several other points to which our attention has been directed,—we deem it proper to express our views upon such of them as seem to be material.

§ 1350. *Suit must be brought upon the contract while it remains executory; when fully executed assumpsit will lie.*

While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue on the contract, or in *indebitatus assumpsit*, and rely upon the common counts. In either case the contract will determine the rights of the parties. When he has been guilty of fraud, or has wilfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*. He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant, the cost of the work or materials has been increased, in so far the jury will be warranted in departing from the contract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance. There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just, and they are sustained by a preponderance of the best considered adjudications. *Cutter v. Powell*, 2 Smith's Lead. Cas., 1, and notes; *Chitty on Contracts*, 612, and notes.

Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

CANAL COMPANY v. RAY.

(11 Otto, 522-528. 1879.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—Assuming the facts to be such as are averred in the bill, and not denied in the answer, we have this case: In 1860 the complainants were engaged in enlarging the machinery and capacity of their flouring mill, situate near the canal of the defendants, between it and the Potomac river, and dependent for its power upon water obtained from the canal. While thus engaged it was agreed between them and the defendants that for a stipulated rent they should have full right, permission and authority to draw from the canal, for the uses of their mill, so much water as would pass through an aperture of specified dimensions, in an iron plate not exceeding an half inch in thickness, on certain conditions. The first of these related to the form of the aperture and its capacity. The second was that the aperture should not be placed nearer the canal bottom proper than two feet. The third prohibited any attachment, contrivance or device to increase the quantity of water that could be drawn through the aperture above what could be drawn if such device were not used. The fourth required that a sliding gate or gates should be placed in front of the aperture, so that the whole water-power granted might, as occasion under the provisions of the contract required, be entirely or partially stopped from passing through it. The fifth condition related to the con-

struction of the forebay, the aperture and sliding gates, requiring them, *inter alia*, to be put down, constructed, and thereafter kept in repair at the sole cost of the complainants, under the special direction and superintendence, and subject in every particular to the approval of such officer of the company as might be charged with that duty. The sixth condition was that, in like manner, at the sole cost of the grantees or complainants, and under the special direction of the officers of the company charged with that duty, such alterations should be made from time to time in the forebay or trunks, cover or bridge aperture, and sliding gate or gates as might be considered necessary by the company or their officers, *to prevent or lessen the inconvenience to the navigation of the canal and the use of its towing-path, which might be found to arise from said use of the water, or that might be thought necessary by the company for the greater security of the canal or of its works.* The seventh condition reserved to the company the right of full ingress and egress, by their officers, to and from the premises of the grantees for the purpose of examining, repairing and preserving the fixtures and works connected with drawing off the water, repairing the embankment and other parts of the canal, and also for the purpose of ascertaining whether any defects existed in the fixtures and works for drawing off water, repairing the embankment and other parts of the canal, and also for the purpose of ascertaining whether any defects existed in the fixtures and works for drawing off water, occasioning leakage from the canal, or endangering its security and that of its works, and also for ascertaining whether more water was drawn off than was granted by the contract. The remaining conditions need not be noticed. They have no possible bearing upon the matter now in controversy.

Obviously this grant of the water privilege contemplated that the aperture, the trunk or forebay, and the sliding gate or gates should be constructed after the grant was made. To that extent the contract was executory. It did not expressly require that the aperture and gauge should be located at the bank of the canal, in front of an opening there made, though probably such was the understanding of the parties. But conceding that it was, and that the contract in terms required such a location, it was nevertheless competent for the parties in the subsequent execution thereof to substitute another location in place of that first contemplated, and if such a change was made by mutual consent it amounted to a compliance with the provisions of the contract. The company, after having accepted or acquiesced in a location of the aperture and gate at a point nearer the complainants' mill than the canal bank, could not afterwards complain that the condition respecting the location had not been performed, unless a right to require arbitrarily a change was reserved.

The bill avers that after the enlargement of the complainants' mill had been completed, the works for conducting the water from the canal to the mill, and for measuring the quantity of water granted by the contract, were constructed and located under the special direction of the engineer and superintendent of the canal company, the officers charged with the duty, and with their approval, and that with like approval the aperture or gauge, and sliding gate thereat, were constructed and located at the wheel of the complainants' mill, where they have since remained, having been repeatedly inspected and approved by the officers of the company. This averment is, at most, only evasively denied. The answer does, indeed, deny that the gauge and sliding gate were located at the wheel of the complainants' mill with the knowledge and consent of the company, and denies that such location was made with the approval or by the

direction of the officers of the company, "*if it is meant by the averment*" (of the bill) "*to that effect that such arrangement was intended as permanent, or as other than a temporary indulgence.*" Such an equivocal denial cannot be considered as breaking the force of the complainants' allegation. Then, what is the effect of that averment? If, in executing the contract between the parties, the gauge and sliding gate were placed at the wheel of the mill with the knowledge of the company and with their consent, and if the location was thus made under the special direction of their engineer and superintendent, the officers charged with the duty; if for years the location remained unchanged and unchallenged, having been repeatedly inspected and approved by the company's proper officers, as averred in the bill and not denied, it would be grossly inequitable to hold that the location was not intended by both parties to be an execution of the contract, and accepted as such. Especially is this true when the location was made at the cost of the grantees of the water, and when, at the time when the works were thus constructed and located, there was also placed at the opening of the forebay into the canal, as part and in consideration thereof, and at the cost of the grantees, a gate to enable the company to control the water-power granted, in accordance with the provisions of the grant. And it matters not that the company may not have intended such location of the gauge to be permanent, unless such was the understanding of both parties, which is not averred. There can be no doubt that a party to a contract imposing mutual obligations may accept, as performance by the opposite party, some other thing than that specifically designated; and if he does, he cannot afterwards insist upon exact performance. Nothing is more common than such fulfillment of contract obligations. In equity it is certainly regarded as sufficient fulfillment. In the present case the location of the aperture and sliding gate at the mill wheel, instead of at the canal bank, effectuated the leading purpose of the contract, which was to give the complainants a specified quantity of water; and the company was fully protected by an additional gate at the canal, at the entrance of the forebay, by which they were enabled conveniently to control the flow of water to the mill.

This, however, is not all the case. On the 23d of February, 1865, some other millers having preferred requests that they might be allowed to draw at the wheels of their mills the quantity of water leased to them by the canal company, the board of directors of the company adopted the following resolution:

"*Resolved*, That the superintendent of the Georgetown division, under the direction of W. E. Smith, C. E., be directed to place the water-gauges for the mills at Georgetown at such points as may be deemed most advisable to effect the object of the respective water grants, and to limit the flow of water to the quantity to which the lessees are severally entitled; *provided*, that said lessees shall severally assent in writing that the officers of the company may, at all times, have free access to their premises for examination or regulation of such parts as may be constructed upon them; and provided further, that the board may, at any time during their pleasure, if they shall deem it necessary, alter or change the position of such gauge or gauges, or any of them, as contemplated by the lease, and that this resolution shall not in any manner change or impair the provisions or requirements of the respective leases granted to said parties."

On the 25th of the same month the several millers, together with the complainants in this case, gave their written consent to the resolution, and requested that their water-gauges should be placed upon their respective premises at or near the water-wheel. This resolution (made a contract by the

acceptance of its provisions) certainly cannot be construed so as to deprive the complainants of the right they had previously acquired. It was intended mainly for the benefit of the other millers whose water-gauges were not located at the wheels of their respective mills. And though the complainants assented to it, and thus subjected themselves to the obligations prescribed, they did not thereby agree that the location of the gauge at their water-wheel might be changed at the pleasure of the company, without cause, or for any reasons except such as were specified in the grants of water to them. The proviso declared that the board of directors might alter or change the position of the gauge "as contemplated by the lease." That means that the company reserved the same power to change the location which they had by the original contract. It stated expressly that the resolution should not in any manner change or impair the provisions or requirements of the respective leases granted to the parties. Now, what were the provisions of the leases, or contemplated by them, respecting changes in the position of the water-gauges? They are to be found in the sixth condition upon which the grants of water were made. They are that such alterations in the forebay or trunk, cover, or bridges, aperture and sliding gate or gates, from time to time, shall be made, as the company or their officer charged with that duty might consider necessary "to prevent or lessen the inconvenience to the navigation of the said canal, and the use of its towing-path, which may be found to arise from the use of said water, or that may be thought necessary by the said company for the greater security of the said canal or of its works." No right was reserved to require such alterations arbitrarily, or for any other cause than one of those thus specified, and none to enforce such a requirement by stopping the flow of the water. It is admitted here by stipulation that the company has no knowledge of abuses by the complainants of the privileges conceded to them by the resolution of February, 1865, necessitating a change of their gauge to the canal bank for the purpose of navigation, or in respect of the tow-path, or for the security of the canal or of its works. The change required, therefore, is without any cause that justifies a demand that it be made—without the existence of any circumstance that, by the conditions of the grant, authorized the company to enforce it.

§ 1351. *The terms of a contract under seal may be varied by a subsequent parol agreement.*

It is said on behalf of the appellants that the contract of lease between the canal company and the complainants, being a sealed instrument, could not be changed by any instrument of a less formal nature. From this it is inferred that neither the action of the company's officers in 1860 nor the resolution of 1865 could change the provisions of the grant. It is admitted that the company could waive any conditions therein for the benefit of the grantors,—such as the condition that the gauge should be at the canal bank,—but is insisted that such a waiver would amount to no more than a license, revocable at will. But were it conceded that the location of the gauge at the water-wheel of the complainants' mill was in pursuance of a mere license, the license, when followed by the expenditure of the licensee's money in the construction of the works, on the faith of it, became a contract irrevocable by the grantor. The case, however, does not rest on that ground. The location of the gauge in 1860, under the direction and with the approval of the officers of the company charged with the duty of directing and superintending its construction, was, as we have said, an execution of the contract in that regard and not an alteration of it. And if it

was not an execution of the contract, the resolution of 1865, accepted by the complainants, was a contract on sufficient consideration, which the parties were competent to make. Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity. *Dearborn v. Cross*, 7 Cow. (N. Y.), 48; *Le Fevre v. Le Fevre*, 4 Serg. & R. (Pa.), 241; *Fleming v. Gilbert*, 3 Johns. (N. Y.), 527. These are cases at law. Numerous others might be cited. The rule in equity is undoubted.

The objections we have thus expressed lead directly to an affirmance of the decree rendered by the court below. In 1873, thirteen years after the gauge had been constructed at the water-wheel, the canal company required the complainants to place the gauge and sliding gate at the canal bank, and threatened to shut off the water from the mill if the requirement was not complied with. The company had no right to make and had none to enforce such a requirement, except in the cases specified in the leases, and those cases have now no existence.

Decree affirmed.

UNITED STATES v. ROBINSON.

(Circuit Court for California: 1 Sawyer, 220-228. 1870.)

STATEMENT OF FACTS.—The defendants contracted with the United States to furnish all the barley needed at certain posts, not to exceed a specified amount. After delivering a part, they notified the quartermaster that they would deliver no more under the contract, and were told that they would be held to their contract, and that the necessary amount of barley would be purchased in open market and the difference in cost charged to them. It was contended by the defendants on the trial, that no recovery could be had except for the requisitions actually made; also, that evidence of a usage to deliver in sacks was inadmissible, nothing having been said about the matter in the contract.

§ 1352. *Proof of usage in the delivery of grain.*

Opinion by SAWYER, J.

The first question in this case is whether it is competent to show a usage in the grain trade in California to deliver grain in sacks, nothing being said in the contract as to whether it is to be delivered in bulk or in sacks. I am satisfied from the authorities that the testimony is admissible. The cases cited in the note to *Wigglesworth v. Dallison*, 1 Smith's Lead. Cas. (5th Am. ed.), page 305, clearly establish this rule. In a case there cited, Baron Parke says: "It has long been settled that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts on matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life in which known usages have been established and prevailed, and this has been done on the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to these known usages." So another learned judge cited, in the notes at page 308, *id.*, says: In all contracts "as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of those usages; they commonly reduce into writing the special particulars of their contract, but omit to specify those known usages which are included, however,

as of course, by mutual understanding. The contract is, in truth, partly expressed in writing, partly implied and unwritten." So at page 309, note a, id., the learned editors of the American Notes well state the rule thus: "In like manner, where there has been an express contract about a matter concerning which there is an established custom, this custom is reasonably to be understood as forming a part of the contract, and may be referred to to show the intention of the parties in those particulars which are not expressed in the contract. And it is obvious that the reason of the rule which forbids the receipt of parol evidence of the intention of the parties for the purpose of adding to a written contract has no application to the evidence of custom." In one case (*Smith v. Wilson*, 3 B. & Ad., 728) the court went so far as to permit the custom of a particular place to be shown—that one thousand rabbits meant one thousand two hundred rabbits. But it is not necessary to go to that extent here; for, in that case, there would seem to be a custom shown contrary to the express terms of the contract. In this case there is nothing in the contract in terms inconsistent with the usage shown. The most that can be said is that the testimony annexes an incident to the contract in a matter respecting which the contract itself is silent. It merely discloses the circumstances surrounding, and the well known incidents connected with, the subject-matter at the time of entering into the contract, and in view of which it is to be presumed the contract was made. See other authorities cited in note to *Wigglesworth v. Dalison*; also, *Marcy v. Whaling Ins. Co.*, 9 Metc., 363. I think the evidence of usage to deliver in sacks, when not otherwise expressly provided in the contract, admissible, and, being admitted, the usage was clearly established, there being no contradictory evidence. The general usage being established, the defendants must be presumed to have been cognizant of it, and to have contracted with reference to it. But I think, also, that the evidence and acts of the parties justify the inference that the contractors well understood the usage. They at least in fact voluntarily conformed to it during the first half of the year over which the contract extended.

§ 1353. *Where a party agrees to furnish barley as demanded, and, after furnishing a part, gives notice that he will furnish no more, this constitutes a breach of the entire contract.*

I also think that the refusal to deliver in sacks, and the subsequent notice to Major Hoyt, United States army quartermaster, that they would deliver no more barley under the contract, but should regard the contract as rescinded, a breach of the entire contract at that time, and that nothing more was required to be done on the part of the plaintiff after the continued failure to deliver the barley referred to, in January, to entitle the United States to recover, than was done in the matter by Major Hoyt. *Hale v. Trout*, 35 Cal., 230, and cases there cited. This case is sought to be distinguished from *Hale v. Trout*, because, in that case, the amount of lumber to be delivered was fixed, while here the defendants, *Robinson & Co.*, might not be called upon to deliver the whole million pounds of barley; and, it is claimed, that it was necessary to make the requisitions from time to time in order to fix the amount. But this, I apprehend, does not affect the principle. The defendants had notified plaintiff that they "decline to furnish any more barley to the government under the contract," and they never did deliver the barley mentioned in the January requisitions. It would be a vain thing after this to continue to make requisitions. They were to furnish all required for certain posts, not exceeding a specified amount. They had already declined to furnish any more under the contract,

and had been notified that they would be held to the contract, and that the necessary amount of barley, etc., would be purchased in open market and the difference in cost charged to them. They did not afterwards notify the agents of the government of any intention to recede from the determination not to furnish more barley. I think there was a total breach of the contract. See, also, *Withers v. Reynolds*, 2 Barn. & Ad., 882; *Franklin v. Miller*, 4 Ad. & Ell., 599. The plaintiff, in my opinion, is entitled to judgment for \$4,048.16 in gold coin. (a)

CLARK v. UNITED STATES.

(6 Wallace, 543-547. 1867.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—Clark entered into a contract with the United States, by which he was to complete an embankment at Memphis, Tennessee, by the 15th of July, 1847. He brought suit in the court of claims to recover a balance due, as he asserted, on the contract. The questions arising in the case were whether he was to be paid for the earth deposited in the embankment, or for the embankment complete. In other words, who, under the contract, should bear the loss in consequence of shrinkage, and how far the contractor's remuneration was affected by the interference of government officers after the 15th of July, 1847. The decision of the court of claims being adverse to him, Clark appealed.

§ 1354. *Where no penalty is reserved by a contract, and the contractor is permitted to complete the work after the limited period, he cannot be subjected to new conditions involving loss to him.*

Opinion by MR. JUSTICE MILLER.

1. Among the facts found by the court it is stated that "the officers of government interfered with claimant in the execution of his work, compelling him to dump loose earth where it was exposed to the direct current of the river, and that they also used the embankment as a roadway, to the loss and injury of the claimant; but that all of such acts of which there was sufficient evidence occurred subsequent to the 15th day of July, 1847, and when claimant was in default in not having performed his said agreement, and completed said embankment." And they declare the law applicable to this state of facts to be, "that the claimant was not entitled to recover for the interference of defendants or their officers subsequent to the 15th July, 1847, the time when the work under his contract was to have been completed by the terms of his agreement."

We are of opinion that this ruling was erroneous. The court seems to have placed this right of the agents of the government to use the embankment as a roadway, and to compel him to dump loose earth into the current, by which it was carried away, both of which are found to be to his loss and injury, upon the simple fact that those injuries were inflicted after the day at which his contract should have been completed. What relation there is between his failure to do all the work by a certain day, and the claim of the government to subject him to these losses, is not pointed out by the court, nor is it perceived by us. The contract declares no penalty for not completing the work by the 15th July. It does not even authorize the government to forfeit the contract or to terminate it. The utmost that can be claimed for this failure is such damages as it may have sustained because the work was not finished in time. For this

the plaintiff had given a bond with sureties. But if the government permitted him to go on in the effort to complete the contract, it surely had acquired no right to compel him to do it in a manner which necessarily involved him in great loss, and to use the embankment as a roadway, to his further injury.

§ 1355. *Construction of contract as to waste and shrinkage while an embankment is building.*

2. The court finds that there was waste and shrinkage of the embankment while building, and a natural settling of the batture on which the embankment was built, and that the loss occasioned thereby necessarily was borne by the claimant under the system of measurement adopted. And they find, as matter of law, that the contract being entire and not severable, claimant could only recover for embankment completed, and that, as a necessary consequence, all losses by settling and shrinkage and the action of the current were to be borne by the claimant. We take it for granted that the word "settling" in this finding of the law is used for the settling of the batture. If this be so, we think the court erred in this matter also. It must be evident, if the foundation on which the embankment was built had settled lower while the building was going on, that the embankment which supplied the place of this settling was there, and had become the property of the government. If the system of measurement did not enable the engineer to compute this accurately, they should have done it approximately, or adopted some other system. It is clear that for the embankment built by him and remaining he should be paid; and if the quantity necessary to be built had increased by this settling, it was the loss of the government, which had agreed to pay by the cubic yard, and not by a certain sum for the job in the aggregate.

§ 1356. *Construction of contract as to loss by the action of the current, etc.*

3. A more difficult question is presented in reference to the question of loss by the action of the current, and the natural waste and shrinkage of the embankment while it was in process of completion.

It is certainly true that if this embankment had been built on dry land the contract is of that nature that these losses would fall on claimant, and the custom of measurement found by the court probably was founded on such work. But we do not feel so clear that in a contract like this, in which no place is mentioned for its precise location, and in regard to which the contract obliges the party to do the work "in such manner and at *such places* as shall be directed by the said engineer or other authorized agent," the government is only bound to pay for what earth remains visible, and capable of being triangulated after the work is finished. If, for instance, the engineer had ordered plaintiff to commence in the middle of the river, and had caused him to dump the whole two hundred and twenty-one thousand yards in the midst of the current, where it could neither be seen nor measured, we are of opinion that the quantity of dirt placed there should be ascertained by some other mode and paid for. As the contract is silent as to the place where the work was to be done, as there are no facts found concerning the previous negotiations as to the location or character of work required, we have not sufficient means of determining whether the application of the law to this point by the court was correct or not. We must, therefore, dismiss this, the most important branch of the case, with the foregoing remarks, and as the judgment of the court of claims must be reversed for the errors already mentioned, the court may, on a new trial,

find differently, or may find such acts as will enable us to determine the law of the case if it shall become necessary.

Judgment reversed, and the case remanded for further proceedings in conformity with this opinion.

COLBY v. REED.

(9 Otto, 560-566. 1878.)

ERROR to U. S. Circuit Court, Eastern District of Wisconsin.

§ 1857. *Tender must be made before action brought.*

Opinion by MR. JUSTICE CLIFFORD.

Tender, when the demand is of money, for a definite sum or for an amount capable of being made certain, may at common law be made on the very day the money becomes due, but it will constitute a defense only when made before the action is brought. Chitty, Contr. (10th ed.), 732, 733; 2 Pars. Contr. (6th ed.), 148; 9 Bac. Abr., Tender, D., 321; Suffolk Bank v. Worcester Bank, 5 Pick., 106; Pitcher v. Bailey, 8 East, 171; Briggs v. Calverly, 8 Term R., 629. In actions of debt and *assumpsit* the principle of the plea of tender is that the defendant has always been ready to perform the contract, and that he did perform it as far as he was able by tendering the requisite money, the plaintiff himself having prevented a complete performance by his refusal to accept the tender. Such a tender and refusal do not discharge the debt, and hence the plea must proceed to allege that the defendant is still ready to perform, and it must contain a *profert in curia* of the money tendered. Ayers v. Pease, 12 Wend. (N. Y.), 393.

STATEMENT OF FACTS.—Arrangements were made between the parties to advance material aid in the construction of a certain land-grant railroad, and to promote that object the defendant agreed with the plaintiff, in writing under seal, that he would take stock in the company to the amount of \$200,000, and that he would pay or deliver to the order of the plaintiff \$45,000 of the proceeds of the subscription. Pursuant to the agreement, the defendant subsequently paid the agreed sum in money, and received the certificates of the stock to the same amount. Progress was made in the undertaking, but it turned out that more money was needed to complete the enterprise; which made it necessary that the same parties should subscribe for an additional hundred thousand dollars of the stock. It appears that they were willing to do so, but that the plaintiff could not furnish his proportion of the money for the new subscription, and that the defendant, in consideration of receiving \$5,000 out of the plaintiff's stock, agreed to pay the entire amount of the additional subscription and to take the whole of the new stock, which left in his hands only \$40,000 of the original stock belonging to the plaintiff. Money to the amount of \$2,000 was, about the same time, borrowed for six months by the plaintiff of the defendant, on a pledge of \$8,000 of plaintiff's stock in the hands of the defendant, which the record shows was never paid, leaving in the possession of the defendant only \$32,000 of the first subscription. Throughout these transactions the relations between the parties were amicable, but they subsequently became hostile, and on the 28th of May, 1875, the plaintiff instituted the present suit in the circuit court, in which he claimed judgment against the defendant for the stock of the railroad in his hands, to the amount of \$45,000, with interest, as alleged in the complaint.

Service was made, and the defendant filed an answer setting up several de-

fenses: 1. That the allegation that he refused to deliver the stock mentioned in the complaint is not true. 2. That no proper demand for the delivery of the same was ever made. 3. That the demand made was for the delivery of \$45,000 of the stock when the defendant well knew that he was only entitled to demand \$32,000 of the same, and the defendant avers that he always was and still is ready and willing to deliver the true amount. 4. That the plaintiff is indebted to the defendant in the sum of \$2,000, for which he claims an allowance as a set-off or as a counterclaim. 5. That the value of the stock is much below par, and that the pledge to him for the loan is inadequate as security.

Preliminary matters being closed, the parties went to trial. Evidence was introduced on both sides, and the court submitted certain questions to the jury, to which they responded to the effect following: That the plaintiff before the commencement of the action made a demand of the stock from the defendant, and that the defendant refused to deliver the same. That the parties entered into the agreement set forth in the answer, by which the plaintiff was to deliver to the defendant the excess of the stock originally subscribed, above \$40,000, in the event that it should become necessary to make the additional subscription of \$100,000, and that the notice required of the defendant in that contingency was waived by the plaintiff; and the jury also found that the amount of stock which the plaintiff was entitled to demand and receive was only \$32,000, and that the cash value of the same was and is \$9,600, which finding appeared to be satisfactory to the plaintiff, as he moved for judgment in his favor; but the defendant filed two motions,—one that the plaintiff be ordered to accept the stock found to be due in mitigation of damages, and the other that a new trial be granted.

Hearing was had, and the court overruled the motions of the defendant and rendered judgment for the plaintiff in the sum of \$7,641.72. Before doing so, however, the court adjusted the equities between the parties as follows: Interest in favor of the plaintiff was added to the sum found due by the jury as the value of the stock, and the court, deducting therefrom the counterclaim and interest set up by the defendant, rendered judgment for the balance. Seasonable exceptions were filed by the defendant and he sued out the pending writ of error. Numerous errors are assigned by the defendant, but in the view taken of the case it will not be necessary to give them a separate examination. Attention will be called to the substantial issues presented in the pleadings and to the material questions which arose in the progress of the trial and in the rendition of the judgment.

Both parties agree that the controversy grew out of a contract between them, and that the redress sought by the plaintiff is compensation for the alleged breach of it and the failure of the defendant to comply with its terms. Every pretense of conversion, therefore, may be dismissed in the outset without the least consideration, as there is nothing either in the cause of action, or the form of the remedy, or in the allegations of the complaint, or in the averments of the answer, or in the evidence introduced by either party, which gives such a theory any support whatever. Instead of that, the plaintiff set up the agreement and alleges that the defendant broke it, and he claims compensation for the damage he suffered from its non-performance by the defendant. Demand of performance is also alleged by the plaintiff, which is explicitly denied by the defendant, who avers in his answer that he was always ready and willing to perform to the full extent of his obligation under the agreement. Neither the

answer nor the evidence shows that the defendant ever did perform the agreement to deliver, but what he alleged and attempted to prove was that the plaintiff claimed \$13,000 of stock more than he, the defendant, contracted to deliver, and his theory is that the demand, being in excess of the obligation created by the contract, was null and of no effect, and, inasmuch as the demand exceeded the right, he was not required to perform what the contract required.

§ 1358. *Unless the contract provides otherwise an oral demand for performance is sufficient.*

Two issues of law were presented by the defendant in respect to the alleged demand: 1. That it must be in writing, and that an oral demand was insufficient. 2. That a request to deliver more property than the party is entitled to receive, and a failure to deliver placed on that ground, do not in law constitute a sufficient demand and refusal to sustain an action like the one before the court. Had the contract contained the stipulation that the demand should be in writing, there would be much force in the suggestion; but inasmuch as the contract is silent upon the subject, the court is of the opinion that the ruling of the circuit court, that it might be verbal or in writing, is undoubtedly correct. *Smith v. Young*, 2 Dev. & Bat. (N. C.), 26.

§ 1359. *A demand is not vitiated because it is for too much.*

Responsive to the second request, the judge told the jury that where a party demands more than he is entitled to receive, that that circumstance *alone* will not justify the other party in refusing to deliver that part of the property to which the party making the demand is entitled, provided it is distinct, well known, and clearly distinguishable from that to which the demanding party had no right; that if the plaintiff demanded \$45,000 of the stock when he was only entitled to \$32,000 of the same, the defendant could not properly refuse to deliver what the plaintiff was entitled to receive, on the ground that the demand was excessive. Injustice and inconvenience would flow from any different rule, and inasmuch as we are all of the opinion that the instruction was correct, it is not deemed necessary to pursue the subject. 2 Greenl. Ev., sec. 604. Matters of fact in the case need no examination, as they are found by the jury, and are not the subject of review in this court. Actual demand, it is conceded, was necessary to complete the cause of action, and the court is of the opinion that the demand was not vitiated because it was for too much, as the party of whom it was made was under no obligation to tender more than was due. *Chitty, Contr.* (10th ed.), 738. Both demand and refusal are established by the special verdict, which is all that need be said upon the subject.

Two other assignments of error deserve to be considered, and they may be examined together, as they involve the same question. They are as follows: 1. That the court erred in denying the motion of the defendant to require the plaintiffs to accept the stock tendered by the defendant to the plaintiff in open court in reduction of the damages. 2. That the court erred in rendering judgment for the full value of the stock in money, and in not applying the stock deposited in court in mitigation of damages, at its value as fixed by the jury.

§ 1360. *The law of tender.*

Tender of the stock before breach of the condition or before the commencement of the action is not pretended, nor is it pretended that the defendant ever made a money tender of the debt due to the plaintiff, either before or after the action was commenced. Such a tender, if made before action brought and kept good, is a defense to the action, as the money to pay the debt remains in the court, and the party plaintiff is not entitled to prevail unless the sum ten-

dered was insufficient, nor is it questioned that such a tender in a proper case, and payment of the money into court, may be made after action brought; but the rule is universal that in that event the tender and the payment must include the costs to that time as well as the debt. Addison, Contr. (6th ed.), 954.

Authority undoubtedly exists in the defendant to tender the debt, if it is of a definite amount, before action brought; but it is equally well settled, even if it be large enough to pay the whole debt, that it is utterly nugatory after action brought, unless it also include a sum sufficient to pay the costs. Emerson v. White, 10 Gray (Mass.), 351; People v. Banker, 7 How. Pr. (N. Y.), 258. Exceptional cases may be found, but they arise in states where the matter is regulated by statute. Ashburn v. Poulter, 35 Conn., 553; Call v. Lothrop, 39 Me., 434; Rev. Stats. (Me.), 642; Gen. Stats. (Mass.), 671. No such regulation has ever been adopted by the state in which this controversy arose, from which it follows that it must be governed by the general rules, which do not give the right of tender after action brought, except in the form and under the conditions before explained. Concede that, and still it is insisted by the defendant that the court erred in refusing his request to order the plaintiff to accept the certificates of stock in mitigation of damages, which presents the principal question in the case.

§ 1361. *Defendant in trover may tender back the property converted.*

Power to tender back the property in trover, where the gist of the action is conversion, is certainly vested in the defendant, and its exercise is a matter of frequent occurrence, where it appears that the property is in the same condition as when taken. Such a right may doubtless be exercised where the change is conversion or a wrongful taking even after action brought, if it be accompanied with a tender of costs and intervening damages. Rutland & Washington R. Co. v. Bank of Middlebury, 32 Vt., 639; Kaley v. Shod, 10 Metc. (Mass.), 317. There can be no manner of doubt that the defendant in actions of trover and trespass *de bonis asportatis*, in cases where the taking was not unlawful and the property is not essentially injured, will be allowed to surrender the property in specie in mitigation of damages. Hart v. Skinner, 16 Vt., 138; Fisher v. Prince, 3 Bnrr., 1363; Pickering v. Truste, 7 Term R., 54.

Courts, beyond doubt, may in a proper case, where the action is trover or trespass *de bonis*, order the plaintiff to accept the property in mitigation of damages against his wishes; and the rule is that the return of the property in such a case will reduce the damages to those actually sustained for the wrongful taking, together with intervening damages and costs. Yale v. Saunders, 16 Vt., 243. Orders of the kind are frequently given in actions of trover and trespass *de bonis asportatis*, but the practice is not applicable in actions of *assumpsit* for a breach of contract, the rule being that the party, if he desires to stop the litigation, must adopt the measure prescribed by the common law, except in jurisdictions where a different mode of proceeding is prescribed by statute.

Judgment affirmed.

COOK v. COMMISSIONERS OF HAMILTON COUNTY.

(Circuit Court for Ohio: 6 McLean, 112-120. 1854.)

Opinion by the Court.

STATEMENT OF FACTS.—This action was upon articles of agreement, dated 15th July, 1851, in which the plaintiffs agree with the defendants to build a court-house and jail for Hamilton county, in Cincinnati, on the court-house lot, ac-

ording to the requisition of plans and sections thereof drawn, and specifications thereof made out, from number one to seventeen, by Josiah Rogers, architect, and which are referred to and made a part of the contract. And the plaintiffs agreed to build, in a good and workmanlike manner, agreeably to the said plan, etc. And it was agreed that the said court-house building and jail are to be erected on the old court-house lot at the corner of Main and Court streets, now in use, as at present understood; but should the commissioners of Hamilton county, at the next session of the legislature, obtain permission to build the said jail in the rear of or adjoining the said court-house lot, or on any other lot in Cincinnati, east of Main street, west of Broadway, and south of Fourteenth street, then and in that case, the said party of the second part agrees to erect and build said jail in the rear of or adjoining to the said court-house, or on any other lot in the above limits, at the same price and without any additional charge.

The plans of the buildings are not furnished, but it is admitted that both of them cannot be put on the court-house lot. The stipulated price for the court-house was the sum \$468,732.55, for the jail \$226,520.74. Ten thousand dollars were to be advanced on the contract, and the building was to be commenced immediately.

The defendants cravedoyer and pleaded: 1. *Non est factum*. 2. That the plaintiff did not begin the work and progress with all reasonable speed, towards the erecting, building and finishing said court-house, etc. 3. This plea merely negatives the averment of the declaration, as to the commencement and prosecution of the work; not alleging specially in what particulars the plaintiffs failed. 4. The fourth plea states, that by an act of the general assembly 23, January 7, 1851, it was enacted as follows: That Richard H. Cox, John Patton and David A. Black, commissioners of Hamilton county, are hereby authorized to erect all such suitable and necessary public buildings for the said county, upon the place or lot of ground now known as the old court-house property, in the city of Cincinnati, upon such plan and of such materials as to them shall seem proper.

The entire act is set out in the plea, and it is averred that the court-house lot is one hundred and ninety feet square, and no more; and that the size of the lot was known to the plaintiffs and defendants to be not of sufficient capacity to admit of the construction of the court-house and jail thereon. That at and before the contract was entered into, it was fraudulently agreed between the commissioners and plaintiffs, that only the court-house should be constructed on the said lot, without reference to the location of the jail, and that plaintiffs should be secured in the profits in said agreement, for the construction of a jail in another place, when authority should be obtained. And that the agreement, etc., was contrary to the statute aforesaid and in fraud thereof. To the fourth plea a special demurrer was filed, and to the others, except the first one, demurrers were also filed.

The buildings were to be constructed under the direction of Rogers, the architect, who had power to vary the plan and dismiss the plaintiffs.

§ 1362. *To vacate a contract it must be alleged that the other party abandoned it or acted in bad faith. Date of commencing work under a contract. Questions of pleading. Impossible contracts.*

The second plea is defective. It merely negatives the averment in the declaration, without stating facts which show the failure of the plaintiffs. The declaration avers that the work was commenced on the day the agreement

bears date. Could an issue be made upon that fact, which would bar the action? Suppose the work was commenced on the second, third or tenth day after the date of the agreement, would such a failure constitute a bar? To bar the action on such ground, it would be essential that notice should be given to the plaintiffs before they were dismissed from the work. This notice was not given, but they went on with the work for three months or more without complaint. This is a sufficient answer to the allegation as to the commencement of the work.

But it is alleged the plaintiffs did not prosecute the work as they were bound by the contract to do. The work was to be done "with all reasonable speed, to be completed by the 1st of May, 1855." And the plaintiffs were dismissed for not so prosecuting the work. To constitute a bar to the action on the ground stated, facts must be alleged in the plea which amount to an abandonment of the contract, or, at least, which show the plaintiffs were acting in bad faith, and this too, after notice given, unless the work had been in fact abandoned.

It does not appear from the plea that the superintendent of the work complained of its progress, nor that the defendants did so, until they dismissed the plaintiffs. The progress, as well as the manner of the work, was under the care of the superintendent. He was the agent of the defendants, expressly made so by the contract, and they had no power to vary the contract, in this respect, without the consent of the plaintiffs. At the time of their dismissal, the plaintiffs had more than three years within which to comply with their contract; and who could undertake to determine that the buildings might not be completed within this time? There is no complaint that the plaintiffs did not conform to the directions of the architect; and unless in this respect they had failed, or had abandoned the contract, or had by their misconduct shown bad faith, and a determination not to perform it, the defendants had no power to put an end to it. And if either of these causes existed, it was essential to state the fact in the plea. But the plea contains no such averment, and in the absence of it there can be no justification or excuse for the acts of the defendants, in the dismissal of the plaintiffs from their work. The acts of the defendants, therefore, must be considered as arbitrary and inexcusable. The demurrer to this plea is sustained. The fourth plea was the one chiefly relied on in the argument. It was contended, first, that the contract was an impracticable one, as the court-house and jail could not be placed upon the court-house lot, as the court-house covered the entire lot; and, second, that the commissioners had no power to build the jail on any other lot.

It is admitted that the new buildings, as planned, covered the entire court-house lot. The act of 1851 does not specify the court-house and jail as the buildings to be erected on the court-house lot, but "all such suitable and necessary public buildings for the county." The plan of the buildings was left to the discretion of the commissioners; and the one they adopted would accommodate all the officers of the county, clerks of the different courts, commissioners, etc., and the different courts. This was certainly a judicious plan, as it carried out the intent of the law, as far as practicable, on the space of ground allotted for the county buildings. It was found that it was impracticable to construct, on the same ground, the jail. The contiguity of the courts and the county officers promoted the public convenience and facilitated the dispatch of the public business. And in this respect it was immaterial whether

the jail was on the court-house lot or adjacent to it. It is, therefore, clear that the commissioners acted wisely in adopting the plan for the court-house.

There is admitted to be some inconsistency in contracting to build the court-house and jail on the same ground which was covered by the court-house; but the agreement in relation to the structure of the jail is consistent in the latter part of the article, which refers to the procurement of a lot for it, within certain prescribed limits. This gives consistency to the entire agreement. The plans for the court-house and jail were distinct, and the price for each was specified in the contract. There was no confusion or uncertainty in the contract. It is therefore not an impracticable contract. Whether it be a legal one will be considered. The ground in the argument assumed is, that the contract is void, on the ground that it is impossible. Now, it may be admitted, that in cases where an individual engaged to do an impracticable or impossible thing, the contract is void and cannot be enforced. But to make out this position, the counsel consider the act of 1851 as a part of the agreement; and that both buildings must occupy the same space. As before remarked, the law does not say what kind of buildings, as court-house and jail, but "suitable buildings for the county." That every part of the court-house contains suitable and necessary buildings for the county will not be controverted. And as all the suitable buildings for the county could not be constructed on the lot designated, it is not conceived why the jail should not have been constructed on some other lot. It is more conveniently separated from the court-house than any other of the county buildings could be. That the jail was intended to be included in the law of 1851, as a suitable and necessary county building, is admitted; still, as all such buildings could not be built on the lot, the commissioners exercised a proper discretion in building the court-house on it. It does not come within the class of contracts referred to. The contract may be executed, if it be legal, and, therefore, is not an impossible contract.

But is it a legal contract? I think it is. The part which relates to the jail is not an absolute agreement. The jail is to be built according to the plans referred to, and for the price stipulated, if the legislature shall sanction it. This proposes to do nothing against the law or its policy. It is valid, on condition that the legislature shall legalize it. So far, then, from this agreement being against law, it expressly provides that the law-making power shall sanction it. And when this is done, the proceeding is as legal as if the law had authorized the contract. A case similar in principle to this came before the circuit court, in *The Columbus, etc., R. Co. v. Indianapolis, etc., R. Co.*, 5 McL., 453. The Ohio company entered into a contract to have the gauge of their road the same as that of the Indiana road, which would be in violation of the act of Ohio, that required the gauge of all railroads to be of a different width. The court say, "an objection is made to the legality of the contract to build the Ohio part of the road, as the gauge is in violation of the Ohio statute."

"To this it is answered, in argument, that the defendants cannot take advantage of the objection, as it is a matter which rests between the state and the complainants, and that the state only can raise this objection." I am not prepared to say that any party who is called upon specifically to execute a contract may not set up the illegality of that contract as being against an express statute. But the answer to the objection is, "that although the contract was made, it was made with reference to a future execution of its conditions, when

the modification of the law of Ohio should be obtained, which removed the objection. And, in fact, it appears that the construction of the road, by laying down the rails, was not commenced until long after the passage of the amended act by the legislature of Ohio. The law, therefore, was not violated under the contract, nor was it intended to be violated."

The plea in bar is defective, and, consequently the demurrer to it is sustained. But there is a fifth plea, on which one of the counsel in defense principally relies. It is as follows: "That at the time of making the contract it was agreed that the commissioners should, under the provisions of the above act, sell and negotiate bonds to a large amount, to wit, the sum of \$200,000, to make the payments under the agreements. That no other means existed or could be legally used in payment. And defendants aver the agreement was entered into without any reference to said bonds, with intent and purpose as a shift and device to violate and defeat the said act, and evade the restrictions thereof, whereby the agreement is void in law."

To this plea a special demurrer was filed, assigning causes of demurrer: 1. That the plea is double and argumentative. 2. That in effect it is the general issue. 3. That it is not capable of being traversed or tried.

The statements in the plea are not very explicit, but its object seems to be, to allege that the agreement is void, because the limitation of the act of 1851 was disregarded. There is no express limitation in this regard, nor can one be implied, unless it be that \$200,000 only were appropriated. In all public works, either by the federal or state governments, it is not usual to appropriate, when the work will require several years for its completion, more than a small part of the necessary expenditure. Any other course, especially where the money must be borrowed, would be a wasteful expenditure.

By the act, the commissioners were authorized to "erect all such suitable and necessary public buildings for the said county, etc., of such materials and upon such plan, as to them shall seem proper." From this provision it is clear that the buildings were to be constructed under the discretion of the commissioners, which is inconsistent with the supposition that they were to be limited in their expenditure to \$200,000. Every practical man must see that the buildings required to be constructed would cost more than three times that sum. In the absence of any express limitation, so unreasonable an inference as would defeat the object of the law cannot be made nor sustained.

It is insisted that a limitation necessarily arises from the limited powers of the commissioners, to impose a tax on the people of the county to meet the expenditure incurred by them. These limitations operate on ordinary expenditures, and a tax must be imposed by the commissioners to meet the expenditures. But the question of the legality of the contract raised in this case is to be considered under the act of 1851, which authorized the contract; and it would seem from its provisions, the commissioners, in making this contract, did not exceed their powers. The act is under the special law, and not under any general provisions in the statutes, regulating the general duties of the commissioners. The demurrer to this plea is, therefore, sustained.

COOK v. COMMISSIONERS OF HAMILTON COUNTY.

(Circuit Court for Ohio: 6 McLean, 612-622. 1855.)

Charge by the Court.

STATEMENT OF FACTS.—This action is brought on a contract between the parties, for the building of a court-house and jail by the plaintiffs, for Hamilton

county. The contract was dated the 15th of July, 1851, by which the plaintiffs agreed to build the court-house and jail on the old court-house lot, in Cincinnati. The jail to be built on another lot, should the consent of the legislature be obtained.

The building was to be constructed according to the requisitions of plans and sections thereon, drawn by J. Rogers, architect, which plans, sections and specifications are referred to and made a part of the contract. These plans were numbered from one to seventeen. The work to be done under the direction and superintendence of the architect. For the construction of the court-house, the defendants agreed to pay the sum of \$468,732.55. And for the building of the jail the sum of \$226,520.74. It was stipulated that the buildings should be commenced immediately, and prosecuted with all reasonable speed, and that they should be completed and ready for use by the 1st of May, 1855. On the 4th of November, 1851, less than four months after the work was commenced, the contractors were dismissed by the defendants, no special cause for the dismissal being assigned, and this action is brought to recover damages against the defendants for breaking up the contract.

The defendants pleaded several special pleas, to which the plaintiffs demurred, and which demurrers were sustained by the court. 6 McL., 112 (§ 1362, *supra*). It was, however, agreed by the parties that the case should be tried on its merits, on the general issue, each party having the right to give in evidence any matter which might be pleaded. On the evidence being offered to the jury, a question was raised at what time the price of the materials should be proved necessary to complete the work, and also the price of labor.

§ 1363. *The rights of parties become fixed at the time when the contract is wrongfully terminated by one of them.*

The court held that the proof must be limited to the time the plaintiffs were discharged from the work. Whether the materials and labor were higher or lower after this period could not be shown, as affecting the merits of the case. The rights of the parties became fixed, on the wrongful dismissal of the plaintiffs by the defendants. No other rule is practicable or certain; and the defendants cannot be heard to complain of hardship, as their own voluntary action fixed the rule of their liability.

By the contract, the architect, Rogers, not only superintended the work, but he had power to dismiss the contractors. So far from being dissatisfied with the progress of the work, he states that there was no ground of complaint against them. In laying the foundation, for some defect in a part of the work, he directed it to be taken up and the defects remedied. He says the work, so far as the plaintiffs were permitted to progress with it, was well and substantially done, and that they would have completed it, as he thinks, within the contract. Whatever pretenses were set up by the defendants in regard to the progress of the work, there was no ground connected with its progress, or the manner in which it was executed, which authorized the defendants to dismiss the contractors. Nor was there any reason for such a step, connected with the interest of the public. It is argued that the people decided against the contract, as extravagant and injurious to the public. That contracts should be submitted to a popular vote, after they had been solemnly entered into, or notice given, as the law required, is a new principle of constitutional law. It certainly affords no justification for breaking up the contract.

§ 1364. *Where a contract is broken without cause, the injured party is placed on the same ground as if he had performed it.*

The people, when left to their own unbiased judgment, will generally, if not always, decide matters submitted to them judiciously, but, under an excited canvass, the result depends upon the means used. A fit illustration of this is found in the case before us. The contract, it is said, was annulled, in obedience to the decision of the people of Hamilton county; and the consequence is, that the extravagant compensation complained of, will, probably, be increased about one hundred per cent., and the buildings, when completed, will be inferior, in every respect, to the first plan. When the sacredness of contracts, fairly entered into, shall be disregarded, under any pretense, there will be an end of all confidence and protection of persons or property. And where a contract is broken up without cause, it places the injured party on the same ground, in regard to an action for damages, as if he had performed the contract. The responsibility is thrown upon the wrong-doer, and if he be a public agent the public must suffer. Our government is founded upon the theory that the people will protect their own interests, by electing to places of trust honest and capable men.

§ 1365. *Measure of damages for a breach of contract.*

Plaintiffs are entitled to compensation for the work done and the materials procured at the time they were discharged from the contract. And they are entitled to damages which shall cover the profits on the work, had it been completed. These are ascertained by estimating the cost of the materials under the contract, and the expense of construction. It appears the plaintiffs purchased a steam-engine and derrick, which were necessary in placing the heavy materials in the building; but as these were retained by the plaintiffs, they cannot be charged against the defendants. For the work done by the plaintiffs and the materials procured, the amount can be ascertained from the evidence.

§ 1366. *In assessing damages upon materials procured to be used under the contract now broken by defendants, the materials should be estimated as the best for the purpose intended. Illegal contract.*

In regard to the materials to complete the building, a question is made and argued, whether they shall be estimated as the best that can be procured. The court-house is designed to be a structure of large dimensions, and it was intended to be substantial and ornamental. The plans of the architect were to govern the contractors, and the jury in assessing damages will also be governed by them. And the materials to be used should be estimated as the best for the purpose intended. The price of the work will not be estimated by the old plan of carrying the brick and mortar in a hod, but by the use of machinery to elevate, not only the brick and mortar, but the heavy materials required, by the contract, to be put into the building. By this mode the labor of many hands, formerly required, is dispensed with, which lessens the cost of construction.

The contract is alleged to be void, because it is impossible to perform it. The impossibility is supposed to arise from the requirement that the court-house and jail shall be constructed on the same ground. The contract in regard to the jail is as follows: "It is further agreed that said court-house and jail are to be erected on the old court-house lot, corner of Main and Court streets, now in use, as at present understood; but should the commissioners of Hamilton county, at the next session of the legislature, obtain permission to build the said jail in the rear or adjoining the said court-house lot, or on any other lot in

Cincinnati, east of Main street and west of Broadway, and south of Fourteenth street, then and in that case the said party of the second part agrees to erect and build said jail in the rear of or adjoining to said court-house, or on any other lot in the above limits, without any additional charge."

An act was passed the 20th April, 1852, which declared "that the county commissioners of Hamilton county are hereby authorized and empowered, in the erection of public buildings, as heretofore by any law provided for, to proceed with the erection of the same, either by contract or otherwise, as in their opinion the public interest may require." This does not meet the above condition, nor was it intended for that purpose. It is supposed to have been intended to carry out the reform required by the vote of the people, by enabling the agents of their choice to construct the buildings under their own superintendence, without inviting bids, by public notice, for the performance of the work. Another act was passed the 14th of March, 1853, which is entitled an act to provide for the purchase of property and the erection of a work-house in Hamilton county. And the act carries out the intention expressed in the title. Not a word is said in it about the building of a jail. Neither this act nor the one above cited authorized the construction of a jail, within the contract, on which this action is founded. The action is not brought to recover damages on the special ground that the commissioners made no effort to procure the passage of a law authorizing the jail to be constructed on any other lot within the limits specified.

The contract was not for the construction of a court-house and jail on the same ground. Seeing that the court-house covered the entire lot, provision was made to build the jail on some other lot, should the legislature authorize the same. This is not a contract against law, as upon its face it is to be binding only on the condition that the law-making power shall sanction it. Such a contract is legal and binding on the parties, on the condition stated. Without the legislative sanction, the contract in regard to the jail is not binding, and as no action of the legislature has been had as contemplated by the contract, the plaintiffs cannot recover damages under the contract to build the jail.

§ 1367. *Construction of act of 1851, authorizing contract for public buildings in Hamilton county.*

But it is insisted that the commissioners had no authority to make the contract. The principle is admitted, that the powers of the commissioners are limited by the laws. The act of 1851 is entitled "An act to authorize the commissioners of Hamilton county to erect public buildings." The fourth section provides "That Richard K. Cox, John Patten and David A. Black, commissioners of Hamilton county, and their successors in office, be and they are hereby authorized and empowered to erect all such suitable and necessary buildings for the said county, upon the same place or lot of ground which is now known as the old court-house property, in the city of Cincinnati, upon such plan and of such materials as to them shall be deemed proper." This power is ample. The plan and materials are to be determined by the commissioners.

The fourth section declares "That the commissioners and their successors shall have power to appoint a superintendent of such buildings, etc., and shall make such necessary arrangements and contracts for the work and materials to be furnished for said public buildings, and require the faithful performance of all contracts in relation to the same." Proposals for the work were required to

be invited and notice given. The powers conferred on the commissioners were full and complete, and required no prior law to be consulted. The ninth section declared, "if there be anything in any prior act inconsistent with these provisions, it is repealed."

A subsequent section authorizes the commissioners to borrow \$200,000, and to provide the means of paying it, by a tax on property within the county. This power to tax is in addition to the power of taxation in any general act. The second section in the act of 1848 declares the commissioners shall not incur any expenditure exceeding \$50, without public notice, etc. And the third section provides "That the commissioners shall not enter into any contract to build any poor-house, or any other public building, which requires an expenditure of more than \$5,000, without first submitting as to the policy of such outlay, to the qualified voters of the county at the annual spring or fall election, by giving public notice, etc. And all contracts in violation of this section shall be void as against the county."

The fourth section authorizes the commissioners to lay a tax on the county levies sufficient to pay the outstanding debts of the county existing at the time such tax is laid. The fifth section authorizes the commissioners to lay a tax, etc., and in the close of this section the following provision is made: "And said commissioners are by law authorized to levy taxes to pay all and every item within each current year, for which said commissioners are by law authorized to levy taxes, provided that such law is not to apply to loans made."

It is argued that the above contract is void, because it is contrary to public policy. It is not contrary to, but promotive of, the provisions of the act of 1851, except as to the place where the jail is to be built; and before the contract was to take effect a modification of the law, in this respect, was to be procured. The contract rests upon the act of 1851, and upon no prior statute. For the ordinary business of the county the general statutes, regulating the powers and duties of the commissioners, were sufficient. But county buildings being contemplated, new powers were necessarily conferred on the commissioners, not only to make contracts and borrow money, but also to impose a tax annually which should meet current expenditures. This was done by the above act.

The act did not specify a court-house and jail, but authorized the commissioners to erect "all such suitable and necessary buildings for the said county, upon the old court-house lot," etc. Finding that the lot afforded space enough for a court-house only, the commissioners wisely determined to build the court-house on the lot specified; and to ask the authority of the legislature to construct the jail on another lot. By doing this they made a larger and better provision for the county officers and the courts than any other plan could have given. Almost all the county offices, numerous as they are, will be accommodated in this building, to the great convenience of the officers and of those who have business with them.

The contract is alleged to be void because the expenditure incurred by it greatly exceeded the sum which the commissioners were authorized to borrow. The commissioners must have known, and every intelligent man in the county, that the county buildings for this great city and densely populated county could not be built for \$200,000. And looking at the act, it is clear that a large expenditure was anticipated, as new powers were given to the commissioners

to tax so as to meet the annual expenditures. Where a public contract is of such magnitude as to require five years for its completion, no wise government will appropriate at once an amount of money which shall meet the entire expenditure.

Having noticed the principal objections made to the validity of the contract, I will make a few remarks on the testimony. A great number of witnesses, gentlemen of the jury, have been sworn, as measurers of the work and as experts; and as usual in such cases, many of them differ widely in their estimates. It is proper that I should say that the engineer, Mr. Rogers, was employed by the commissioners to make an estimate of the work and superintend the construction of the building. He made a plan of the entire building, called the working plan, and from which his estimates were made for the commissioners, before a contract was made with the plaintiffs. When this work was done he could have had no motive but to sustain his professional character for accuracy and taste. Mr. Rogers also drew a general plan of the building, showing its outlines and general appearance. From the proportions thus delineated, the experts called by the defendants made their estimates.

The first item of limestone in the walls of the building McLaughlin & Baily estimate the cost at \$13,000, while Rogers estimates it at \$17,820. The latter sum being stated by the plaintiffs' witness, and being higher in amount than defendants' witnesses, it would seem to be entitled to greater weight, as Rogers had the best opportunity of making an accurate estimate. The same remark applies to the brick work, which is estimated by Rogers at \$34,975, while the sum stated by Johnson and Morris was about \$20,000.

The sheet iron roofing Mr. Rogers sets down at \$11,983, which is not objected to by defendants. The same may be said of the plastering, which Rogers states at \$7,024. The carpenters' work is estimated by Byefield at \$23,376, whilst Rogers puts the cost at \$18,629. You must decide between these estimates by taking the one or the other, or by making an average, as you may think the evidence requires.

The bill for plumbing is set down by Rogers at \$3,000, whilst Gibson and Borrowly estimate it at more than three times that amount. Mr. Rogers does not profess to be acquainted with that work, and admits that his opinion respecting it is not to be relied on. Rogers estimates the painting and glazing at \$8,447, whilst Hasbaugh, a professed painter and glazier, estimates the cost at \$10,618.

The heating apparatus is estimated by Byefields at \$13,947, whilst Rogers puts down the sum of \$6,000. Rogers estimates the cut stone at \$208,316, and this is taken by both parties. The iron is estimated by the same witness at \$123,000. Mr. Rogers says that the prices at which he made the estimate would have given to the plaintiffs, on both buildings, a profit of \$50,000. No estimates have been proved in regard to the jail, as the contract for that building was not sanctioned by the legislature, consequently it cannot be considered as a valid contract.

You will compare, gentlemen, the estimated cost of the building with the contract price, and taking into view the profit on the court-house, as may appear to be just, and from the sum thus made up you will deduct the amount received by plaintiffs, after deducting from such amount the value of the materials furnished by the plaintiffs, and the work done by them on the foundation. (Verdict for plaintiffs.)

NEW BRUNSWICK & CANADA RAILROAD COMPANY v. WHEELER.

(Circuit Court for Connecticut: 12 Federal Reporter, 877-888. 1893.)

Opinion by SHIPMAN, D. J.

STATEMENT OF FACTS.—This is an action at law which was tried by the court, the parties having waived a jury trial by the written stipulation which is a part of the record. The facts in the case which are found to be true, the testimony which was objected to, the rulings of the court upon said objections, and the exceptions to said rulings, are as follows:

The averments of the complaint in regard to the citizenship, residence, incorporation and partnership of the respective parties are true. The New Brunswick & Canada Railroad Company is a corporation which owns and manages a railroad running from St. Stephens, in New Brunswick, to Holton, in the state of Maine, a distance of about one hundred miles. At the time of the transactions hereinafter mentioned the corporation had eight directors, who owned nearly all of the capital stock of the company. At the organization of the company, a few years ago, there were but eight owners. The business of said directors was transacted very often without the formality of votes, but by verbal instructions to the president, and more after the manner of a partnership than of a corporation.

In 1878 the directors commenced to relay the road with new steel rails, and one thousand tons were bought for that purpose. On July 24, 1879, the directors passed the following vote: "*Resolved*, That the president be authorized to purchase two thousand tons of steel rails, if he deems it advisable to do so." Negotiations for this purpose were thereafter commenced, which resulted in a contract, executed about February 6 or 7, 1880, with an English firm for the purchase of that amount of steel rails. They were to arrive some time thereafter. As reliance was placed upon the money to be obtained from the sale of the old rails for the payment of the new, the directors of the corporation, in conversations and by verbal instructions given from time to time before the completion of said contract, both at directors' meetings and at occasional interviews elsewhere, but not by vote passed at any meeting, verbally authorized and instructed their president to sell the old rails belonging to said company and then upon the road-bed, and gave him full authority to do whatever was necessary for that purpose. When Mr. James Murchie, the vice-president of said company, was about to leave St. Stephens for New York and the eastern cities in January, 1880, upon business of his own, the president gave him express instructions to sell said old rails, the approximate weight of which was well understood, for seventy-five tons of old rails would be taken up by the laying one hundred tons of new rails, and in pursuance of said instructions said Murchie, as vice-president of the company, entered at New Haven on January 31, 1880, into the written contract with the defendants for the sale of one thousand tons, and also for the sale of two hundred to six hundred tons, which contract is contained in plaintiff's Exhibits 1 and 2 hereto annexed. (u)

On February 16, 1880, at a meeting of the directors of the plaintiff corporation, the following votes were passed:

"*Resolved*, That the contract made by Mr. Murchie with Messrs. E. S. Wheeler & Co., of New Haven, be agreed to; a memorandum to this effect to be furnished to Mr. Murchie, to be forwarded to Messrs. Wheeler & Co.

“Resolved, That the following sale of old rails, made by Mr. James Murchie to Messrs. E. S. Wheeler & Co., be confirmed:

“Sold E. S. Wheeler & Co. 1,000 tons of old rails for delivery in New York or New Haven, at their option, before August the 1st next, at thirty dollars (\$30) per ton of 2,000 lbs., the duty to be paid by Wheeler & Co.; and also 200 to 600 for delivery in New York or New Haven, between August 1st and October 1st, at twenty-eight dollars (\$28) per ton of 2,000 lbs., the duty to be paid by Wheeler & Co.

“In each case, cash against invoice, bill of lading; insurance policy in satisfactory company.”

On February 17, 1880, Mr. Murchie sent the defendants the letter hereto annexed, marked Defendants' Exhibit B. On February 28, 1880, the defendants replied to said letter of Murchie, and sent to him, as vice-president, the letter hereto annexed, marked Defendants' Exhibit D., which letter was duly received, but to which no reply was made. No other communication, verbal or written, passed between the plaintiff and defendants until about June 10, 1880, when Mr. Murchie called upon the defendants and asked them whether they would have those rails delivered in New Haven or New York, and said that the defendant was ready to deliver them, and that the tons were to be two thousand two hundred and forty pounds each. The defendants declined to receive any rails upon the ground that the plaintiff had repudiated the contract of January 31st, or that it had ceased to exist by the plaintiff's act. The plaintiff thereupon sent the defendants the letter of June 14, 1880, hereto annexed and marked Defendants' Exhibit E., to which the plaintiff replied by letter of June 15, 1880, hereto annexed and marked Defendants' Exhibit F.

On June 30, 1880, the plaintiff tendered in fact, under the contract of January 31, 1880, to the defendants a cargo of old iron rails of about sixty-five tons, of two thousand two hundred and forty pounds to the ton, at the city of New Haven, and the defendants declined to receive the same, or to say where they should be delivered, whether at New Haven or New York, or to give any instructions whatever on the subject. The plaintiff, on August 10, 1880, sent to the defendant the letter of that date, hereto annexed and marked Plaintiff's Exhibit 3, to which the defendant replied by letter of August 21, 1880, hereto annexed and marked Plaintiff's Exhibit 4. All the letters hereinbefore mentioned were duly and seasonably received by the respective parties to whom they were sent.

The defendants never received, but always, after June 10, 1880, refused to receive any of said one thousand tons, or of said six hundred tons, either at the city of New York or at New Haven, although the same were duly and properly tendered to them on June 10th, June 14th, June 30th and August 10th. The plaintiff had, at said respective dates, and before August 1, 1880, one thousand tons of rails for delivery under the contract of January 31, 1880, and also had six hundred other tons of rails, between August 1 and October 1, 1880, for delivery under said contract, and was, at said respective dates upon which tender was made, able, ready, willing and anxious to deliver said iron, and to comply with the contract of January 31st by the delivery of one thousand and six hundred tons, of two thousand two hundred and forty pounds each.

It was agreed (subject to the plaintiff's right of objection to the admission of evidence to prove the same, to which evidence and to the proof of which fact the plaintiff duly and seasonably objected upon the ground that the statutes hereinafter quoted show the meaning of the word “ton,” but the court

admitted the same, to which ruling the plaintiff duly and seasonably objected) that a ton of iron rails or other scrap iron, when contracted for or bought and sold in the markets of the cities of New York and of New Haven, by the uniform usage or custom of those markets, means, and on January 31, 1880, meant, a ton of two thousand two hundred and forty pounds, unless the term of the contract evidenced a different meaning upon its face.

The statute of the state of Connecticut, in force on January 31, 1880, and still in force, provides as follows: "In the sale of articles by avoirdupois weight, one hundred pounds shall constitute a hundred weight, and two thousand pounds shall constitute a ton; and the aliquot parts of a hundred weight and of a ton shall be reckoned accordingly." By the statutes of New York, Maine and the dominion of Canada, in force upon January 31, 1880, and still in force, two thousand pounds constitute a ton. The parliament of the dominion of Canada has control of weights and measures throughout the dominion, and its statute provides that every contract made in the dominion, for any merchandise agreed for by weight or measure, shall be deemed to be made and had according to one of the dominion weights or measures, ascertained by said act, and, if not so made, according to the metric system.

On January 31, 1880, and when the contract of that date was entered into by and between the said Murchie, acting in behalf of and as the agent of said company, and E. S. Wheeler, one of the defendants, and acting for said firm, each of said parties contracted for the sale and purchase of gross tons, in accordance with said custom, and each understood that he was contracting for tons of the customary weight,—that is, of two thousand two hundred and forty pounds each,—and each knew that the word "tons," as used in said contract, meant, in his mind, tons of two thousand two hundred and forty pounds each; and there was no misunderstanding between said persons as to the true intent and meaning of said contract. The plaintiff duly and seasonably objected to any evidence in regard to custom or usage, or the understanding of Mr. Murchie as to the meaning of the word "ton," but the same was admitted, and to said ruling the plaintiff duly and seasonably excepted.

It was agreed that the list hereto annexed, and marked Plaintiff's Exhibit No 6, correctly shows the market price per ton of old iron rails in the markets of the cities of New York and New Haven, at the dates respectively as given, and that a ton of such rails or other scrap iron, when quoted for the market price in said markets, means a ton of two thousand two hundred and forty pounds, the duty on such iron being \$8 per ton of two thousand two hundred and forty pounds, and included in said market price. The damage to the plaintiff by reason of the refusal of the defendant to accept said one thousand tons was the sum of \$11,000; and the damage by reason of their refusal to accept said six hundred tons was the sum of \$5,400.

The defendants' counsel asked Mr. E. S. Wheeler, the only defendant who made the contract or had any knowledge of the business, the following questions, to each one of which the witness gave the answers respectively written in response to the respective questions. To each one of said questions, and to each one of said answers, the plaintiff objected upon the ground that it was immaterial. The question and answer No. 2 was admitted to contradict a single statement in the testimony of Mr. Murchie. No. 8 was admitted, as was also the other testimony in regard to the meaning of the word "tons" as used in said contract, because a decision upon the question of admissibility

became immaterial in view of the plaintiff's conduct in tendering gross tons, and to avoid dispute agreeing to the defendants' construction of the contract. No. 9 was excluded. The remaining questions and answers were considered to be properly in evidence for the purpose of enabling the court to ascertain the effect of the silence of the plaintiff after the letter of February 28th upon the defendants' previous position in regard to the contract, the previous position having been that of affirmance. To the rulings against the objection of the plaintiff, and to the ruling in favor of the objection of the plaintiff, the defendants duly and seasonably excepted.

No. 1. Between January 21 and February 17, 1880, did you have any opportunities of disposing of the one thousand tons of rails about which you had contracted with the plaintiff? *Ans. No. 1.* We had repeated opportunities. Mr. Murchie called on Saturday, January 31st, and on Monday we could have sold the rails for that future delivery at \$4 per ton profit, and on Tuesday at \$5 per ton profit.

No. 2. Do you know of any manufactory in New Haven which uses old iron rails? *Ans. No. 2.* No.

No. 3. State the object for which you bought these rails. *Ans. No. 3.* I bought these rails to sell, not to manufacture.

No. 4. Had you other opportunities to sell these rails? *Ans. No. 4.* We had other opportunities to sell, but these offers were firm offers, made by responsible parties.

No. 5. Why did you not take these offers? *Ans. No. 5.* Because Mr. Murchie had come to us a stranger, representing a company of which we had never before heard, bringing no letter of introduction, and showing by his conversation that he was not familiar with old rails, and because he had sold them at much less than the market price of the day. I had grave suspicions whether we should get the property, and the amount involved was so large as to make it prudent for us to investigate the character and responsibility of the sellers. That investigation we could not make without some delay.

No. 6. After the letter of February 17th, did you make any attempt to sell the iron? *Ans. No. 6.* No.

No. 7. Could you have sold it at a profit at that time? *Ans. No. 7.* We could have sold at a large profit.

No. 8. State in regard to the truth of the statements made in your letter of February 28th. *Ans. No. 8.* The statements made in our letter of February 28th are true. It correctly states our understanding of the contract.

No. 9. When did you first hear of the statute of Connecticut in regard to the meaning of the word "ton?" *Ans. No. 9.* I first heard of the statute of Connecticut about a month ago, from Mr. Beach.

The statutes of New Brunswick (Consolidated Statutes, 750) provide that "the contract of the agent of any corporation within the scope of his authority and the acts of a corporation shall be valid, though not authenticated by their seal."

The plaintiff did not intend by its votes February 16th, or by the letter of February 17th, to repudiate or abandon the contract of January 31st. It did attempt by said votes to draw from the defendants a modification of said contract. The defendants did not, by word or act, prior to June 10th, change their previous position in regard to the contract, which position is stated in their letter of February 28th.

§ 1368. *Contract construed.*

The conclusions to which I have come from the foregoing facts are as follows:

1. That the president of the company was fully authorized to take all steps necessary to sell the iron rails, although the authority was not conferred by vote of stockholders or directors; that this power to sell was not limited to his personal action, but that he was also fully authorized to employ substitutes or agents, and that James Murchie was duly authorized to make the contract of January 31, 1880.

2. That the questions whether parol evidence was admissible to explain the meaning of the word "ton," as used in the contract of January 31, 1880, in view of the statutes hereinbefore specified, or whether parol evidence was admissible to alter or vary the meaning of the word from that given in said statutes, or either of them, are immaterial, inasmuch as the plaintiff, by its conduct in tendering tons of two thousand two hundred and forty pounds each, and by its letters of June 14th and August 10th, agreed, for the purpose of avoiding dispute, to the defendants' construction of the contract, and, in fact, admitted that the contract should be taken to mean gross tons.

3. Neither the votes of February 16, nor the letter of Mr. Murchie of February 17, 1880, can fairly be considered a repudiation of the contract, or an attempt to abandon it. The directors did not intend or want to repudiate or abandon, and no confirmation of the contract was needed, but they desired, by an apparent misunderstanding of the terms of the contract, to see whether the defendants would consent to such a modification of it as was suggested by the addition of the words "of two thousand pounds." But if these votes were a repudiation, the defendants, by their letter of February 28th, insisted upon the execution of the contract according to its true intent; and if it was then permitted to them to treat the contract as at an end by reason of the disingenuous conduct of the plaintiff's directors, they refused to do so, and continuously held the plaintiff to strict performance. When the plaintiff performs, the defendant having continuously called for execution of the contract, it is not competent for him to refuse to accept performance. But if, upon notice by the promisor of an executory contract that he will not perform, the promisee accepts the situation, and treats the contract as at an end, the promisor cannot afterwards, by changing his mind, compel the promisee to accept performance.

§ 1369. *The law of executory contracts. The rights of the promisee.*

4. The silence of the plaintiff, after the letter of February 28th, raises a more doubtful question; but I think, assuming that this silence amounted to a notice of non-intention on its part to complete the contract for gross tons, that the defendants, by their conduct, treated such notice of non-intention as inoperative, and insisted upon performance, and cannot, when the plaintiff is really and willing to perform, refuse to accept its tender. The natural effect of the plaintiff's silence, after the letter of February 28th, was to create great uncertainty, and to cause consequent annoyance and pecuniary loss to the defendants. Such pecuniary loss is not proved here, for I do not regard Mr. Wheeler's answers to questions 6 and 7 as proving any loss to which he was subjected by the silence of the plaintiff, but cases may easily arise where such silence would be very injurious to the other contracting party, and would be very censurable. Assuming that the defendants would have been justified in regarding this silence as a continued affirmation of the construction which was given in the vote of the directors to the contract, and as a wrongful putting an end to it, they were silent on their part, and continued to stand on the letter of February 28th, de-

manding performance. When the plaintiff performs, if the defendant has not declared by his words or conduct, in regard to the subject-matter of the contract, that it is at an end, but has kept it alive and demanded fulfillment, he is bound to accept of performance. The law on the subject is stated in a recent English case by Chief Justice Cockburn as follows:

"The law with reference to a contract to be performed at a future time, when the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. Delatour* and the *Danube & Blade Sea Co. v. Xenos* on the one hand, and *Avery v. Bowden*, *Read v. Hoskins*, and *Barwick v. Buba* on the other, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

5. The plaintiff is entitled to judgment for the sum of \$16,400, with interest at six per cent. upon \$11,000 from August 1, 1880, and interest upon \$5,400 from October 1, 1880.

PLAINTIFF'S EXHIBIT NO. 1.

NEW HAVEN, January 31, 1880.

James Murchie, Esq., Vice-President New Brunswick & Canada Railroad:

DEAR SIR—We have this day bought of you, as representative of the New Brunswick & Canada Railroad Company, one thousand tons old rails, for delivery in New York or New Haven (at our option), at \$30, without duty, and delivery to be before August 1st, and also two (2) to six hundred tons for delivery in New York and New Haven, between August 1st and October 1st, at \$23, without duty. Terms, in each case, cash, against invoice, B. L., and insurance policy in satisfactory company.

Very respectfully,

E. S. WHEELER & Co.

PLAINTIFF'S EXHIBIT NO. 2.

NEW HAVEN, January 31, 1880.

E. S. Wheeler & Co., New Haven:

We hereby accept your order of this date, and will deliver rails at price and on terms named.

Respectfully,

NEW BRUNSWICK & CANADA R. R. CO.
JAMES MURCHIE, Vice-President

DEFENDANTS' EXHIBIT B.

ST. STEPHENS, February 17, 1880.

Messrs. E. S. Wheeler & Co., New Haven:

DEAR SIRS—I herewith inclose a copy of resolution passed at our meeting of directors yesterday. This confirmed the sale "made by me to you," by the company, which was done on my arrival home. The car wheels and chains that we had on hand were sold before I came home; we will have a large quantity by the time we ship our rails. Please acknowledge the above.

Yours truly,

JAMES MURCHIE.

NEW BRUNSWICK & CANADA RAILROAD COMPANY.

Minute of a Resolution Passed at a Directors' Meeting, February 16, 1880.

Resolved, That the following sale of old rails, made by Mr. James Murchie to Messrs. E. S. Wheeler & Co., New Haven, Connecticut, be confirmed:

"Sold Messrs. E. S. Wheeler & Co. one thousand tons of old rails, for delivery in New York or New Haven, at their option, before August the 1st next, at thirty dollars (\$30) per ton of two thousand pounds, the duty to be paid by Wheeler & Co.; and also two hundred to six hundred tons for delivery in New York or New Haven between August 1st and October 1st, at twenty-eight (\$28) per ton of two thousand pounds, the duty to be paid by Wheeler & Co. In each case, cash, against invoice, bill of lading. Insurance policy in satisfactory company. (True copy.)

"F. H. TODD, President."

DEFENDANTS' EXHIBIT D.

NEW HAVEN, February 28, 1880.

James Murchie, Esq., Vice-President New Brunswick & Canada Railroad Company, St. Stephens, Canada:

DEAR SIR — We received duly your favor of the 17th instant, inclosing what purports to be a certified copy of a resolution adopted by the directors of the New Brunswick & Canada Railroad Company in reference to the sale of old rails made by you, on behalf of that company, to us, on the 31st ultimo. We assume that this resolution was passed merely as matter of form, and a copy has been sent us for our information solely, as no mention was made at the time of the negotiations that you acted subject to any approval by your company. We understood then, and understand now, that the sale made at that time on behalf of your company was an absolute and final unconditional sale. We do not understand further that this resolution was forwarded to us with the view of in any way modifying that sale in any of its terms.

Furthermore, we understood at the time, and now understand, that the number of pounds in each ton of this contract, there being no contrary specification when the contract was made, was not two thousand, but two thousand two hundred and forty. Old rails, like other scrap and like pig iron, are bought and sold by the gross ton, not only in this market, but in every foreign market. The custom of the trade fixing two thousand two hundred and forty as the standard number of pounds in a ton of old rails is universal, and can be excluded from operating on contracts only by distinct conditions fixing some other quantity. No such conditions were mentioned in the contract of your company with us, and we look, therefore, for the delivery of the rails within the dates named in the contract of your company, and in "gross," not net, tons. We make no doubt but that your understanding of that contract is in accord with ours, and that in so far as this resolution fixes a different number of pounds for each ton, that it so fixes them by an oversight on the part of the directors. We hope to hear from you at your early convenience.

Very truly yours,

[Signed]

E. S. WHEELER.

DEFENDANTS' EXHIBIT E.

69 CHURCH STREET, NEW HAVEN, CONN., June 14, 1880.

Messrs. E. S. Wheeler & Co.:

DEAR SIRS — We now have ready for delivery the one thousand tons of old rails sold you January 31, 1880, by contract of sale of that date, made by you and James Murchie, as representing the New Brunswick & Canada Railroad Company. By the terms of that contract the one thousand tons are to be delivered before August 1st next in New York or New Haven, at your option.

You will please inform us at your early convenience at which of those ports the rails shall be delivered.

In your letter to James Murchie, as vice-president of our company, of February 28th, last, you construe the contract as meaning that the ton of rails specified in that contract is two thousand two hundred and forty pounds, or the gross ton. Now, without waiving any of our rights under that contract, but to avoid dispute, we tender you the delivery of the thousand tons, at gross weight of two thousand two hundred and forty pounds to the ton, and ask your determination whether the delivery shall be made at New Haven or New York.

NEW BRUNSWICK & CANADA RAILROAD CO.

By F. A. PIKE, Special Agent.

DEFENDANTS' EXHIBIT F.

(Copy.)

NEW HAVEN, June 15, 1880.

New Brunswick & Canada Railroad Co.:

GENTLEMEN — Your letter of yesterday, advising that you are ready to deliver to us one thousand tons of old rails, and asking us to designate a port of delivery, is received. As we do not recognize the existence of any such contract of sale as your letter contemplates, we have no instructions to offer upon the subject. It is true that we tried last winter to buy of you one thousand gross tons of old rails, at a price which would have netted us a large profit; but this we had to lose, as your company insisted they were selling net tons, and no contract resulted upon which we could base our sales.

Very truly yours,

E. S. WHEELER & Co.

PLAINTIFFS' EXHIBIT NO. 3.

69 CHURCH STREET, NEW HAVEN, CONN., August 10, 1880.

Messrs. E. S. Wheeler & Co.:

DEAR SIRS — By the terms of your contract with the New Brunswick & Canada Railroad Company of the date of January 31, 1880, you bought of the company two hundred to six hundred tons of old rails, to be delivered to you in New York or New Haven between August 1 and October 1, 1880. We now have six hundred tons of such old rails ready for delivery to you, and respectfully inquire at which port, New York or New Haven, you wish the delivery to be made.

In your letter to James Murchie, as vice-president of said railroad company, of February 28th last, you construe the contract as meaning that the ton of rails specified in that contract is two thousand two hundred and forty pounds, or the gross ton. Now, without waiving any of our rights under that contract, but to avoid dispute, we tender you the delivery of the six hundred tons at gross weight of two thousand two hundred and forty pounds to the ton, and ask your determination whether the delivery shall be made in New Haven or in New York, or whether, in view of your action concerning the one thousand tons mentioned in the same contract, a delivery at all shall be made.

Respectfully yours,

THE NEW BRUNSWICK & CANADA RAILROAD COMPANY.

By JOHN W. ALLING, Attorney.

PLAINTIFFS' EXHIBIT NO. 4.

NEW HAVEN, August 21, 1880.

The New Brunswick & Canada Railway Company:

GENTLEMEN — We have your favor of the 10th inst., wherein you ask shipping instructions for certain old rails under the terms of an alleged contract with us. Upon the 15th of June last, in answer to a similar request from you, we stated that we did not recognize the existence of any such contract and that we therefore had no instructions to offer. Our views regarding this matter have undergone no change since our last letter on this subject, and we do not see that we can give you any further directions regarding the disposition of the rails named by you.

Truly yours,

E. S. WHEELER & Co.

PLAINTIFFS' EXHIBIT NO. 6.

NEW BRUNSWICK & CANADA RAILROAD COMPANY v. E. S. WHEELER & Co.

(United States Circuit Court, District of Connecticut. April Term, 1882.)

In the above case it is agreed that the following list correctly shows the market price per ton of old iron rails in the markets of the cities of New York and of New Haven, at the dates respectively as given, and that a ton of such rails or other scrap iron, when quoted for the market price in said markets, means a ton of two thousand two hundred and forty pounds, the duty on such iron being \$8 per ton of two thousand two hundred and forty pounds, and included in said market price.

It is also agreed (subject to the plaintiff's right of objection to the admission of evidence to prove the fact) that a ton of said rails, or other scrap iron, when contracted for, or bought or sold in said market by the uniform usage or custom of those markets, means, and at the

date of said alleged contract in controversy meant, a ton of two thousand two hundred and forty pounds, unless the terms of the contract evidenced a different meaning upon its face.

PLAINTIFFS,

By INGERSOLL & ALLING.

Defendants reserving right to offer evidence consistent with stipulation.

By JOHN S. BEACH.

[Here followed a list of the prices of "old T rails in New York, as reported in the New York Commercial Bulletin."]

§ 1370. *Performance necessary to recovery.*—A fulfillment by one party of the terms of a contract to be performed by him is an essential condition to his right to recover. So, where libellant chartered a steam-tug to use in certain dredging operations, and agreed to furnish her with supplies and pay her expenses, but failed in both particulars, upon the filing of a libel for breach of contract on the part of the owner in taking the tug from the libellant's service, it was held that the libel must be dismissed. *The Alida*,* 12 Fed. R., 343.

§ 1371. *Suit for price—Plaintiff must show performance.*—In an action to recover the price of goods contracted for, the burden of proof is on the plaintiff to show a compliance on his part with the terms of the contract. *Pope v. Filley*,* 3 McC., 190.

§ 1372. The vendor in a contract for the sale of goods cannot recover the contract price unless he proves a tender of the goods called for by the contract, and a compliance on his part with all the other material provisions thereof. *Ibid.*

§ 1373. *Refusal by one party to allow the other to perform.*—By the terms of their hiring the crew of a fishing vessel were to help "make" the fish, but on arrival in port the owners declined to allow them to make the fish at that time. The crew then waited two months, ready at all times to do the work, but the owners refused to allow them to do so. *Held*, that as the crew were ready to perform, and performance was refused by the owners, it must be held to be waived, and the readiness of the crew held to be equivalent to performance. *Goodrich v. The Barque Domingo*, 1 Saw., 184.

§ 1374. *Performance by one of what is necessary to a compliance by the other.*—Where a contract by its terms imposes upon one party the necessity of large expenditures in preparation, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do to enable the other to comply with his promise or covenant. *United States v. Speed*, 8 Wall., 84.

§ 1375. *Time of performance where an act is to be done at a certain day and place.*—If money is to be paid or any other act to be performed on a certain day, at a certain place, the legal time of performance is the last convenient hour of the last day for transacting the business. This rule is established for the convenience of both parties, that neither may be compelled unnecessarily to attend during the whole of the day. But if the parties meet at the agreed place any time during the day, a tender and refusal, though not at the last convenient hour, is sufficient, for neither party is put to inconvenience. *Savary v. Goe*, 8 Wash., 141.

§ 1376. If the place of performance of a contract be fixed, and a party is to do the act on or before a certain time, or has the whole of a fixed period to do it in, he cannot plead a readiness to perform, or a want of readiness on the part of the other party, at any time prior to the last convenient hour of the last day. The reason for this is that neither party may be put to the inconvenience of being obliged at all times to be ready. *Ibid.*

§ 1377. *Acts to be done at the same time—Offer to perform—Reasonable time.*—Plaintiff and defendants were partners, and the former agreed to sell his interest in the firm, in payment for which the defendant F. was to give his personal note for \$3,000, and defendant W. was to give plaintiff a deed of certain lands. Upon the execution of the note and the deed, plaintiff was to execute to defendants a deed of all his interest in the firm, and defendants were to execute to him a mortgage back. It was the intention of the parties that the deeds, note and mortgage should be executed and exchanged at the same time, viz., May 1, 1842. *Held*, that neither party could sue for a breach of the agreement without first having offered to perform on his part, or show some excuse for not doing so; that the offer to perform must be made within a reasonable time, and that, as plaintiff had not alleged a performance on his part on or before May 1, 1842, a demurrer would lie. *Barbee v. Willard*,* 4 McL., 836.

§ 1378. *Acts to be done at the same time—Offer to comply or excuse necessary to recovery.*—Where by the terms of a contract the agreement of one of the parties is to do an act by a time specified, in consideration of which the other party is to do another act at the same time, the party in default cannot sue for a violation of the agreement, or insist on its

specific performance, without showing an offer to comply, or a sufficient excuse for not doing so. *McNamara v. Gaylord*,* 1 Bond, 303.

§ 1379. **Equity will not treat time as of the essence of a contract when compensation can be made for its lapse, or in case of an offer which requires acceptance to make it a contract.** *French v. Hay*, 23 Wall., 236.

§ 1380. **Condition precedent — No time fixed — Reasonable time.**— Where the parties to a contract have fixed no time within which a condition precedent shall be performed, the law will imply that a reasonable time is to be allowed. *Green v. Town of Dyersburg*, 2 Flip., 499.

§ 1381. **Reasonable time — Parol evidence.**— If a contract to manufacture and deliver articles does not mention the time at which they are to be delivered, the law declares that they are deliverable within a reasonable time. A verbal agreement to deliver them at a specific time cannot be proved. But parol evidence of conversations may be given to show what, at the time, the parties considered to be a reasonable time; and what is in fact a reasonable time is to be shown by parol. *Cocker v. Franklin Hemp and Bagging Co.*,* 8 Sumn., 530; S. C., 1 Story, 332.

§ 1382. **Composition must be paid punctually — Creditor not bound till performance.**— In cases of composition, where the debtor agrees to pay a less sum in discharge of a contract, he must pay punctually, for until performance the creditor is not bound. *Clarke v. White*, 12 Pet., 191.

§ 1383. **Contract to furnish a quantity of goods at a certain time — What is a sufficient compliance.**— Where a contract is made for furnishing a quantity of merchandise at a given place within a given time, it is not necessary that a formal tender be made of the whole amount. It is sufficient, if the defendants have not accepted, that a part of it be actually tendered in time, and that arrangements have been made, and the plaintiffs are ready to supply the rest. *Hughes v. United States*,* 4 Ct. Cl., 73.

§ 1384. **Article to be delivered on a certain day — Performance waived or rendered unnecessary.**— If a party contracts to manufacture and deliver an article by a certain day, he is bound to furnish it by that day, unless delivery at that time is waived or rendered unnecessary by the other party. *Chicago v. Greer*,* 9 Wall., 726.

§ 1385. **Time of performance extended by modification.**— A modification of a contract which is to be performed within a certain time, which necessitates an additional time for its performance, implies that such an extension will be allowed for performance as is necessitated by the modification. *Manufacturing Co. v. United States*, 17 Wall., 595.

§ 1386. **Release of performance.**— G., through F., his supercargo, purchased of C. at Canton a quantity of teas stipulated to be fresh, prime, and of the first chop. Held, that the fact that F., without examination, stated the teas to be of the first quality, did not release C. from the obligation of the contract to furnish teas of the quality prescribed. *Gilpin v. Consequa*,* 8 Wash., 184.

§ 1387. **Tender of performance — Refusal to accept.**— One who is bound by contract must either perform or offer to perform; but if the other party, by his conduct, refuses to accept a tender, none is necessary. After the offer has been made the other party cannot say that the party making the offer would not have performed it. *Blight v. Ashley*,* Pet. C. C., 15.

§ 1388. **Work to be paid for in stock — Demand and tender.**— In an action against a corporation for work and labor done under a sealed contract, by which the plaintiff agreed to receive the stock of the corporation in payment, he may, if he has performed his part, recover for the balance due him, without a demand or tender of the stock. *Hallihan v. Corporation of Washington*,* 4 Cr. C. C., 304.

§ 1389. **Tender upon condition.**— A tender is not good if the party annexes to it, as a condition precedent, a release which he has no right to require. Two parties agreed to submit matters in dispute to arbitration. The debtor agreed to pay the award in certain bills of exchange or in money, and on such payment the creditor agreed to give him a full release and discharge, or he agreed to accept from the debtor the conveyance of a certain tract of land at a certain sum, and, if the award was less than such sum, he promised to pay the difference. The award being for a less sum, the debtor made a tender of the title papers on the condition that a release should first be executed and delivered to him. Held, that the condition was one on which he had no right to insist, and that the tender was consequently insufficient. *Hepburn v. Auld*, 1 Cr., 330.

§ 1390. **Estoppel from claiming a non-performance.**— The owner of property, delivered to another for the purpose of having repairs and additions made thereto, is not estopped, by taking possession of the property for the purpose of testing the work done, to deny the fulfillment of the agreement in relation to such repairs and additions. *The Isaac Newton*,* Abb. Adm., 11.

§ 1391. **Where, by the terms of a contract, work is to be done under the superintendence of the employer, and payments are to be made from time to time as the work progresses, the**

fact that the employer continues to superintend the work and make payments thereon after the time limited for the performance of the work has expired, estops him from claiming any damages for the delay beyond such expenses and disbursements as are incurred in consequence of the prolongation of the work. *Ibid.*

§ 1392. Non-performance by plaintiff may be shown under general issue.— Under the general issue in an action of *assumpsit* upon the common counts, the defendant may show that the contract was special, or that the goods were not as represented. *Dawes v. Peebles*,* 6 Fed. R., 858.

§ 1393. Contract to deliver beef for a year— Delivery for part of the year.— Where a party contracted to deliver rations of beef for a year, he cannot recover for beef furnished for a part of the year, unless the breach was owing to the fault of defendant. *Krouse v. Deblois*,* 1 Cr. C. C., 156.

§ 1394. Where a person contracts for a certain quality of goods, he is not bound to receive any other quality. *Ladd v. Dulany*,* 1 Cr. C. C., 533.

§ 1395. Non-performance of another contract made at the same time shown in defense.— The president of a locomotive manufacturing company contracted in writing to purchase certain shares of railway stock, and pay therefor in cash "on the delivery of the last engine of the twelve" from the locomotive manufacturing company of which he was president. Fourteen engines being delivered the president was sued on his contract, and it was held that he was entitled to show a certain contract entered into with the company on the same day for the manufacture of twelve locomotives, and that not all of these twelve had been delivered. *Rutland & Burlington R'y Co. v. Crocker*, 4 Blatch., 180.

§ 1396. Substantial compliance— Contract to superintend factory— Superintendence of rebuilding.— L. contracted orally with P. to superintend the latter's glass manufactory as foreman at a certain price per week, and P. agreed that at the end of eight months he would transfer to L. an interest in the works valued at \$800, or he would pay him the money. In about two months the glass works burned. L. superintended their rebuilding for about two months, and just before the rebuilding was finished the parties entered into a written agreement to the same effect as the previous oral one. L. continued in P.'s employ for nearly a year, and at the end of eight months elected to take the \$800. *Held*, that L. was entitled thereto, and that he had substantially complied with the terms of the contract. *Langdon v. Purdy*,* 1 MacArth., 24.

§ 1397. Performance by sub-contractor which would not have been a performance by the contractor.— A contractor having agreed to build a jail, to furnish the materials, and to conform to certain plans and specifications, the erection of the building being subject to the approval of a superintendent, who had authority to stop the work if it was not proceeding according to the requirements of the contract, entered into a contract with a subcontractor, to furnish and put in the iron work according to the specifications and plans of the original contract. The subcontractor not having agreed that his work should be subject to the approval of the superintendent, it was held that he might recover of the original contractor for his work, if in compliance with the plans and specifications, or if such compliance had been waived, although such work had been condemned by the superintendent and the contractor required to replace a portion of it. *Woodruff v. Hough*,* 1 Otto, 596.

§ 1398. Partial performance— Open account.— Where a party agrees to transport a certain amount of freight within a certain time, at a certain rate per ton, and only a part is transported, the demand cannot be regarded as an open account. The contract was the foundation of the claim, and though not fulfilled according to its letter, yet with the qualifications which the law imposes, it determines the respective liabilities of the parties. *Railroad Co. v. Lindsay*, 4 Wall., 655.

§ 1399. Performance by and assignment to third person, and action by him against original contractor.— A contractor being unable to perform his contract, a third person, at the request of the two parties to the contract, performed the contract and took an assignment of the contract. *Held*, that such third party could not maintain an action on the contract against the original contractor. *Jones v. Smoot*,* 2 Cr. C. C., 207.

§ 1400. Performance of an agreement to take back land given for a purchase, if the other party shall elect.— A surviving partner purchased of the executor of his deceased partner all the interest of the estate of the latter in the partnership property. As a part of the consideration he conveyed certain lands to the executor, agreeing to take them back at the end of five years and pay money instead, if the executor should so elect. It was held that the rights of the parties respectively under this contract became fixed, when, at any time before the expiration of the five years, the executor made the election and gave the other proper notice; that either party could then require the other to perform at the expiration of the time, but that neither could insist on the default of the other so long as he was himself in default; and that neither party having offered to perform on the day, either could after-

wards insist on performance by the other by relieving himself of his own default by performance or an offer to perform. *Brown v. Slee*,* 13 Otto, 828.

§ 1401. Abandonment of work on failure of the other party to make the stipulated payments.—A contract for the building of a canal provided that the canal company should make certain payments at certain times as the work progressed. The payments not being made the company abandoned work. *Held*, that they had the right so to do; that the fault was with the canal company; that they could recover for the work done up to the time of quitting, even if it was some days after the failure of the company to make the proper payments, and this though the contract provided that interest at a certain rate should be paid on all deferred payments. *Canal Co. v. Gordon*, 6 Wall., 568.

§ 1402. Performance of contract to recover bonds.—By written contract defendants agreed to pay plaintiff a certain proportion of the value of certain bonds which had been fraudulently obtained from them, provided plaintiff recovered the bonds. The bonds were recovered by the police of Memphis and re-delivered there to defendants. *Held*, that to entitle plaintiff to his reward he must show that the police of Memphis recovered the bonds through information furnished by him. *Franklin v. Heiser*,* 6 Blatch., 426.

§ 1403. Failure of seller to pack goods in good order as stipulated—Measure of damages.—The plaintiffs purchased of the defendants a quantity of pork at Madison, Indiana, for the English market. The defendants agreed that it should be put up in prime order, and the packing was superintended by the plaintiffs' agent. The meat was shipped via New Orleans and Baltimore. At Baltimore the meat was found to be spoiled. In an action for damages the court instructed the jury that as the pork was inspected and delivered to the agent of the plaintiffs at Madison, and as there was no warranty of the article, or that it should pass inspection at Baltimore, there could be no recovery if the pork was put up in good order by the plaintiffs; that if the pork was not in good order or there was any deception in packing it, which caused its condition at Baltimore, the defendants were responsible, and that in that case the measure of damages is the difference between the article contracted for and that delivered; and that if the pork was put up in good order the defendants were not liable for any subsequent injury. *Lawrence v. White*,* 5 McL., 108.

§ 1404. Sale of goods to be shipped as soon as possible—Reasonable diligence.—A contract for the sale of goods provided that they should be shipped "as soon as possible." *Held*, that this provision required the sellers to use reasonable diligence, and that if the goods were shipped by the first conveyance then it was complied with. *Pope v. Filley*,* 3 McC., 190.

§ 1405. Contract to sell and deliver—When fulfilled.—A contract for the sale and delivery of a quantity of railroad iron is not fulfilled until the iron is delivered; the seller is liable for a loss at sea. *Thompson v. Cin., Wil. & Z. R. Co.*,* 1 Bond, 152.

§ 1406. Sale by sample—Goods selected by agent of buyer—Liability on warranty—Fraud in sending inferior goods.—In case of a contract for the sale of teas to correspond in quality with sample chests to be selected by A., if A. selects and marks all the chests, the vendor is not liable on his warranty, and is only liable for a fraud in imposing on the vendee teas apparently of a particular quality, but really of a different and inferior quality. *Cheongwo v. Jones*,* 3 Wash., 359.

§ 1407. Sale of goods not subject to examination—Implied warranty—Time given to test the article—Rescission by giving notice—Return accepted without objection.—In an action to recover the price of soda apparatus sold by plaintiff to defendant, the court instructed the jury that if the plaintiff, without the defendant having an opportunity of examination, agreed to supply him with a soda apparatus, the law implied the undertaking that it should reasonably answer for the purpose for which it was intended by the parties; that if it did not answer that purpose, and the defendant had by the contract a certain time to test it, he had a right to reject it, by giving notice at the end of that time, but was liable for the price if he did not give such notice; that the defendant was not rendered liable by using it for a short while after that time, having given the plaintiff, whose duty it was to take it away, notice to come and take it away; and that if it was afterwards returned to the plaintiff, even though it fulfilled the conditions of the contract, and kept by him without objection, he could recover only the difference between the price and the value of the apparatus as received on its return. *Dawes v. Peebles*,* 6 Fed. R., 856.

§ 1408. Contract to carefully loan money and take security.—It seems that a contract diligently and carefully to lend money and take security therefor is fulfilled by taking a good mortgage and delivering it unrecorded to the mortgagee. *Turton v. Dufief*, 6 Wall., 422.

§ 1409. Slaves hired for voyage—Liability for their escape.—Where the owner of slaves hires them for a voyage to the master of a vessel, he takes the risk of their escaping in consequence of the master's resorting to any of the contingent *termini* of the voyage. And where the slaves are hired as mariners generally, the master is not liable for a misconstruction of his orders in going to the place at which the slaves escape, such place being

mentioned in his orders as the final destination of the vessel in the event that he could not proceed to other places mentioned. *Beverly v. Brooke*,* 2 Wheat., 100.

§ 1410. **Quantum meruit**, where the plaintiff has abandoned the work before completion.—Where a party contracts to do certain work, but abandons it before it is finished, he cannot recover upon a *quantum meruit* for the work done. *Lewis v. Esther*,* 2 Cr. C. C., 423.

§ 1411. **Promise to send money by express—Delay caused by bad roads.**—Where the time for payment under a contract is not fixed definitely, but the party who is to pay agrees to send it to the other by express, and the other agrees so to receive it by express, a delay of a few days, caused by the badness of the roads, is immaterial, if the money is forwarded at the proper time. *Halsey v. Hurd*, 6 McL., 106.

§ 1412. **Interest allowed in judgment for sum acknowledged to be due for breach of contract presumed to be correct.**—Where an action is brought for a sum acknowledged by note to be due to plaintiff in consequence of breach of contract by defendant, and not upon the note, a judgment in the trial court for lawful interest demanded in the petition, to which no objection or exception is taken, will be presumed by the supreme court to be correct, although the interest contracted for in the note is usurious under a law which forfeits the entire interest so contracted for. *Newell v. Nixon*,* 4 Wall., 572.

§ 1413. **Interest account between buyer and seller—Balance not to exceed a certain amount—Excess of the limit—Stoppage in transit—Breach.**—Where there is a dealing between merchants for successive cargoes of merchandise upon time, for which notes of hand are to be given, payable from the date of the ascertainment of the quantity of each cargo, and an arrangement is afterwards made for the substitution of an interest account for the notes which are to be given; and, in that arrangement, the seller stipulates that the allowance of the interest account shall depend upon the continuance of the original time credit, and that the buyer's balance on account shall always be under a certain sum; and the buyer exceeds that amount, and refuses to make a remittance or payment, upon the call of the seller to bring the account within that sum, the seller may arrest the further delivery of any cargo or cargoes, though the same are in the course of being delivered to the buyer upon the seller's indorsement of the bills of lading and invoices. Such arrest of delivery is not a breach of the contract and will not prevent a recovery for merchandise actually received by the buyer. In the absence of all understanding between the buyer and seller that any cargo which has been delivered and not paid for, though notes of hand have been given for the same, is not to be considered within the new arrangement, such cargo must be taken into the computation in ascertaining whether the balance due by the buyer exceeds the amount of credit allowed to him. *Masters v. Barreda*,* 18 How., 439.

§ 1414. **Contract arising out of receipt of public money—Bond for performance of duty.**—The simple contract arising out of the receipt of public money by an officer is not extinguished by his official bond executed for the faithful performance of his duty as such officer. *Walton v. United States*, 9 Wheat., 655.

§ 1415. **Contract to carry mails—Annulled by statute—Recovery.**—The government entered into a contract with a steamship company for the carrying of the mail at a certain sum per year for a certain number of trips per year. The contract was annulled by statute after a voyage had commenced but before it had been completed. *Held*, that the annulment of the contract did not defeat the right of the company to recover compensation for the voyage then in progress. *Steamship Co. v. United States*, 13 Otto, 729.

§ 1416. **Transfer of note received as conditional payment.**—If a promissory note has been received by the vendor of property as a conditional payment therefor, and has been by him transferred to a third party, he cannot maintain a suit for the price of the goods. *Harris v. Johnston*, 3 Cr., 817.

§ 1417. **Work, whether done in performance of an original agreement or under a new contract.**—A dry dock company contracted to raise and dock a steamer for \$150. While endeavoring so to do a bulkhead of the dock burst and the work was delayed. On the repair of the dock the work was done and a bill for \$250 rendered as on a new contract. There was no new agreement, and it was held that the dock company could recover only \$150, and that the work was done in pursuance of the original agreement. *Balance Dry Dock Co. v. Howes*, 9 Ben., 232.

2. *When Performance is Excused.*SUMMARY — *Performance impossible*, § 1418. — *Notice excused*, § 1419.

§ 1418. The performance of a condition of a contract is excused where it becomes impossible by the act of the party for whose benefit it was inserted. *City Bank of Racine v. Babcock*, §§ 1420–22. See §§ 1425, 1426.

§ 1419. Whenever a precedent act is to be performed at a particular time or place, if the precedent act be a notice, and the party to whom the notice should be given has, by his absence, prevented it, or if he is absent from the state and has no known agent to receive it, and has no place of residence or business which reasonable diligence could discover, the law dispenses with the necessity of giving regular notice, and will not permit him to set up the non-performance of the condition as a bar to the liability imposed upon him by the contract. *Ibid.*

[NOTES.— See §§ 1423–1443.]

CITY BANK OF RACINE v. BABCOCK.

(Circuit Court for Rhode Island: 1 Holmes, 180–184. 1872.)

Opinion by SHEPLEY, J.

STATEMENT OF FACTS.— This is an action of trover, commenced by the plaintiff corporation, as trustee of Alfred W. Davison, for the alleged conversion of thirty-five bonds, each for the sum of \$1,000, with the interest coupons unpaid thereon, issued by the Racine & Mississippi Railroad Company; and for five bonds of the town of Rockton, in the state of Illinois, of \$1,000 each; and a certain real estate mortgage, specially described in the declaration. The conversion is alleged to have taken place on the 31st day of October, 1862. Defendant pleads *nul tiel* corporation, and also the general issue; and issue is joined upon both pleas.

The bonds of the town of Rockton, and the real estate mortgage which was sold under a decree of the court, need not be considered in this case, the conversion relied upon by the plaintiff being of the thirty-five bonds of the Racine & Mississippi Railroad Company. It appears from the evidence that these bonds were pledged by the City Bank of Racine to the Phenix Bank of Westerly, R. I., to secure the performance of a certain contract between the parties, and the payment of a note given by the City Bank to the Phenix Bank, for the sum of \$20,000, dated October 1, 1856.

This contract was subsequently modified by a supplemental agreement, dated the 3d day of October, 1859, extending the payment of the principal sum to the 3d day of June, 1861, with interest to be paid semi-annually on the 1st days of October and April in each year. By the terms of the agreement, upon the failure of the City Bank of Racine to perform the conditions of the contract, or to pay the note or interest at maturity, the Phenix Bank had the right, upon giving thirty days' notice to the City Bank, to sell the securities at the merchants' exchange in the city of New York, or elsewhere, and credit the proceeds thereof, after the payment of all expenses thereon, to the indebtedness of the City Bank of Racine.

The City Bank of Racine failed, and closed its doors in the fall of 1859. Previous to its failure it had its office and place of business in the city of Racine. After its failure it had no office or place of business, and since that time has not transacted any business as a bank in any public manner. On the 1st of October, 1859, a draft given to the Phenix Bank for the semi-annual interest due on that day was duly protested, and since that time no payment

has been made of principal or interest by the bank. On the 31st of October, 1862, the defendant, as president and agent of the Phenix Bank, sold the bonds of the Racine & Mississippi Railroad in the city of New York to Richard Irvin & Co., for the sum of \$13,948.34, being twenty-five per cent. of the amount due on the bonds and interest coupons to that date.

No notice was given to the City Bank of the time and place of sale. The sale in other respects appears from the evidence in the case to have been made in good faith. The bonds were sold for their full market value at the date of sale. The purchasers of the bonds, representing a large amount of the other outstanding bonds of the road, purchased the balance, and subsequently, by the expenditure of large amounts of their own funds, extended and completed the unfinished and unproductive and insolvent railway which was mortgaged to secure the bonds, and thereby made that available as a security which had comparatively little value before, and thus greatly advanced the value of the bonds. But the evidence entirely fails to show that there was any collusion or unfairness or want of good faith at the time of sale, or that there was any sacrifice of the securities at a rate below their then market value.

The proceeds of the sale were duly credited on the indebtedness of the City Bank of Racine. After applying the proceeds of this sale, and of a subsequent sale made under a decree of court of the other securities, there still remained a large balance due to the Phenix Bank. No tender has ever been made of payment of the debt, nor any action taken of any kind until after the lapse of many years, and after the additional value had been given to the bonds by the expenditures made by the purchasers. The claim of the City Bank of Racine was subsequently transferred to Davison. The present action is brought in the name of the bank, for his benefit, against the president of the Phenix Bank. Plaintiff claims that by effecting the transfer and sale of the bonds, as agent of the Phenix Bank, without notice to the City Bank of Racine, the defendant was liable for a conversion of the bonds, and for the highest price at which the bonds could have been sold prior to the commencement of the action, and that he is not entitled to offset the claim of the Phenix Bank against the City Bank of Racine.

On the plea of *nul tiel* corporation, the defendant contends that by the provisions of the statutes of Wisconsin, in force at the time of the failure of the plaintiff corporation, that corporation, by continuing insolvent for one year after its failure, and by suspending for three years thereafter its ordinary and lawful business as a banking corporation under the laws of Wisconsin, had thereby surrendered its rights and privileges as a corporation before the commencement of this action, and was and is incapable of prosecuting this suit. The provisions relied upon in the statutes of Wisconsin are not now in force, and during their existence do not appear to have ever received any judicial construction by the supreme court of the state of Wisconsin. In the view taken by the court, it becomes unnecessary to decide this question.

§ 1420. *Party not liable for a conversion.*

In the opinion of the court, the defendant cannot be held to have converted the bonds by reason merely of the omission to give notice of the time and place of sale, under the state of facts proved in this case.

§ 1421. *The performance of a condition is not necessary where performance becomes impossible by act of the party for whose benefit it was made.*

The Phenix Bank held the bonds in pledge, with a power to sell in case of failure to perform the contract. There was coupled with the power of sale a

condition for the benefit of the pledgor, that the pledgee should give thirty days' notice before the sale. The performance of this condition became impossible by the act of the party for whose benefit it was made. For years before the sale (if the bank had any corporate existence, which is at least doubtful), it certainly had no place where, or acting officers upon whom, notice could have been served. "It is a rule common to all conditions of obligations, that they be taken to be accomplished when the debtor who is obliged under such condition has prevented its accomplishment. *Quicumque sub conditione obligatus curaverit ne conditio existeret, nihilominus obligatur.*" 1 Evans' Pothier, 212; 2 id., 38; *Hotham v. East India Co.*, 1 Term R., 638. Mr. Justice Washington, in the case of *Williams v. Bank of United States*, 2 Pet., 102, states the rule thus: "If a party to a contract, who is entitled to the benefit of a condition upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent, the performance, the opposite party is excused from proving a strict compliance with the condition." The rule is one of general application.

§ 1422. *When notice is dispensed with.*

Wherever a precedent act is to be performed at a particular time or place, if the precedent act be a notice, and the party to whom the notice should be given has, by his absence, prevented it, if he be absent from the state, and has no known agent to receive it, and has no place of residence or business which reasonable diligence could discover, the law dispenses with the necessity of giving regular notice, and will not permit him to set up the non-performance of the condition as a bar to the liability imposed upon him by the contract. The question whether the agent who acted merely as agent between the bank and the purchasers in effecting the transfers, and had no possession except as agent without any claim of title, should be held liable for a conversion, is one upon which there was great difference of opinion in the minds of the learned judges in the case of *Fowler v. Hollins*, L. R., 7 Q. B., 616; but we are not called upon to decide that question in this case, for we are clearly of opinion that the sale of the bonds upon the facts of this case did not constitute a conversion for which the Phenix Bank would have been liable, if the action had been brought directly against the bank.

Judgment for defendant.

§ 1423. *By act of God or the law.*—The act of the law as well as the act of God can always be pleaded as an excuse for the performing or not performing of an act. No damages are recoverable for the performance of an act compelled by *mandamus*. *Smith v. Commissioners of Tallapoosa Co.*, 2 Woods, 598.

§ 1424. *By accidents, vis major, or fortuitous events*—*Difficulty in obtaining a crew*—*Contract of affreightment.*—Every engagement to perform a future act is in one sense conditional. If it becomes impossible by any event not imputable to the party who is bound to perform it, he is excused unless he assumes the risk of all contingencies. Accidents, *vis major*, fortuitous events, or the so-called acts of God, always constitute an implied condition in every contract. But, in the absence of an expressed condition, a difficulty in obtaining a master and crew for a certain voyage is not such a contingency as will excuse the performance of a contract of affreightment. *The Eliza*, Dav., 818.

§ 1425. *By act of the other party.*—The conduct of one party to a contract in preventing the other from performing his part is an excuse for such non-performance. *United States v. Peck*, 12 Otto, 65. See § 1418.

§ 1426. *By absolute impossibility.*—It seems that a party binding himself to a delivery of personal property at a future time can only be relieved from liability for failure to deliver on the clear refusal of the other party to receive, or an absolute and subsequently arising impossibility on his part to deliver. *Smoot's Case*, 15 Wall., 45. See § 1418.

§ 1427. *By disability not arising from the fault of the promisor.*—Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy even, the law will excuse him. *Gibbons v. United States*, * Dev., 56 (168).

§ 1428. **By impossibility—Condition precedent.**—A condition precedent must be performed in order to furnish grounds for recovery under the contract. Impossibility of performance growing out of unanticipated exigencies constitutes no exception to its operation, especially where the impossibility is personal in its nature. If an impediment arise and a loss must ensue, the law leaves the loss where the contract has placed it, and a court of equity will not interfere. *Tait v. New York Life Ins. Co.*, 1 Flip., 817.

§ 1429. **By accident or inevitable necessity.**—Where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident or inevitable necessity, because he might have provided against it by the contract. *West v. Steamer Uncle Sam*, McAl., 507; *Gibbons v. United States*, * Dev., 50 (169).

§ 1430. **By unforeseen difficulties.**—The performance of an absolute express covenant to do a certain thing possible to be performed is excused only by act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse. *Dermott v. Jones*, 2 Wall., 1 (§§ 1348-50).

§ 1431. **By stress of weather.**—A ship-owner sold tickets in New York for a passage from Panama to San Francisco by a certain ship which would leave Panama at a certain time. The vessel in which the passengers were to have been carried was detained by stress of weather and did not arrive in Panama till some months later. *Held*, that the passengers could recover the amounts paid by them for such tickets. *Cobb v. Howard*, 8 Blatch., 525.

§ 1432. **By failure of consideration or impossibility.**—Where the whole consideration for any stipulation fails, or where any stipulation becomes incapable of being performed substantially in the manner which the parties intended, by the voluntary act of either, the other party is not bound to proceed, but is at liberty to decline a performance thereof on his part. *Kleine v. Catara*, 2 Gall., 74.

§ 1433. **By high water or sickness.**—If malicious motives on the part of the defendant in procuring a forfeiture of his contract with plaintiff (the contract having given to a third person the power of declaring a forfeiture for lack of diligence on the part of the plaintiff in performing his part) are made the gravamen of the charge, high water, or sickness of the plaintiff, as excusing the delay, is not to be considered. *Culbertson v. Ellis*, 6 McL., 248 (§§ 1910-16).

§ 1434. **Illness as excusing the performance of a condition.**—Where the validity of a contract depends upon the performance of a condition precedent, the party whose duty it is to perform the condition is not excused therefrom by illness or any other causes beyond his control. *Thompson v. Knickerbocker Life Ins. Co.*, 2 Woods, 551.

§ 1435. **Illegality of part as an excuse for not performing the rest.**—Where a law forbids the performance of a contract in part only, he who is bound by it must still perform what he lawfully may. So in case of an embargo, where a ship-owner is prevented from commencing a voyage agreed upon, the contract is not at an end, but the performance of it is simply delayed till the embargo is removed, and must then be performed. *Odlin v. Insurance Co. of Pennsylvania*, 2 Wash., 317.

§ 1436. **By subsequently becoming unlawful.**—It seems that where a contract is lawful at the time it is made, and a law afterwards renders a performance unlawful, neither party shall be prejudiced, but the contract shall be considered at an end. *Ibid*.

§ 1437. **Illegality arising from one's own act.**—A law of the state of New York provided that no contract with the state for the use of convict labor should be valid unless the contractor should deposit a certain sum of money to secure its performance. No such sum was deposited, but the contract was entered upon. *Held*, that the person who was required by the terms of the law to make the deposit would not be heard to dispute the validity of the contract on account of such failure on his part to make such required deposit. *In re Burt*, 12 Blatch., 255.

§ 1438. **Performance becoming impossible by the promisor's own act.**—If parties bind themselves to pay money out of funds expected to come into their hands, they are not excused from payment of damages, if their failure to receive the funds proceeds from their own fault. *Blight v. Ashley*, * Pet. C. C., 15.

§ 1439. **Defect in bridge not excused by defect in pier, where the builder is responsible for the pier also.**—In an action by contractors for the price stipulated for the construction of a bridge for a railroad company, the contract calling for the construction of a bridge upon which the cars of the company could cross, and implying that the bridge should be serviceable for that purpose and capable of being used with like facility and ease as similar bridges properly constructed and used, where the defendants seek to recoup damages for the defective execution of the work which prevented this result from being attained, the plaintiffs cannot insist that this was owing to a defect in the pier, such pier having been built under the direction of the plaintiffs' agent, in accordance with his directions, and adopted by him as sufficient, and

the plaintiffs being bound to see that the pier was in proper condition for the bridge before proceeding with the construction. *Railroad Co. v. Smith*, 21 Wall., 235 (§§ 1936-1939).

§ 1440. By payment of a stipulated penalty.—Where, by the terms of a contract of sale, the penalty for its non-performance is put at a certain sum, and the purchaser at the time believed that he could be released from the contract on the payment of such sum, and the vendor by his act at that time aided such belief, it was held, in a suit for specific performance, that the purchaser could not avoid the contract on the payment of the amount stipulated. *Cathcart v. Robinson*, 5 Pet., 277.

§ 1441. By the death of the other party, where the act is to be done upon his request.—Where a contract provides that something shall be done after a certain time, upon the request of the person to be benefited, the obligor has his life-time in which to perform his part of the agreement, unless hastened by the demand of the one to be benefited. If the latter wishes to hasten the performance of the contract, he must demand it, and after such demand the obligor must perform within a reasonable time. If the person to be benefited dies before making the demand, the obligor is not liable for non-performance of his agreement. *Tilghman v. Tilghman*, Bald., 493.

§ 1442. Party must do all in his power to perform.—If a party would excuse himself for the want of a strict performance of his contract, he should show by direct and positive allegations that he did all that was in his power to perform. *Savary v. Goe*, 3 Wash., 144.

§ 1443. Exhausted market, where the contract is for the delivery of teas.—Where a contract was made at Canton for the sale of teas of the quality of certain selected sample chests, the fact that the contract was made late in the season, when the market was nearly exhausted, and the vendor was unable to comply with the contract, will not excuse the failure to deliver teas of the quality of the sample chests. *Cheongwo v. Jones*,* 8 Wash., 359.

§ 1444. Where a party contracts to deliver a certain quantity and quality of teas, the fact that such teas could not be obtained in the market will not excuse a breach of the contract. *Youqua v. Nixon*,* Pet. C. C., 223.

§ 1445. Payment of rent at the place named becoming impossible.—Where the payment of rent at the place named for that purpose becomes impossible, it is incumbent upon a party claiming a forfeiture for the failure to pay rent to fix another place, and to give notice to the lessee of such change. *People of Vermont v. Society for Propagating the Gospel*, 1 Paine, 658.

§ 1446. Promise to pay when able.—Where a party has promised to pay a debt if he should ever be able to do so, it is not necessary to prove absolutely his ability to do so. That ability may be inferred from his apparent circumstances. *Lonsdale v. Brown*, 4 Wash., 89.

§ 1447. The temporary destruction of the thing in reference to which the contract is made furnishes a legal excuse for a delay caused thereby, unless it appears that such temporary destruction was allowed to continue an unreasonable length of time, or it be shown that negligence was the cause of the accident. So a dry dock company is not liable for delay in docking a steamer caused by the bursting of a bulkhead in the dock, if not negligent or unreasonably long in repairing the damage. *Balance Dry Dock Co. v. Howes*, 9 Ben., 234.

§ 1448. Equity rule where performance of condition subsequent becomes impossible.—If a condition subsequent be possible at the time of making it, and afterwards becomes impossible to be complied with by the act of God or the law or the grantor, the rule of law is that the estate, having vested, becomes absolute. But equity will not apply the principle to this extent where it would work injustice, but will treat the condition as though no particular time was specified, and in such case the performance may be within a reasonable time. *Davis v. Gray*, 16 Wall., 230.

3. Specific Performance.

[Of contracts between vendor and vendee, see LAND.]

SUMMARY — *Power of revocation*, § 1449. — *Against a receiver*, § 1450. — *Partial performance of an entire contract*, § 1451. — *Requiring payment in different classes of securities*, § 1452. — *Agreement to surrender old bonds and receive new*, § 1453. — *Contract to build and equip a railroad*, § 1454. — *Defendant disabled from performing*, § 1455. — *Agreement for furnishing sleeping cars*, § 1456. — *Delivery of policy of insurance enforced*, § 1457. — *Adequate remedy at law; failure to procure and assign note*, § 1458. — *What plaintiff must show*, § 1459.

§ 1449. No contract will be specifically enforced where a power of revocation exists. *Express Co. v. Railroad Co.*, §§ 1460-61.

§ 1450. A contract for transportation between a railroad and an express company will not be specifically enforced against a receiver appointed in a suit brought by bondholders of the railroad against the corporation. *Ibid.*

§ 1451. Under the law of Louisiana a partial performance of an entire contract by one party does not entitle him to a decree for specific performance *pro tanto* by the other, although if the contract be divisible, a partial performance by plaintiff may entitle him to compensation in money. *Hyde v. Booraem*, § 1463-70.

§ 1452. A bill was brought to enjoin defendants from issuing certain mortgage bonds because (as the bill alleged), if allowed to issue them, defendants would be unable to issue and deliver to plaintiffs certain other bonds as required by a contract between the parties. *Held*, that an injunction should not be decreed unless the contract referred to was one which equity would enforce specifically; that a contract which requires defendant to make payment for work in three classes of securities, viz.: bonds of the United States, paid-up shares in the defendant company and mortgage bonds of the defendant company, is a contract which will not be specifically enforced in equity; and *semble*, that the same is true where the contract requires the delivery of the company's securities only; that specific performance of a contract which requires one party to build a railroad will not be enforced. The motion for an injunction was accordingly overruled. *Ross v. Union Pac. R. Co.*, §§ 1471-81.

§ 1453. S. agreed to surrender to a railroad company certain of its bonds owned by himself and others whom he represented, and to accept in return certain new bonds of the company. A part only of the old bonds were surrendered and only a part of the new ones issued. Upon a bill by S. to compel the company to deliver to him the balance of the new bonds, it was held that the company would not be compelled to perform its part of the contract until S. either surrendered the old bonds or made satisfactory proof of their loss. *Railway Co. v. Stewart*, §§ 1482-83.

§ 1454. Specific performance of a contract between a railroad company and plaintiffs, who had contracted to "iron and equip" the road, was refused. *Fallon v. Missouri & Mississippi R. Co.*, §§ 1484-85.

§ 1455. A contract will not be specifically enforced when the defendant's interest in the machinery necessary to complete the contract has been sold on execution to a third person. *Bickford v. Davis*, §§ 1486-87.

§ 1456. In a contract between plaintiff and defendant it was agreed that the former should furnish sleeping and drawing-room cars, and that the latter should pay a fixed sum per mile for their use, repair them, etc., and should not make a similar contract with any other company; it was further agreed that within a certain time plaintiff might elect to continue business relations with defendant according to a form of contract then prepared. Plaintiff did elect to continue, and notified defendant accordingly, but was informed that defendant declined to execute the second contract, and that it was about to make contracts with another car company. Upon a bill by plaintiff to compel defendant to perform its contract, and to enjoin it from contracting with the other car company, it was held that specific performance of the contract could not be decreed, and that the injunction must be refused. *Pullman Palace Car Co. v. Texas & Pac. R. Co.*, §§ 1488-90.

§ 1457. A contract to deliver a policy of life insurance may be specifically enforced. *Herbert v. Mutual Life Ins. Co.*, § 1491.

§ 1458. Specific performance of a contract will not be decreed when the plaintiff has an adequate remedy at law. So where a debtor agreed to procure the note of a third party to himself and assign it to his creditor, but failed to do so, specific performance of the contract was refused the creditor on the ground that he had an adequate remedy at law. *Roundtree v. McLain*, §§ 1492-94. See § 1498.

§ 1459. A party asking specific performance must show diligence; also performance, or an offer to perform. Facts not sufficient to authorize a decree. *Boone v. Missouri Iron Co.*, § 1495. See § 1497.

[NOTES.— See §§ 1496-1554.]

EXPRESS COMPANY *v.* RAILROAD COMPANY.

(9 Otto, 191-201. 1878.)

APPEAL from U. S. Circuit Court, Western District of North Carolina.

STATEMENT OF FACTS.— The express company made a contract with the railroad company, agreeing to lend the latter \$20,000, to be repaid in the transportation of express matter or otherwise. The railroad passed into the hands of a receiver, and by leave of the court the express company filed a bill against him for a specific performance of the contract. The bill was dismissed upon demurrer. Further facts appear in the opinion of the court.

§ 1460. *A suit against a receiver without the consent of the court appointing him is a contempt.*

Opinion by MR. JUSTICE SWAYNE.

The bill avers that it was filed against the receiver appointed by the court below, that he was in possession of the railroad, and that the institution of the suit was by the consent of the court. Without this latter fact the bill could not have been filed or maintained. The suit would have been a contempt of the court which had appointed the receiver, and punishable as such. *Davis v. Gray*, 16 Wall., 203.

The citizenship of the complainant corporation is sufficiently averred. *Express Co. v. Kountze Brothers*, 8 id., 342 (CARRIERS, §§ 1499-1502). Such a complainant need not prove its existence, unless the fact is directly put in issue by the defendant. *Society for Propagation, etc., v. Town of Pawlet*, 4 Pet., 480. To the objection that the requisite corporate power of the complainant is not shown, there are two answers. The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear. 2 Wait, *Actions and Defenses*, 334. The charter is set out in the record, and forms a part of it. That leaves no room for doubt upon the subject. Adequate capacity on the part of the railroad company to make the contract is to be presumed in like manner. No party defendant was necessary but the receiver. He was in the possession of the property and effects of the railroad company, subject to the order of the court, and could have specifically performed the contract, or paid back the money loaned if the court had so directed. The presence of the other parties was immaterial, and the bill might well have been dismissed as to them. *Davis v. Gray*, *supra*; *Doggett v. Railroad Co.*, 99 U. S., 72.

§ 1461. *The contract was not a license, but a contract for transportation, which created no lien.*

The contract between the express company and the railroad company was that the latter should give to the former the necessary facilities for the transaction of all its business upon the road, forward without delay by the passenger trains both ways all the express matter that should be offered, do all in its power to promote the convenience of the express company, both at the way and terminal stations, and carry free of charge the messengers in charge of the express matter, and the officers and agents of the express company passing over the road on express business. The consideration for these stipulations was a loan by the express company to the railroad company of \$20,000, to be expended in repairs and equipments for the road, the loan to bear interest at the rate of six per cent. per annum, and the payment of fifty cents per hundred pounds for all express matter carried over the road, to be applied in discharge of the loan and interest. The contract was to continue for one year from the 1st day of January, 1866, and until the principal and interest of the debt should be fully paid. The bill avers that the receiver had refused to carry out the contract, and that the principal of \$20,000 and a part of the interest were unpaid.

§ 1462. *Specific performance of contracts is enforced where the remedy at law is inadequate.*

The enforcement of contracts not relating to realty by a decree for specific performance is not an unusual exercise of equity jurisdiction. Such cases are numerous in both English and American jurisprudence. They proceed upon the ground that under the circumstances a judgment at law would not meet the demands of justice; that it would be less beneficial than relief in equity;

that the damages would not be an accurate satisfaction; that their extent could not be exactly shown, or that the pursuit of the legal remedy would be attended otherwise with doubt and difficulty. Judge Story, after an elaborate examination of the subject, thus lays down the general rule: "The just conclusion in all such cases would seem to be that courts of equity ought not to decline the jurisdiction for a specific performance of contracts whenever the remedy at law is doubtful in its nature, extent, operation or adequacy." 2 Story, Eq. Jur., sec. 723. See, also, *Stuyvesant v. Mayor, etc.*, of New York, 11 Paige (N. Y.), 414; *Barr v. Lapsley*, 1 Wheat., 151 (§ 27, *supra*); *Storer v. Great Western R'y Co.*, 2 You. & Coll., 48; *Wilson v. Furness R. Co.*, Law Rep., 9 Eq., 28.

§ 1463. — *but equity will not interfere where the power of revocation exists.*

But we need not pursue the subject further, because there is one provision of the contract in this case which is fatal to the relief sought. A court of equity never interferes where the power of revocation exists. *Frye, Specif. Perform.*, 64. The contract stipulates that after the first year it shall cease upon the payment of the \$20,000 and interest. This might be made immediately upon the rendition of the decree. The action of the court would thus become a nullity.

§ 1464. — *and a receiver of a railroad will not be compelled specifically to perform a contract for transportation, which amounts to a mere license, and creates no lien.*

There is another objection to the appellant's case which is no less conclusive. The road is in the hands of the receiver appointed in a suit brought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license, as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. It well might be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced. Both belong to the lien-holders, and neither can thus be diverted. The appellant can, therefore, have no *locus standi* in a court of equity. Both these objections appear by its own showing. It was, therefore, competent and proper for the court below, *sua sponte*, to dismiss the bill for the want of equity upon its face. *Brown v. Piper*, 91 U. S., 37.

Decree affirmed.

HYDE v. BOORAEM

(16 Peters, 169-181. 1842.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is the case of a writ of error to the circuit court of the eastern district of Louisiana. The original suit was brought conformably to the Louisiana practice, by petitioner, in which Booraem & Company, the original petitioners, state that two of the original defendants, Hyde and Gleises, merchants of New Orleans, being indebted to the petitioners in a considerable sum, did, in April, 1837, deliver to the petitioners certain promissory notes, to wit, three notes drawn by Hyde and Gleises to the order of and indorsed by T. R. Hyde & Brothers, dated the 6th of April, 1837, at six, twelve and eighteen months, amounting to \$5,000; and three notes, drawn by the same drawers to the order of and indorsed by William T. Hepp, dated on the 6th of April, 1837, at seven, eleven and fifteen months, amounting to \$5,000; and

three notes drawn by the same drawers to the order of Booraem & Company, dated the 6th of April, 1837, at nine, thirteen and seventeen months, amounting to \$2,750.64. The petitioners then state that, on receipt of the notes, they, the petitioners, agreed to extinguish any and all demands which they had against Hyde and Gleises, or for which the petitioners had become responsible by account, note or acceptance previous to the 6th of April, 1837, and which, including interest and exchange, amounted to \$11,798.64. The petitioners then aver that they did pay and extinguish the said demands, with the exception of a draft for \$2,000 and a note for \$1,568.74, which they were unable to provide the means of taking up, and which have since been taken up by Hyde and Gleises. The petition then goes on to state that these notes were left in the hands of H. Locket, Esq., the other defendant, at New Orleans, who had been notified not to dispose of them to the prejudice of the rights of the petitioners; that they had demanded the delivery of five of the notes, to wit, three indorsed by Hepp (the others drawn to the order of and indorsed by Hyde & Brothers, being omitted in this part of the petition by mistake), and a balance in cash of \$469.12, according to the account annexed; that they had also demanded a delivery of the same five notes from Locket, but he had refused to deliver the same. The petitioners therefore prayed that they might have a judgment of the court decreeing a delivery to them by Locket of the three notes drawn by Hyde and Gleises to the order of T. R. Hyde & Brothers, and two of the three notes drawn to the order of William T. Hepp, one at eleven months for \$1,500, and the other for \$2,000 at fifteen months, and decreeing Hyde and Gleises to pay the said balance of \$469.12, and they also prayed for further relief.

Such is the substance of the petition, which does not seem to be drawn with entire accuracy and precision. Annexed to the petition is a receipt, signed by Booraem & Company, acknowledging the receipt of the nine notes described in the petition, and that they are given for the purpose of extinguishing the demands against Hyde and Gleises before the 6th of April, 1837, as stated in the petition, and then adding the following clause: "Should Joshua B. Hyde, of the firm of Hyde and Gleises, now in New York, have settled for the draft of \$2,000 paid by Booraem & Company on the 15th of March, 1837, or for the sum of \$2,128.36, by notes or otherwise, the said Booraem & Company are bound to take them up at maturity, and are included in said arrangement herein first specified."

Hyde and Gleises, in their answer, admit the drawing and indorsing of the notes, and aver that they were prepared for delivery to the petitioners according to the receipt, which contains stipulations binding upon the petitioners, and forming conditions precedent to the delivery of the notes; that to secure a compliance with the agreement, it was mutually agreed that the notes and receipts should be deposited in the hands of Locket, to be delivered to the petitioners when the several conditions mentioned in the receipt were performed, and only in that event were to be delivered; that the petitioners totally neglected and refused to perform the conditions; and, in consequence of such omission and neglect, the defendants, Hyde and Gleises, were forced to pay and did pay a note of \$1,564.74, and an acceptance of \$2,000, with costs and damages, both of which the petitioners had assumed to pay; that the friends of the defendants, Hyde and Gleises, were induced to indorse the notes by the reasonable expectation that the defendants would be enabled to meet the notes from the profits of their business, and save their indorsers from loss, if the

extensions stipulated in the receipt were granted upon all the demands of the petitioners; that, by reason of the failure of the petitioners to comply with the agreement, and the payments they were forced to make, they exhausted their resources and credit, and their business was destroyed, and their ability to protect their indorsers was utterly at an end; and they conclude by denying their indebtedness in the manner stated in the petition, and pray that the petitioners may be cited to answer in reconvention, and be condemned to pay the amount of \$5,000 to the defendants as damages.

The defendant Locket, by his answer, asserted that the notes were deposited in his hands by the joint consent of the petitioners and Hyde and Gleises, to be delivered to the petitioners by him when all the conditions in the receipt were fulfilled by the petitioners; and he avers that the agreement never was fulfilled on the part of the petitioners, and that they are not entitled to the notes. The indorsers also filed a petition of intervention in the cause; which, however, was afterwards withdrawn. The petitioners replied to the plea of reconvention, denying their indebtedness.

Upon this state of the pleadings, the cause came before the circuit court for the decision, without the intervention of a jury, by the consent of the parties, and the final decision was made by the district judge, upon an examination of the evidence offered by the parties. The decree was, in effect, that the defendants ought to pay to the petitioners, out of the notes, the balance of \$11,789.64, after deducting the amount of the note of \$1,567.74, and of the acceptance of \$2,000 paid by the defendants, and the interest thereon; and that for this purpose four of the notes in the possession of Locket, to wit, two drawn by Hyde and Gleises to the order of T. R. Hyde & Brothers, of the 6th of April, 1837, one for \$2,000, payable in eighteen months, and the other for \$1,500, payable in twelve months, and two other notes drawn by Hyde and Gleises to the order of W. T. Hepp, dated 6th of April, 1837, one for \$2,000, payable in eighteen months, and the other for \$1,500, payable in eleven months, amounting in all to \$7,000, to be delivered by Locket to the petitioners or their attorney; and that the remaining five notes be delivered to Hyde and Gleises; and that judgment be for the petitioners against Hyde and Gleises for the remaining unsatisfied sum due to the petitioners, of \$776.90, with interest from the decree. It is from this judgment that the present writ of error is brought, the district judge having, at the request of the defendants' counsel, made a statement of the facts on which he relied; and the record containing at large the whole evidence at the hearing.

§ 1465. *The supreme court will not, upon a writ of error, revise the evidence.*

One of the embarrassments attendant upon the examination of this cause, in this court, is from the manner in which the proceedings were had in the court below. We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence and drew right conclusions from it. That is the proper province of the jury, or of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision. We can only re-examine the law, so far as he has pronounced it upon a statement of facts, and not merely a statement of the evidence of facts, found in the record in the nature of a special verdict, or an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before this court by an appropriate exception, in the nature of a

bill of exceptions, and should not be mixed up with his supposed conclusions in matters of fact. Unless this is done, it will be found extremely difficult for this court to maintain any appellate jurisdiction in mixed cases of the nature of the present. The same embarrassment occurred in the case of *Parsons v. Armor*, 3 Pet., 413; and was there rather avoided by the pressure of the circumstances, than overcome by the decision of the court. Taking this case, then, as that was taken, to be one where there is no conflict of evidence, and all the facts are admitted to stand on the record, without any controversy as to their force and bearing in the nature of a statement of facts, and looking to the allegations and prayer of the petition, and the facts stated by the judge, the question which we are to dispose of is, whether, in point of law, upon these facts, the judgment can be maintained. We are of opinion that it cannot be, and shall now proceed to assign our reasons.

§ 1466. *Law of Louisiana as to contracts containing mutual obligations.*

In the first place, it is a material circumstance that the petition is not to recover pecuniary compensation or damages for any supposed benefit conferred upon Hyde and Gleises under the agreement; but it is in the nature of a bill for a specific performance of that agreement by a delivery up of a part of the notes deposited in the hands of Locket, not upon the ground of an entire performance of the agreement on the part of the petitioners, but confessedly upon the admission that they have not performed it, except in part; and therefore seeking a part performance only, *pro tanto*, from the other side. Now, the present being what in the French law, which constitutes the basis of that of Louisiana (Code of Louisiana, art. 1760 to art. 1763), is called a commutative contract, involving mutual and reciprocal obligations, where the acts to be done on one side form the consideration for those to be done on the other, it would seem to follow, upon principles of general justice, that if they are to be done at the same time, neither party could claim a fulfillment thereof, unless he had first performed, or was ready to perform, all the acts required on his own part. And this accordingly will be found to be the rule of the Civil Code of Louisiana, art. 1907, where it is declared that, in commutative contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default must, at the time and place expressed or implied in the agreement, offer, or perform, as the contract requires, that which on his part was to be performed, or the opposite party will not be legally put in default. And again (art. 1920 and art. 2041), on the breach of any obligation to do or not to do, the other party in whose favor the obligation is contracted is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option; or he may require the dissolution of the contract. But it is nowhere provided that the party who has omitted to perform the acts which he has contracted to perform can entitle himself, if the other party has been in no default, either to a specific performance, or to damages, or to a dissolution of the contract. That would be to enable the party committing the default to avail himself of his own wrong, to get rid of the contract.

§ 1467. *Partial performance by one does not entitle him to ask for performance pro tanto by the other.*

But it is supposed that where a party has performed his contract only in part, he may, nevertheless, be entitled to a performance, *pro tanto*, from the other side; although it has been by his own default that there has not been an entire performance. And certain cases in the Louisiana Reports have been

relied on to establish this doctrine. But these cases, when examined, will not be found to justify any such broad and general conclusion.

§ 1468. *Partial performance of a divisible contract by plaintiff entitles him to compensation in money.*

They establish no more than this: that where, in a commutative contract, there has been a part performance on one side, from which a benefit has been derived by the other side, the other party is compellable to make compensation in pecuniary damages to the extent of the benefit which he has received, deducting therefrom all the damages which he has sustained by the want of an entire performance thereof. There is nothing unreasonable in this doctrine; and although it may not be in many cases recognized and acted upon in the common law, it is often enforced in equity. But this doctrine is not applicable to all cases of commutative contracts generally, but only to cases where the contract is susceptible, from its nature and objects, of divisibility; and where not a specific performance, but a mere pecuniary claim in the nature of a *quantum meruit* is sought to be enforced. Thus, in the case of *Loreau v. Declouet*, 3 La., 1, where A. agreed to build a sugar-house for B., for a certain price, and B. was to pay for it, when the work was completed, and to furnish materials, it was held that if A. failed to complete the work in the manner stipulated, yet if B. used the sugar-house, he was bound to pay for it, in money, the value of the labor he had expended upon it; that is to say, the value of the benefit he had derived from the labor; for the Civil Code of Louisiana, art. 2740, contemplates that B., in such a case, is entitled to damages for the losses sustained by him from the want of a due fulfillment of the contract. The same decision was made under similar circumstances in the case of *Etie v. Sparks*, 4 La., 463.

§ 1469. *Contracts regarded as indivisible, when.*

But where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement, the contract is treated as indivisible; and neither party can compel the other to a specific performance unless he complies with it *in toto*. Thus, if A. should agree to sell B. a ship for \$10,000, or a horse for \$500, and B. should pay a part only of the purchase money, as, for example, a fifth or tenth part thereof, it would hardly be pretended that he would be entitled to a specific performance *pro tanto*, by a conveyance of a fifth or tenth part of the ship or horse. And, on the other hand, the vendor would have no pretense to require that, if he had a good title only to an undivided fifth or tenth of the ship or horse, that the purchaser should be compellable to take that part and pay him, *pro tanto*, the purchase money. In every such case, it would be manifest that the contract of sale would be indivisible; and that each party would have a right to insist upon an entirety of performance. Now that is precisely the ground applicable to the present case. The contract between the parties was, from its very character and object, entire and indivisible. Hyde and Gleises, and their indorsers, entered into the new agreement, and gave the new notes upon the faith and confidence that the petitioners would punctiliously perform the whole of it on their side. The object was to procure a prolonged credit and delay of payment to Hyde and Gleises for all their debts contracted with the petitioners; and thus to enable them to retrieve their affairs, rescue themselves from impending ruin, and to make their indorsers safe. This could be only by the petitioners taking up all the notes and acceptances already given by Hyde and Gleises, according to the stipulations of the petitioners, and thus enabling them to carry on their operations in business; and it seems to have been contemplated on all sides, that, by the omission, Hyde and Gleises

might be compelled to stop, and their indorsers be brought into peril; and, indeed, the record shows that the event actually occurred. If, then, Hyde and Gleises have failed to realize the benefits contemplated by the arrangement, by the default of the petitioners, what ground is there to assert that they, or their indorsers, ought to be compelled to a specific performance of a contract *pro tanto*, when the consideration was a punctilious performance of the entirety? The most that could, under such circumstances, be contended for, would be to say, not that Hyde and Gleises should be compelled to give up any part of the indorsed notes, but that they should be bound to repay to the petitioners, in money, the amount paid by them for Hyde and Gleises, deducting all damages sustained by the latter by reason of the non-performance of the contract, as in the cases already cited. But that is not the object or the prayer of the allegations in the present petition.

§ 1470. *If a new contract, which seeks to extinguish a precedent debt by novation, be conditional, the old debt is not extinguished until such condition is performed.*

In the next place, there is another view of the case still more striking and conclusive. It is not true, as the petition supposes, that there was any actual delivery of the notes to the petitioners (which might have presented another question); but in point of fact, as the evidence fully establishes, the notes were deposited in the hands of Locket, to be delivered over to the petitioners, only upon their full performance of the stipulations on which they were to have effect. It is admitted that those stipulations have never been performed. Upon what ground, then, can the petitioners now demand a delivery of any of the notes, they not having fulfilled the conditions of the deposit? It has been said that here, by the giving up of the new notes, the old debts due by Hyde and Gleises have been extinguished by novation; and, therefore, their sole remedy lies upon the new contract and notes given in pursuance thereof. But that doctrine is by no means true, as it is attempted to be applied to the circumstances of the present case. A novation will, indeed, if it be absolute and unconditional, amount to a direct extinguishment of the original debt by substituting the new contract in its place. This is sufficiently apparent from the language of the Civil Code of Louisiana, arts. 2181 to 2194. But no extinguishment is wrought if the arrangement is conditional, and the conditions are not fully complied with. Pothier (Pothier on Obligations, 550, 551) states this in the most clear and explicit terms. "It follows," says he, "that if the debt of which it is proposed to make a novation by another engagement is conditional, the novation cannot take effect until the condition is accomplished." Therefore, if there is a failure in the accomplishment of the condition, there can be no novation, because there is no original debt to which the new one can be substituted. *Vice versa*, if the first debt does not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the condition of the new engagement, before the first debt is extinct.

Now, that the giving of these new notes by way of novation for the old debts was conditional, is apparent from the fact that they were not delivered to the petitioners, but were deposited in the hands of Locket, "subject to the provisions of the receipt," and to be delivered over by him only when these conditions were complied with by the petitioners. So all parties must have understood the transaction; and the deposit in any other view would be as unaccountable as it would be unmeaning. The petitioners have never, as they

admit by their petition, complied with these conditions. How, then, can they, consistently with all rules of law, insist upon the transactions being a complete and absolute novation, entitling them to the delivery of the substituted securities in lieu of the old debts?

Nor is the consideration to be lost sight of, that the arrangement does not merely limit itself to the immediate interests of the debtors and the creditors. The indorsers have rights also which must have been intended to be provided for and secured by the deposit; to which, in reason, they must be presumed to have been parties, and given their assent. We have no right to presume that they would have indorsed these notes without the entire confidence that the new arrangement would be carried out and fulfilled with the most scrupulous punctuality. Their own recourse over against Hyde and Gleises might otherwise be most materially and injuriously affected. Their object must have been, by securing to Hyde and Gleises the prolonged credit, to have enabled them to meet the new payments, and thereby exonerate themselves from ulterior responsibility. If, therefore, we were to give effect to the present suit, the conditions of the novation not having been fulfilled, we should either deprive the indorsers of all the benefits and securities contemplated in the arrangement, or, at all events, leave them exposed to a responsibility as indorsers, from which, by the very deposit, they meant to guard themselves.

There are other embarrassing difficulties in the frame of the decree, as to the manner in which it disposes of the notes, and divides the responsibilities of the respective indorsers without their consent, and proceeding to adjudge money to the petitioners for the balance. But it is unnecessary to dwell on them, for, upon the grounds already stated, we are of opinion that the judgment ought to be reversed, and the cause remanded with directions to the court below to dismiss the suit with costs for the original defendants.

ROSS v. UNION PACIFIC RAILWAY COMPANY.

(Circuit Court for Kansas: 1 Woolworth, 26-48. 1863.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—This is an application for an injunction on a bill filed in the circuit court of the United States for the district of Kansas. The material matters set forth in the bill may be shortly stated thus: In September, 1862, the plaintiffs, under the partnership name of Ross, Steel & Co., contracted with the defendant under the corporate name of The Leavenworth, Pawnee & Western Railroad Company, which has since been changed to its present style, that they would build for it a railroad in the state of Kansas, some three hundred and fifty miles in length, the same to be part of the great Pacific Railway provided for by the act of congress.

The defendant, on its part, agreed to pay for said road, as each section of forty miles should be built, equipped and furnished ready for use, and accepted by the commissioners, as provided in the act of congress, the sum of \$33,500 per mile. This sum was to be made up as follows: \$16,000 of the bonds of the United States, to be issued under said act; \$6,000 of the paid-up stock or shares of the company, and \$11,500 of the bonds of the company, secured by a first mortgage on the road and its appurtenances, and on the land granted by the government to aid in its construction. The plaintiffs have done work and furnished material to the value of \$40,000 or \$50,000. They have made extensive arrangements for procuring the necessary capital, and for the pur-

chase of the iron; and are fully ready and able to prosecute the work, diligently and successfully. But the defendant has notified them that their contract is forfeited, and the work covered by it he has employed other parties to perform.

To secure its bonds, which are to be delivered to the new contractors for their work, the defendant has made two mortgages on the road and its appurtenances, and on its lands. These mortgages are entirely different from those which are provided for in the contract with the plaintiffs, and if the bonds are issued thereon, the defendant will be unable to comply with its covenants to them in relation to the same subject-matter. The bonds have not been issued yet. The bill therefore prays for an injunction to prevent their issue, and, on final hearing, that the defendant may be decreed specifically to perform its covenants in said contract, and for general relief.

§ 1471. *An injunction to prevent a party from disabling himself to perform his contract will issue only when such contract is one which might be specifically enforced.*

If, for the purpose of compelling the parties to perform specifically their contract, the court, on the case made by the bill, ought to entertain it, it should grant the injunction; because, otherwise, before a hearing on the merits, the defendant would probably render itself incapable of giving to the plaintiffs first mortgage bonds as it has agreed to do. On the other hand, if, on the hearing, specific performance will not be decreed, there is no ground for the injunction, which is sought only for the purpose of making the final decree effective. We are called upon, then, to inquire, in the first place, whether the case made by the bill is one in which a court of equity will decree specific performance of the contract. In considering the question of the jurisdiction of the court to enforce them by decree, the covenants of the defendant may be treated as requiring the delivery of three kinds of securities, namely: 1. The bonds of the United States provided to be issued by act of congress. 2. The paid-up shares of the company. 3. The bonds of the company secured by mortgage.

§ 1472. *A contract to deliver United States bonds will not be specifically enforced.*

1. The bonds of the United States are stocks within any definition which can be given to that term. They are public stocks, government stocks. The decisions are clear and uniform, that a covenant for their delivery will not be specifically enforced in a court of equity. 2 Story's Eq. Jurisprudence, §§ 717, 717a, 718, 724a. The cases cited in the notes to these sections of Judge Story's work (Redfield's edition) fully sustain this doctrine. They cover a period of two hundred years, coming down to the present time. In reference to this class of stocks, no case is cited to the contrary.

§ 1473. *A contract to deliver railway shares will probably not be specifically enforced.*

2. As to the shares in the railroad company, I think the rule should be the same. I see no sound reason for any distinction between them and government stocks. They belong to a class of securities which are generally called stocks; they are the subject of every day sale in the market, and the rates at which they are selling are quoted in the public commercial reports, so that their value is as readily and certainly ascertained as that of government stocks. No especial value attaches to one share over another, and the money which will pay for one will as readily purchase another. The damages, then, for failure to deliver any such shares may be awarded at law, and be an adequate compensation for the injury sustained.

§ 1474. — *authorities reviewed.*

And this has been the holding of the courts for a hundred years. *Cud v. Rutter*, 1 P. Wms., 570; 5 Vin. Ab., 538, decided in 1719, was a bill to compel the delivery of South Sea stock according to a contract alleged. Lord Chancellor Parker, "delivering his judgment with great clearness," as the reporter says, held "that a court of equity ought not to execute any of these contracts, but to leave them to law, where the party is to recover damages, and with the money may, if he please, buy the quantity of stock agreed to be transferred to him; for there can be no difference between one man's stock and another's. It is true, one parcel of land may vary from, and be more commodious, pleasant or convenient than another parcel of land, but £1,000 *South Sea* stock, whether it be A., B., C. or D.'s, is the same thing, and in no sort variant; and therefore let the plaintiff, if he has a right, recover in damages, with which, when received, he may buy the stock himself." So, also, are *Cappur v. Harris*, Bunb., 135; *Dorison v. Westbrook*, 5 Vin., 510, pl. 22. In all the cases in which in former times specific performance was decreed, the reason existed, and the court proceeded upon the reason that damages at law afforded no sufficient compensation, on account of some peculiarity in the stock contracted to be delivered, or in the situation of the parties. Of this class are *Colt v. Netterville*, 2 P. Wms., 304; *Buxton v. Lister*, 3 Atk., 383; *Gardner v. Pullen*, 2 Vern., 394.

§ 1475. — *the later English decisions.*

In England, by recent decisions, the jurisdiction seems to have been extended beyond the early cases. In them it has been said that there is no analogy between government stock and railroad shares, because the latter are limited in amount, and are not always to be had in the market. *Duncuft v. Albrecht*, 12 Sim., 189; *Shaw v. Fisher*, 5 Railw. C., 465; *Parish v. Parish*, 32 Beav., 207. Whether the distinction taken in these cases shall be held finally to prevail in this country, and, if it be established, whether it shall be held applicable in principle to cases like this, I need not now determine. But conceding that if this contract called for only the shares in the company and its bonds, a specific performance of it might be decreed by this court, how does the case stand when the first mentioned class of property, as to which we have seen that the contract cannot be specifically enforced, is coupled with the other two classes.

If this bill can be maintained, we are to suppose that when the first section of fifty miles of road is completed, the plaintiffs will call on the court to compel the defendant to perform the contract to that extent. There will then be due from the defendant to the plaintiffs \$1,675,000; \$800,000 of which will be payable in government stock, of which this court cannot compel the delivery, and \$875,000 in railroad shares, of which delivery may be decreed. Now, will the court, on a covenant, which is a unit, give the plaintiffs this partial relief, and as to one-half of it in nominal amount, and perhaps more than one-half in value, turn them over to a court of law for damages? In a court of law, strict and technical performance, on the part of the plaintiffs, of their covenants is essential to a recovery. In a court of equity, time is not of the essence of the contract. Thus the contract becomes subject, in different courts, to wholly different rules of construction and to different kinds of relief, which may prove in reality both a snare to the plaintiffs and a detriment to the defendant.

And this has been ruled in several cases. Thus in *Gervais v. Edwards*, 2 Dr.

& W., 80, Sir Edward Sugden in Ireland held that, unless the court can decree specific performance of the whole of a contract, it will not interfere to enforce any part of it. And in *South Wales R'y Co. v. Wythes*, 1 K. & J., 186; 24 Law J. Rep., N. S., Ch., 1, Lord Justice Knight Bruce says: "I find no authority for the proposition that where the main body of an agreement is not fit to be performed, or rather the specific performance of which is not fit to be enforced in equity, the subsidiary part of it can or ought to be enforced, particularly when the peculiar nature of that subsidiary part is considered." This contract remains unexecuted. It is true that the bill alleges that the plaintiffs have done work and furnished material to the value of \$40,000 or \$50,000. But the contract, if executed by them, would require from them \$12,000,000 of work and material. The amount already expended, compared with that to be expended, is too inconsiderable to take the case out of the class of executory contracts. It is the settled doctrine of this court that such a contract will not be specifically enforced, unless the remedy is mutual; that is to say, that the covenant of the plaintiff, to be performed on his part, and that of the defendant on his part, must both be of such character that, if either of them shall be delinquent, the court can give relief by compelling its performance specifically by him. 2 Story's Eq. Jur., §§ 711, 723, 790; *Cathcart v. Robinson*, 5 Pet., 264.

§ 1476. *A contract to build a railroad is not one which can be specifically enforced.*

I proceed, then, to inquire whether this contract is of such a character that, if the plaintiffs were in default, it could be specifically enforced as against them by a decree of this court. The covenant on the part of the plaintiffs, although expressed in very simple terms, is nevertheless a very grave undertaking. It is, that they will, within such time as the act of congress requires, build about three hundred and sixty miles of railroad, and equip and furnish the same, complete, with rolling stock, depots, etc., ready for use, furnishing all the materials necessary for this extensive work. Shall this court, in addition to, or rather before, enforcing the covenants of the defendant, undertake to enforce performance on the part of plaintiffs of this covenant of theirs?

§ 1477. — *authorities cited.*

No case is reported, I believe—at least none has been produced on the hearing—in which the court has undertaken to compel a party to build a railroad. In fact, the case of *South Wales R'y Co. v. Wythes*, 1 K. & J., 186; S. C., 5 De G., M. & G., 880, is to the contrary. In this case the court refused specific performance of an agreement for the building of a branch railway, which was entered into during the pendency of a bill before parliament. See, also, *Attorney-General v. Birmingham & Oxford Junction R'y Co.*, 8 Macn. & G., 453; S. C., 16 Jur., 113, affirming S. C., 15 Jur., 1024; S. C., 7 Eng. L. & Eq., 283; *People v. Albany & Vermont R. Co.*, 24 N. Y., 261. There are several cases on the subject of building houses and bridges, which, as the subject bears an analogy to that of building railroads, I will now examine.

§ 1478. — *analogous English cases examined and discussed.*

The first case claiming attention is that of *City of London v. Nash*, 3 Atk., 512; S. C., 1 Ves. Jr., 12. In this case Lord Hardwicke decreed that a covenant in a lease to rebuild should be specifically enforced, on the ground that it was essential to the security of the landlord; but, at the same time, he held that a covenant to repair would not be enforced, because compensation in damages could be had at law. This case does not seem to place the jurisdiction of the court

to compel the performance of the contract on any ground generally applicable to building contracts.

The next case in the order of time is *Errington v. Aynesly*, 2 Brown, Ch., 341, in which Sir Lloyd Kenyon, master of the rolls, refused to decree a specific performance of a contract to build, mainly on the ground that, if one person would not build, another might be found who would. In *Lucas v. Comeford*, 3 Brown, Ch., 166; S. C., 1 Ves. Jr., 235, decided very shortly after the above case, Lord Thurlow held the same doctrine, and refused a decree, saying that the court could not undertake to superintend the construction of a building, any more than it could the repairing of it. In *Morely v. Virgin*, 3 Ves. Jr., 184, Lord Loughborough refused to decree the performance of a contract to lay out £1,000 in a building, because there was not sufficient definiteness in the contract. But he took occasion to say that there would be a distinction between the case of a covenant to repair, and one to build; and that cases might arise where the contract, being sufficiently specific, might perhaps be enforced. I think that Lord Loughborough, in alluding to Lord Thurlow's decision, did not correctly state the grounds of it; yet it does not seem to me that he intended to overrule that decision, or that he said anything which could have such an effect. In *Fleet v. Branden*, 8 Ves. Jr., 159, the chancellor refused to decree the specific performance of an agreement to level and fill up a gravel-pit, on the ground that an adequate remedy for a breach of such contract could be had at law.

Thus far it would seem that no case overrules the decision of Lord Thurlow against decreeing specific performance of building contracts. We are now, however, to examine a class of cases which are supposed to establish a contrary doctrine. Before we enter upon their consideration, let us remark certain circumstances which attend them. 1. In each case, the building was to be done upon the land of the person who agreed to do it. 2. The consideration for the agreement, in every instance, was the sale or conveyance of the land on which the building was to be erected; and the plaintiff had already, by such conveyance on his part, executed the contract. 3. In all of them the building was in some way essential to the use, or contributory to the value, of adjoining land belonging to the plaintiff.

The first of these cases is that of *Storer v. Great Western R'y Co.*, 2 Young & Coll., 48. The plaintiff had sold to the railway company the right of way through his pleasure-grounds, and the company had agreed, in order that he might have the full use of his adjoining land, that it would make an arched way under its road-bed large enough for a wagon loaded with hay to pass with facility. The court decreed that the arched way should be made. The vice-chancellor said that "it was competent for that court to enforce the specific performance of a contract by the defendant to do defined work upon his own property, in the performance of which the plaintiff has a material interest, and one which cannot be compensated in damages." The next case is that of *Price v. Corporation of Penzance*, 4 Hare, 506. In this case the plaintiff had sold the town some land, and the corporation covenanted to lay out streets and build houses on it, especially to erect a fish-market. The defendants, without awaiting a decree, built a market. The court, although the relief was not resisted, approved the principle above stated. Wigram, vice-chancellor, says: "The contract was, that the corporation having purchased the plaintiff's land, should, at their own expense, make a street, and also a market. Under this contract, the corporation have taken possession of the land and converted it;

and having had the benefit of the contract in specie, as far as they are concerned, I need not say that the court will go to any length which it can to compel them to perform the contract in specie."

§ 1479. — *analogous American cases.*

In *Stuyvesant v. New York City*, 11 Paige, 414, the plaintiff, being the owner of a large tract of land in the city of New York, had granted to the city corporation a certain part thereof for the purposes of a public square; and in the conveyance which was executed by the defendant, it covenanted to grade, inclose and improve the premises in a manner therein provided; the plaintiff having exacted this covenant in order to increase the value of adjoining lands which he retained. After two judgments at law for damages, he brought his bill for specific performance, and Chancellor Walworth decreed in his favor. In the course of his opinion, that distinguished jurist says: "The true rule on the subject of decreeing the specific performance of a covenant in such cases is, that where, from the nature of the relief sought, performance in specie will alone answer the purposes of justice, this court will compel a specific performance, instead of leaving the complainant to a remedy at law, which is wholly inadequate. The court has jurisdiction, therefore, to compel the specific performance by the defendant of a covenant to do certain specified work, or to make certain improvements or erections upon his own land for the benefit of the complainant, as the owner of the adjoining property, who has an interest in having such work done or such improvements or erections made; and where the injury to the complainant, from the breach of the covenant, is of such a nature as not to be capable of being adequately compensated in damages."

In *Burchett v. Boling*, 5 Mumf. (Va.), 442, the partners had entered into a contract to build a hotel on the land of the plaintiff, which he agreed to convey for that purpose, and to receive two shares of the capital stock of the hotel therefor. He conveyed, and removed some buildings from the land, and delivered possession. The other parties commenced erecting the hotel, but afterwards abandoned the enterprise. The court decreed that they should complete the building. All these cases are clearly referable to the principle laid down in the case of *Storer v. Great Western R'y Co.* Judge Story adopted the precise language of the court in that case, without claiming that the principle goes any further. Story's Eq. Jur., § 721a. I think the cases cited rest on a principle clearly distinguishable from that of enforcing building contracts generally, in which parties have contracted, for money or personal property as the consideration, to build on the plaintiff's land; and there is no special reason to render non-performance incapable of being compensated in damages. In a case reported in 3 Humphrey (Tenn.), 657, upon a contract like that in the case last cited, except that it was wholly executory, the court refused to decree specific performance against the party who was to convey the land, although the plaintiffs were ready and willing to perform on their part.

I have thus attempted to analyze all the cases bearing on the subject which have been cited by counsel, or which I have been able to find in the short time I have had for examination; and I do not think that any of them overrule, or are in any manner inconsistent with, the case decided by Lord Thurlow, in 3 Brown's Ch., 166, notes; 1 Ves. Jr., 235. On the contrary, the decrees which have been granted are based upon principles entirely reconcilable with that case. And when we take into consideration the length of time it has stood, during which no decree resting on the general principle has been rendered to enforce a building contract, I am inclined to concur fully with Judge Story,

that "in cases of contract to build a house or a bridge," or I will venture to add, a railroad, "a specific performance would not now be decreed." 2 Story's Eq. Jur., § 716, note 2.

§ 1480. *Reasons for refusing specific performance of building contracts.*

I have been much pressed by counsel for the plaintiffs with the argument of the distinguished jurist just named, in favor of a general enforcement of this class of contracts. 2 Story, Eq. Jur., § 728. But it is evident that the author is there stating not what the rule is, but what he thinks it should be. And I cannot say that I am very strongly impressed by the reasoning with which he supports the abstract propriety of his opinion. It seems to me, that to establish the general doctrine that contracts for building may be specifically enforced in equity, would be to invite into litigation very many matters which are now generally settled by the parties on a basis much more beneficial to both; and that it would require the constant supervision of the court, through its officers, in the conduct of affairs it is very poorly adapted to administer. The result of the court's drawing to itself such a jurisdiction would certainly be far less remedial than the ordinary action for damages.

There is another consideration to be noted in this connection. If the act to be done by the delinquent party, whether the plaintiff or the defendant here, were a single act, to compel which a single decree of the court would be sufficient, a case would be presented very unlike that before us. Years must elapse before this work can be done and paid for. At every step in its progress, the interposition of the court, either by orders in this case, or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to either of the parties. It is not difficult to foresee the mischiefs of such a course. The rule is settled, even in the English chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once; that it will not decree a party to perform a continuous duty extending over a number of years, but will leave the opposite party to his remedy at law. It was on this principle that Lord Hardwicke proceeded in the case of *The City of London v. Nash*, cited above. In answer to the objection to the plaintiffs' having specific performance of the contract, he expressly says: "The objection will not hold, for, upon a covenant to build, the plaintiffs are clearly entitled to come into this court for a specific performance—otherwise on a covenant to repair; for to build is one entire single thing, and if not done prevents that security which the city of London has for the rent by virtue of the lease."

§ 1481. *A covenant to repair will not be specifically enforced. Cases cited.*

And this may have been a reason, and a very strong reason, for the rule, now well settled, that a covenant to repair will not be specifically enforced. *Gervais v. Edwards*, 2 D. & War., 80; *Hill v. Croll*, 2 Phill., 60; *Saunderson v. Cockermouth*, etc., R'y Co., 11 Beav., 497; *Nickels v. Hancock*, 7 D. G., M. & G., 300, 327; *Ogden v. Fossick*, 11 W. R., 128, L. J. The case cited above of *South Wales R. Co. v. Wythes*, 1 K. & J., 186; 24 Law J. Rep., N. S., Ch., 1, is in many of its features like that before us now. After some negotiations between the parties, not necessary here to notice, a memorandum was entered into between the company and the defendants as contractors, providing, among other things, that "The company to find the land within a reasonable time and build the stations. The contractors to give a bond to the amount of £50,000 to secure the performance of their contract, and to undertake to execute the works for a double line of railway, and the ballasting and permanent way for a single

line, according to the terms of the specification to be prepared by the engineer for the time being of the company, for the sum of £290,000, to be complete ready for opening by the 1st of December, 1855, to be paid in a new stock to be created, bearing £5 per cent. interest from the day of the line being so ready for opening, such interest being derived from the receipts upon the branch line, £60 per cent. of such gross receipts being devoted to such purpose, and an additional £10 per cent. of such receipts, making £70 per cent. on all traffic over the said branch, which shall pass to and from or beyond Carmathen, or any other more distant place on the main line, the residue of the gross receipts upon the said branch being retained by the company for working the branch; any arrear of the interest of £5 per cent. in one year to be made good out of any surplus in any following year or years until the stock is redeemed.

Any of the details of this arrangement, in case of difference, to be determined by a referee, to be appointed by the solicitor-general for the time being, on the application of either party, such referee to draw out and settle on behalf of both parties the documents necessary to carry it out. The arbitrators, under working clause, to have the power of considering whether the mode of working the Pembroke branch is reasonable, having reference to the company's mode of working the branch to Heyland, and, if the arbitrators make any award, both parties to abide by it."

A bill was filed to compel the specific performance of this contract by the company against the contractors. To the bill was a general demurrer, which Vice-Chancellor Woods sustained, and the case was appealed to the lord justices. Lord Justice Knight Bruce, in his judgment, says: "There are several very satisfactory reasons why a specific performance of this agreement should not be enforced in a court of equity, and I will mention some—I do not say all—of those reasons. In the first place, by the agreement, it is provided in the most vague terms, that the plaintiffs shall find the land—the land, I suppose, for the stations—within a reasonable time and build the stations; then the contractors are to give a bond for £50,000 to secure the performance of their contract, and they are to execute the works for a double line of railway according to the terms of the specifications to be prepared by the engineer 'for the time being' of the company; then the contract provides for the payment of a sum of £290,000 to the defendants with interest, in a manner which I assume, for the purpose of the argument, to be intelligible. Skilful, experienced and honorable as the engineer of this present time, and of the time of the contract, is and was, it is obvious that the engineer of the time when the works may be, if ever, completed, may not be the engineer of to-day, and the engineer of that time might be both incompetent and dishonest. In my opinion it would not be a proper course for a court of equity to take, to force such an agreement on any man or body of men. But, then, it has been said, that a specification has been prepared by the present engineer of the company, Mr. Brunel; but that makes no difference. Whether, if such specification had been not only prepared, but accepted and approved of, by the defendants, that would have made any difference, it is not necessary to say, because there is no such allegation in the bill; the only allegation in the bill being, that the plaintiffs believe that the specification had been approved."

He closes by saying: "I have never known any attempt like the present; and certainly this court will be no party to the entertainment of a suit to enforce so vague, so obscure, so uncertain an agreement, the suit to enforce which has been successfully demurred to; and the suit, being frivolous and utterly

vain, will be of course dismissed, and, equally of course, be dismissed with costs." It will be observed that the infirmity of uncertain and vague stipulations is common to that and this contract, for this line of road remains unlocated, and, according to the usual course of such enterprises, must be subject to changes not possible now to foresee; and in this way differences irreconcilable between the parties, and which this court cannot determine, may, and almost certainly will, arise. So, too, as to the performance of the work, the same difficulties are very likely to occur. Then there is the great consideration of time. Years will be required for the execution of the contract. In the case cited, twenty-two miles of a branch road was to be built. Here is a line of three hundred and sixty miles stretching out into a new, unpopulated, almost unknown region. Other points of similarity might be mentioned. In fact, where the cases differ, it is against the claim of the plaintiff here.

It seems, therefore, that in granting this injunction, which would require that this railroad should be built, equipped and delivered by one party, and payments made by the other under the control and compulsion of the court, I should be going far beyond any adjudged case, or any principle established by any adjudged case. More than that, I should proceed in the very face of some of the highest authorities, and, in direct opposition thereto, inaugurate a policy without a precedent, involving interests of the greatest consequence to everyday life. The effect of the doctrine, if established, no wisdom can foresee. Entertaining these views, I must decline to make this advance, and shall overrule the motion for an injunction. Motion for an injunction overruled.

RAILWAY COMPANY v. STEWART.

(5 Otto, 279-285. 1877.)

APPEAL from U. S. Circuit Court, District of Kansas.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.— This is a bill in equity, filed by Stewart, as complainant, August 20, 1868, against the Union Pacific Railroad Company, Eastern Division (now known as the Kansas Pacific Railway Company), the National Mechanics' Bank of Baltimore, the National Union Bank of Maryland and the National Exchange Bank of Baltimore, but dismissed by the complainant as against the several banks made defendants, November 28, 1871. The case, as stated in the bill, is substantially as follows:

On the 6th of January, 1866, there were outstanding four hundred and fifty land grant bonds and six hundred and forty construction bonds of the railroad company, upon which it claimed that it was not liable. All the land grant bonds and three hundred and ninety of the construction bonds were owned or controlled by Thomas C. Durant. Stewart owned or represented the remaining two hundred and fifty construction bonds. A suit had been commenced by the company, and was then pending in one of the state courts of Kansas, against Durant, Stewart and others, the object of which was to obtain a cancellation of the construction bonds and the mortgage executed to secure their payment. There were also other matters in dispute between Durant and the company, and between him and John D. Perry, its president. In this state of affairs, Stewart, on the 6th of January, 1866, proposed in writing to the company, through its attorney, to surrender all the land grant and the construction bonds held or represented by Durant or himself, and procure a release by Durant of all actions and rights of action which he had or might have against

John D. Perry or the company, or any of its officers, so that its mortgages might be canceled, if it would, in exchange therefor, execute and deliver to him, for the parties interested, five hundred of its bonds of \$1,000 each, secured by a first lien on the first one hundred and fifty miles of the lands west of Fort Riley, granted by congress to aid in the construction of its road. It is then alleged that in the early part of February following, this proposition was accepted, with some slight modifications, and that the company agreed to take up the old bonds and deliver the proposed new ones in exchange; that Durant, in pursuance of this agreement, executed the proper release, surrendered his bonds, and received in exchange his stipulated portion of the new securities; that certain persons owning some of the bonds represented by Stewart at the time of the contract accepted the terms of the settlement, and made the contemplated exchange; that he, Stewart, was the owner of one hundred and fifty-four of the construction bonds, for which there still remained in the hands of the company one hundred and twenty-six of the new issue, to be exchanged upon surrender in accordance with the terms of the settlement, but that he was unable to produce his bonds, as they were in the possession of the banks that were made defendants, and they refused to give them up. He insisted, however, that the bonds were his, and that they were no longer binding upon the company. He accordingly prayed that the company might be required to deliver to him the bonds which were held for exchange under the terms of the agreement of settlement. The company answered, denying substantially all the material allegations in the bill.

From the testimony it appears that Stewart made the proposition set forth in his bill, and that it led to an interview between Durant and the officers of the company, at Philadelphia, early in February, 1866, at which Stewart was present, representing his own interests. Durant objected to the terms proposed by Stewart; and, after some negotiation, a settlement was finally agreed upon, by which the bonds held by all the parties were to be surrendered, and in consideration thereof the company was to pay Durant \$100,000 in cash and notes, and execute and deliver four hundred new bonds of \$1,000 each, secured by mortgage on the lands of the company lying on the first one hundred miles of its road west of Fort Riley. As part of the settlement, also, the company was authorized to enter in the suit pending in the state court of Kansas a decree directing the cancellation of the construction bonds and the discharge of the mortgage securing them.

Pursuant to this arrangement, the company executed its new bonds and mortgage; and, during the latter part of April, 1866, Durant surrendered his old bonds, and received the part of the new issue which, as between him and the holders of the other construction bonds, it was stipulated he should have. Alexander Hay, also, who owned seventy-six of the bonds represented by Stewart in the settlement, made his exchanges; and since the commencement of this suit twenty more have been taken up by the company. This leaves outstanding one hundred and fifty-four bonds, claimed by Stewart, which were not exchanged at the same time with the others, because of his inability to control them for that purpose. The parties actually holding them did present them, but on account of his objections the exchange was not made.

In accordance with the terms of the settlement, a decree, canceling the construction bonds and discharging the mortgage, was entered in the suit pending in the state court. None of the one hundred and fifty-four bonds have been surrendered to the company, but deliveries of new bonds held for

exchange have in some cases been made upon the order of Stewart without a corresponding surrender. Fifty of the old bonds were lost, and cannot be produced. Hamilton G. Fant, claiming to be the owner of them, filed with the master in this cause the evidence of his title, and of their loss, and asks that their distributive share of the new bonds may be given to him. Of the remainder, there were presented to the master by W. A. Coit, five; H. G. Fant, four; R. F. Baldwin, sixty; George E. Jarvis, five. The other thirty are claimed by William E. Edmonds, and they have never been presented to the master.

Each of the persons presenting the bonds claims them either as owner or as pledgee; and Fant claims to have an assignment of the whole, as security for moneys loaned to Stewart, or for obligations incurred on his account. Stewart disputes the claims of all the different holders, including Fant, and insists that he is entitled to a decree awarding to him all the new bonds now remaining with the company, to carry out the settlement as finally concluded. None of the persons filing the bonds with the master, or asking an order of distribution in their favor, are parties to the suit, to such an extent or in such a manner that their title can be litigated and determined here. They come in only for the purpose of surrendering their bonds and receiving in exchange their respective shares of the fund produced by the settlement. Stewart may resist their recovery; but he cannot by their presentation of the bonds secure the possession and control of them, and then upon the surrender claim for himself the stipulated equivalent in exchange.

§ 1482. *Under a contract to exchange one set of bonds for another, the company issuing them cannot be required to issue the new bonds until the old ones are surrendered.*

The company is not bound to make the exchange until the surrender is perfected. It is not required to litigate titles for Stewart—that he must do for himself. When that is done, if he secures the control of the bonds, he may be entitled to call upon the company to carry out its contract of exchange. But until then, he is in no condition to insist upon performance. The contract on the part of the company was to make the exchange upon the surrender of all the old bonds. It is not required to deal with the individual owners separately, but only to accept the surrender of all, and give the new bonds in exchange. So far as it has gone, however, it is bound by what it has done; but it is not under obligations to go further in that direction. Until, therefore, Stewart surrenders all the remaining outstanding bonds, or makes satisfactory proof of their loss, and furnishes security against the further liability of the company to any other holder, he cannot require it to give him the balance of the new bonds which it still holds for exchange. The decree of the state court having been entered by consent, and in part performance of the agreement of settlement, is not a bar to a suit for an appropriation of the fruits of the settlement. The outstanding bonds are still binding upon the company to the extent that may be necessary to enable the owners of them to secure the benefit of the consideration agreed to be paid for their cancellation. The present holders, though not parties to the suit in which the decree was entered, are at liberty to treat the settlement as made for their benefit, and to act accordingly.

The view we have taken of the case makes it unnecessary to inquire whether the contract stated in the bill is the same as that which has been proven. The evidence as it stands is not sufficient to entitle Stewart to recover upon either. Both that averred and that proved require him to surrender his bonds for can-

cellation before he can demand the new ones in exchange. That he is unable to do; and, consequently, at this time he is not entitled to the decree he asks. It is unnecessary to determine what would be his rights if all the adverse claimants were in court, so that a decree could be entered which would settle their conflicting claims as between each other, and protect the company against further liability. They are not here, and any decree rendered against them in favor of Stewart would not be binding upon them without their consent.

§ 1483. *Remarks on the proper mode of making up records for this court.*

This disposes of the case; but we feel it our duty to call attention to the very unsatisfactory manner in which the record has been made up and sent here for the purposes of this appeal. It contains nearly twelve hundred printed pages, and is full of irrelevant matter and useless repetitions. All that is material for the proper presentation of the cause might easily have been put into one-fourth the space. It opens with a copy of the bill, occupying seventeen pages; and immediately following this is a certified copy of the same bill, attached to the return of the service of a subpoena upon one of the corporation defendants, as to which the suit was subsequently dismissed. The proposition made by Stewart on the 6th of January, 1866, and which is claimed to have been the basis of the contract sued upon, is copied no less than ten times, and an affidavit of his, which occupies seventeen pages, is copied three times within a space of seventy pages. These are but specimens of the gross irregularities with which the record abounds. In addition to this, the matter is not well arranged, and the index is almost useless. We have long suffered from the want of attention of parties, or their counsel, and the incapacity, not to say dishonesty, of clerks below in matters of this kind, and deem this a proper occasion for applying the remedy for such neglect or abuse. We are at a loss to determine whether the complainant or defendant is most to blame for the irrelevant matter which has been introduced into this case; but it is clearly the duty of the party who takes an appeal to see to it that the record is properly presented here. Care should be taken that costs are not unnecessarily increased by incorporating useless papers, and that the case is presented fairly and intelligently. While, therefore, the decree in this case will be reversed, each party will be required to pay his own costs in this court. We shall not hesitate to apply the same remedy hereafter in cases where the circumstances are such as to require it. Under rule 24, par. 3, the court below will be required, when the mandate goes down, to tax the costs of the transcript of the record below as part of the costs in the case. That court will then have an opportunity, if it sees fit, of making an order in respect to the amount its clerk shall be permitted to charge. It is not easy to prescribe by rule what a record in all cases shall contain or what shall be excluded; but rule 52 in admiralty contains suggestions which may serve as an appropriate guide in cases at law or in equity.

The decree of the circuit court will be reversed, and the cause remanded with instructions to enter a decree dismissing the bill without prejudice of the right of the complainant or the holders of the construction bonds, which are the subject of the action, to commence another suit to enforce the alleged contract of settlement, whenever they shall be in a condition so to do. Each party to these appeals is required to pay his own costs in this court; and it is so ordered.

FALLON v. RAILROAD COMPANY.

(Circuit Court for Missouri: 1 Dillon, 121-129. 1871.)

STATEMENT OF FACTS.— This was a bill for specific performance of a contract. The plaintiffs, on the 13th of August, 1869, made the contract in question with the Missouri & Mississippi Railroad Company, by which they agreed to furnish and lay the iron rails, chairs and spikes from Glasgow to Clark City, fill up and surface the track, and furnish locomotives, rolling stock and necessary buildings. This work was to be done by the 31st day of December, 1871. The defendant was to obtain the right of way, grade the road, furnish ties and erect bridges, and have the road ready for the iron by August 1, 1870.

The plaintiffs were to receive a stipulated sum per mile, part in first mortgage bonds of the company and the balance in capital stock, the bonds to be a first and exclusive lien on the road and its equipments.

It was also agreed that the bonds should be issued and deposited with a trustee, and that they or their proceeds should be made available by the company, at plaintiffs' request, for the purchase of iron, etc. The bill alleged that the defendant had failed to comply with this part of the agreement, and that plaintiffs had been prevented from complying with the contract on their part; that the company had also failed to obtain a part of the right of way, and failed to finish the grading, furnish ties and erect bridges. It was alleged that plaintiffs had purchased a large amount of the material which was to be furnished by them with their own means; also that the board of directors of the defendant company had declared the contract forfeited by reason of the failure of the plaintiffs to comply therewith.

It was further alleged that the defendant was endeavoring to make a new contract, and that it would do this, and would execute a first mortgage to others, and would dispose of its stock, unless enjoined; that plaintiffs would be without remedy unless permitted to complete their contract. The bill prayed for a decree of specific performance, and that the defendant be enjoined from preventing plaintiffs from complying with their contract. There was also a prayer for general relief. No preliminary injunction was granted, and the bill came up on general demurrer.

§ 1484. *No relief at equity where the law affords a complete and adequate remedy.*

Opinion by DILLON, J.

The main purpose of the bill is to compel the defendant specifically to execute the contract of the 13th day of August, 1869. Whether equity will decree a specific performance, or leave the parties to their remedy at law, rests in the discretion of the court, to be exercised in view of the special circumstances of the particular case. And the settled rule is that equity will leave or remit the parties to law where the remedy in the legal forum is plain, adequate and complete. But if the remedy there is doubtful or inadequate, or will not so completely effectuate justice, and specific execution be practicable, equity will entertain jurisdiction and decree it.

Upon the case made by the present bill the court is of opinion that it cannot decree the specific execution which the complainant seeks. Bills of the same general character with the one before us, and, in principle, not distinguishable from it, have repeatedly and upon full consideration been held in England not to be maintainable. *South Wales R'y Co. v. Wythes*, 1 Kay & Johns., 186; *Ranger v. Great Western R'y Co.*, 1 Eng. R'y Cas., 1, 51; *Peto v. Brighton, etc.*,

R'y Co., 1 Hem. & M., 468; 1 Story, Eq. (10th ed.), 778, *a*, and note. The grounds upon which this doctrine rests are so fully set forth in the opinions in these cases that it is unnecessary to restate them or enlarge upon them. No cases in this country holding a contrary view, or denying the soundness of the English decisions, have been called to our attention. The question, upon authority, therefore, is decisively against the complainants.

But if the question be not regarded as controlled by authority, the circumstances of the present case are not such, in our judgment, as to call upon the court to decree a specific execution. The proposed road is one of considerable length, and requiring a large sum of money to construct. A large portion of the road-bed and bridge is unfinished. For part of the distance the right of way has not yet been secured, nor the route finally located. We cannot know that the resources and credit of the company are such that it would be practicable for it to carry into execution any order we might make to comply with its part of the agreement. Comparatively but a small proportion of the contract has been actually performed by the complainants. The difficulties which the court might reasonably expect to meet in attempting to enforce from both parties a specific execution in all its parts of a work of this nature are many and great. Compensation in damages would, under these circumstances, appear to be a much more plain and practicable and just as adequate and complete a remedy as a specific execution, and less oppressive or injurious in its effects to the defendant. Demurrer sustained.

TREAT and KEEKEL, JJ., concur.

[After the demurrer was sustained to the bill, the question was made and argued by counsel, whether the bill should be retained for compensation.]

§ 1485. *As to whether or not a bill which has been successfully demurred to should be still retained for compensation depends upon the discretion of the court, which will be governed, in the exercise of its discretion, by the circumstances of the case.*

Opinion by TREAT, J.

This case is now before the court on a single proposition, viz.: Whether the bill should be retained for compensation. In the opinion delivered heretofore, upon the main object of the bill, viz., to secure a decree for specific performance, it was held that no such decree could be had; but it was suggested that possibly the court could properly retain the cause for the purpose of securing compensation to the plaintiffs for the breach of contract, especially under the averment that certain securities, by the terms of the original contract, were to be for the benefit of the plaintiffs.

The argument and authorities on this subject are reducible to this proposition: that a court of equity should not, "except under particular circumstances" (nowhere defined), in a case like the present, retain the bill for the purpose of awarding and securing compensation for the breach of the contract. That rule means, that although generally the bill will not be retained for compensation, when the court is compelled on equitable principles to refuse a decree for specific performance, still there may be special circumstances developed which require, in order to prevent gross wrong and injustice to the plaintiff, that compensation should be given, and, under those circumstances, it may proceed to do so when no special oppression or injury would thereby be done to the de-

fendant. The judicial discretion involved is, however, to be exercised with due regard to the rights of both parties.

The case presented is, for the purposes of this question, simply this: Instead of proceeding, as they had a right to do, under their contract, to negotiate for the purchase of iron, etc., or to purchase, with the means to be furnished therefor by the defendant, the property purchased to be in the name of, and for, the company, as its own, the plaintiffs chose to buy in their own names and with their own funds, some property of the kind described, and negotiate on their own responsibility for more. It is averred in the bill that some of the property so purchased has been delivered to the defendant, and that outstanding liabilities have been incurred as just stated. What loss or damage they have suffered thereby, if any, does not definitely appear. But those dealings were *dehors* the contract.

It is stated that the defendant is about to make a new contract on the same subject-matter, with other persons, and to execute bonds and mortgages in connection therewith, whereby plaintiffs will be practically remediless at law. It is not necessary to inquire whether the attachment act of the state, or the bankrupt law, would, under the supposed contingency, afford adequate means of redress; for the important facts apparent on the face of the bill must determine the action of this court. What are the damages and how ascertainable, with a view to compensation? The road has scarcely been commenced. Here, then, is a railroad yet to be built, and at nearly the inception of the enterprise, a court of equity is asked to retain a bill filed for specific performance of a contract for doing most of the work therefor, which relief cannot be granted in consequence of the intrinsic difficulties of the case as connected with equitable jurisdiction and administration—to retain that bill for the purpose of ascertaining the amount of damages to be awarded for the alleged breach of the contract. The damages actually sustained thus far, if any, did not occur under the specific terms of the contract. The damages ultimately recoverable depend on many matters which have not yet occurred, and which may never occur, and which, if they do occur, may be in such ways as yet unknown, and under such unknown conditions as leave no definite mode of causing such unliquidated and speculative damages to be reduced, before the road is completed, to any ascertainable sum for which a charge can now be made as a lien on the unbuilt road. It may be that the road, if built by the plaintiffs from the proceeds of bonds and stock as contemplated, the price they would bear in the market being unknown, would cost more than the sum agreed in the contract, and hence, instead of a loss of profits to the plaintiffs from the breach, the reverse would follow. If others build the road in the same way, in the most economical manner, even if all the bonds and stock do not have to be sold for the purpose, the value of the remaining stock and bonds contemplated to be paid to the plaintiffs at that time cannot be now ascertained, and consequently there is no practicable way whereby this court can determine for what sum to charge a lien on this road, as security for compensation in the way of possible and unascertainable profits. If the road is not built and equipped, it is of no value, and a charge upon it would be worthless as security to plaintiffs for *any* sum; and if it be charged in advance, under a decree of this court, with an uncertain sum to be hereafter ascertained, the road probably can never be constructed. Hence the intrinsic difficulties presented on equitable rules. If the road were completed or nearly finished, the case might be different, for the court would then have something definite on which

to act, without destroying the contemplated enterprise. But a road to be built on credit, when scarcely begun, stands in a strange position as to the question here to be considered.

The security sought for prospective damages, or rather for loss of profits, would necessarily destroy the *value* of the security; would, if given, make the security worthless, and prevent the defendant from obtaining, by completing the work, the only means of compensating the plaintiffs. It is in view of these and like considerations, which must necessarily suggest themselves to the minds of the counsel, that the court is constrained to decide that the bill cannot be retained for compensation. Bill dismissed

DILLON and KREKEL, JJ., concur.

BICKFORD v. DAVIS.

(Circuit Court for New Hampshire: 11 Federal Reporter, 549-551. 1882.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—The plaintiff in his bill represents that the defendant Benjamin Davis was a skilful manufacturer of peg-wood, and owned the special machinery for that manufacture, which only one other person had the skill and machinery to make; and the plaintiff, being desirous to go into this business, bought one-half of certain machinery, tools and stock of said Benjamin, and entered into partnership with him, but soon dissolved that connection, and made a contract with said Benjamin, March 25, 1881, for a term of three years, by which the said Benjamin agreed to make peg-wood exclusively for the plaintiff, in such quantities as he should order, delivered on board the cars at or near his factory at Runney, at four cents a roll, and not to manufacture for any one else. The plaintiff, on his part, agreed to pay said price for all peg-wood which should be delivered in pursuance of his orders, to the extent of the demand for the same, and to settle monthly. The bill alleges that Benjamin Davis has contracted with his son, the defendant Charles F. Davis, to injure and defraud the plaintiff, by putting the business into the hands of Charles, who agrees to sell the peg-wood made at the factory to the plaintiff, and is about to sell to other persons. It prays that the defendants may be restrained from selling to any other person than the plaintiff, and may be required to carry out the contract.

§ 1486. *Circumstances under which a specific performance will not be enforced by a court of equity.*

The defendants allege that Benjamin Davis is old and feeble, and that the contract was obtained from him hastily, and under a promise to modify it if not satisfactory; that it has not been carried out in good faith by the plaintiff, and has so continued his orders for peg-wood as to give the defendant Benjamin unnecessary trouble and expense, and that, in fact, he has made nothing by five months' work under the contract. The plaintiff denies all this, and says he has done his best to make the business successful. Each party seems to think that the other is playing into the hands of one Sturtevant, who was the owner of a patent for making peg-wood, which gave him a monopoly of the business, until lately, when his patent expired. Since the bill was filed the interest of the defendant Benjamin in the machinery has been sold on execution at the suit of said Sturtevant, who had recovered a judgment in decree against him, for infringement of the patent, I suppose. Upon examination of the affidavits and

consideration of the circumstances of the case, it seems to me proper that the plaintiff should seek his damage at law. As a general rule, a court of equity will not order such a contract to be specifically performed, and in this case such an order has become impossible by the sale of the defendants' one-half of the machinery. On execution, when specific performance cannot be decreed, the negative injunction against dealing with other persons, which is in its nature auxiliary to this relief, will not be issued. There are a few exceptions to this rule, as I said in *Singer Sewing Machine Co. v. Union Button-hole Co.*, 1 Holmes, 253; still it is the general rule. *Fothergill v. Rowland*, L. R., 17 Eq., 132.

§ 1487. *A one-sided contract will not be enforced by injunction.*

Another reason for not enjoining the defendants is, that the contract is one-sided. The plaintiff may order as much or as little peg-wood as he pleases, and is only bound to account for what he actually orders and sells; his stipulation to pay according to the demand refers only to such goods as he has ordered. He is under no obligation to devote his time or energies in developing the market. He may have done so, as he avers, but the other party has no power to compel him. A contract thus unequal is not enforced by injunction. The reason is obvious. If I were to enjoin the defendant from selling to any one but the plaintiff, I could not require the latter, on his part, to buy a single roll of peg-wood of the defendant. See *Marble Co. v. Ripley*, 10 Wall., 339; *Shrewsbury, etc., R'y Co. v. Northwestern R'y Co.*, 6 H. L., 113. Motion for injunction denied. Restraining order dissolved.

PULLMAN PALACE CAR COMPANY v. TEXAS & PACIFIC RAILROAD COMPANY.

(Circuit Court for Texas: 11 Federal Reporter, 625-632. 1892.)

Opinion by PARDEE, J.

STATEMENT OF FACTS.—The complainant sets forth in its bill an agreement alleged to have been made on the 28th day of February, 1874, with the defendant company, whereby the Pullman Company was to furnish sleeping cars to be used by the railway company, sufficient to meet the demands of travel on its line of road, to provide the necessary attendants therefor, and also keep said cars in good running order and repairs, except repairs and renewals made necessary by accident and casualty; it being understood that the railway company should repair all damages to said cars, of every kind, occasioned by accident and casualty. The railway company was to pay the Pullman Company for the use of said cars four cents per car per mile for each mile run, and the railway company was to repair the cars in its own shops at cost price for the Pullman Company. Settlements to be made monthly. The railway company to furnish and apply lubricating materials, and provide fuel and lights for, and wash and cleanse, said cars.

The railway company was to permit the Pullman Company to place its tickets on sale at the ticket offices of the railway company, and to permit the Pullman Company to collect from passengers using said cars "such sums as may be usual on competing lines furnishing equal accommodations." The Pullman Company was to furnish free passes on its cars for the general officers of the railway company, and the railway company to furnish free passes to the general officers, conductors and porters of the Pullman Company when on duty. This agreement was to continue for *two years*, say till February 28, 1876, "unless another agreement shall have been entered into, as provided in the seventh

article; but in case either of said companies should at any time fail to observe the covenants so entered into, it might be terminated by notice." By this seventh article it is alleged the Pullman Company was given "the option, if exercised within two years from the date hereof, to determine whether it will make with the Texas & Pacific Railway Company a contract of the form and kind hereunto attached and marked 'H,' and that if the Pullman Company shall within the said two years determine to make such contract, then and in that case the Texas & Pacific Railway Company *shall enter into* such contract with the Pullman Company."

The "Contract H," so annexed, is a blank form of agreement "between ———, hereinafter called the railway company, and Pullman's Palace Car Company," and contains a considerable preamble and fifteen articles, which may be briefly summarized:

(1) The Pullman Company is to furnish its cars sufficient to meet the requirements of travel over the lines of the railway company now controlled or hereafter to be controlled by ownership, lease or otherwise; said cars to be satisfactory to the general manager or superintendent of the railway company.

(2) The Pullman Company agrees to keep carpets, upholstery and bedding in good order, and to make certain repairs.

(3) The Pullman Company agrees to furnish and pay certain employees on said cars.

(4) The railway company is to furnish certain free passes.

(5) The Pullman Company is to furnish certain free passes.

(6) The servants of the Pullman Company are to be governed by the rules of the railway company, and sundry provisions are made for liability in case of their injury, and indemnity by the Pullman Company.

(7) The railway company is to have said cars on the passenger trains of its lines, now or hereafter to be controlled, in such way as will best accommodate passengers desiring to use them, and furnish fuel, lighting material, and make certain repairs and renovations.

(8) The railway company is to furnish without charge, at convenient points, room and conveniences for airing and storing bedding.

(9) The Pullman Company is to collect certain fares.

(10) The railway company is to permit the Pullman Company to place its tickets on sale at the railway ticket offices, and their sale to be made by the railway's agents free of charge.

(11) The Pullman Company is to have the exclusive right for fifteen years to furnish such drawing-room, parlor, sleeping and reclining chair cars on all passenger trains of the railway company, on its entire lines, present, prospective, now controlled or hereafter to be controlled by ownership, lease or otherwise, and also on all passenger trains on which it may, by virtue of contracts with other roads, have the right to run such cars, and the railway company is to agree that it will not contract with any other parties to run said class of cars over said lines of road for fifteen years.

(12) The Pullman Company is to guaranty the railway company against damages for infringements of patents and expenses of litigation, etc.

(13) Elaborate provisions are made in regard to cleansing and repairing cars in case of default by party charged with this duty.

(14) Provisions are made for each party having the right to terminate the contract in case the other does not comply with its obligations.

(15) Provisions are made whereby the railway company might, on certain terms, acquire a half interest in all the equipment so furnished.

The bill alleges that on or about the 14th of February, 1876, the complainant notified the defendant that it would exercise the option aforesaid, and sent to defendant a letter advising it that "your orator had thus decided, and that on and after the 28th day of February, 1876, it would operate its cars upon the lines of the railway company, under the terms of the said contract marked 'H,' as aforesaid, and your orator causes duplicate copies of said contract to be prepared, which were duly executed *on the part of your orator*, and sent by your orator to the said Texas & Pacific Railway Company for *execution by said company*." The bill then alleges that complainant has continued to operate its cars on defendant's roads under the authority and provisions of said contract, and then alleges that the defendant has notified it that its cars will not be handled any longer. It charges "that the officers and agents of the Texas & Pacific Railway Company do publicly declare that the said railway company has, by contract with others than your orator, engaged for use on its said road, on and after the 15th day of December, 1881, other and different drawing-room and sleeping cars than those of your orator, namely, the cars of the company known as the Wagner Sleeping-Car Company, and your orator has reason to believe, and does believe, that on and after the 15th day of December, 1881, the cars of your orator will be put off the line of the said Texas & Pacific Railway Company, and their use discontinued, and the cars of persons other than your orator substituted therefor in the operation of the business of said road, in violation of the express terms and provisions of the contract," etc.

The Wagner Company is not made party. After sundry allegations of apprehended injury the complainant proceeds to ask for an injunction, which is the only relief requested. The injunction is asked for in the following form: That the defendant:

"May be enjoined and restrained from *discontinuing* the use and employment of the cars of your orator, on and after the 22d of December, 1881, over its line of railroad; and from refusing to handle the cars of your orator upon any of the passenger trains contemplated and referred to in and by said contract; and from refusing to keep for sale and to sell, at their ticket offices, tickets for the accommodations furnished upon your orator's cars, as provided in said contract; and for making or entering into any contract or agreement with any person other than your orator for the supplying of drawing-room and sleeping cars for use upon the line of said Texas & Pacific Railway Company; and from permitting any other person than your orator to engage upon said line of road in the business of furnishing such cars as aforesaid for the use of said road; and from hauling said cars, for any other person than your orator, upon any of the trains of the said Texas & Pacific Railway Company; and from selling, offering for sale, or allowing to be sold, at the ticket offices or other places under the control of said railway company, the tickets of any other person than your orator, for the accommodation of drawing-room and sleeping cars operated on said road; and from transacting and operating upon the said road the business of drawing-room and sleeping cars, *or other cars of the sort*, contemplated by the contract aforesaid with the said Texas & Pacific Railway Company, except in accordance with the provisions of said contract with your orator; and from violating any of the covenants or agreements in said contract contained; and for such other relief," etc.

On this bill a restraining order has been granted in the terms prayed in the

bill for a final injunction, and the question now presented to the court is whether such an injunction shall issue pending the suit. The parties have had ample notice for preparation, and counsel have presented the case fully on all the merits it has, and a decision on this question should be decisive of the whole case.

It is not necessary, nor have I the time, to argue fully on all the points presented. I shall merely try to present my conclusions so that they may be understood by counsel. It is not necessary that the Wagner Sleeping-Car Company should be a party to this suit. That company was no party to the original contract. The bill does not declare it to have any subsequently-acquired rights, and clearly it can have no rights that would affect this litigation, or control in any manner the remedies sought by the complainant herein, nor will any decree rendered herein injure or affect that company any more than it will any other person who may have acquired rights subordinate to complainant's contract. For the general rule, see *Pomeroy*, 544; also, see *Willard v. Tayloe*, 8 Wall., 557.

The contract set out and detailed in complainant's bill is a valid subsisting contract, and as binding on the defendant in a court of equity as though it had been regularly signed, sealed and delivered, according to the terms of the first agreement between the parties. *Willard v. Tayloe*, 8 Wall., 557; *Pearce v. Cheslyn*, 4 Ad. & E., 225; *Atwood v. Vincent*, 17 Conn., 581. After the first contract between the parties was entered into, all that was necessary to complete the obligations of the second contract was the exercise of the option of the complainant, as stipulated, in time and according to the terms of the first agreement. It was a continuous offer from the defendant, forming a complete contract when accepted by the complainant. *Boston, etc., R. Co. v. Bartlett*, 3 Cush., 224; *Wright v. Brigg*, 21 Eng. C. L., 591; 2 Chit. Cont., 1061. Nor do I think that the alleged contract is affected by the statute of frauds of the state of Texas. See same authorities, and *Pearce v. Cheslyn*, 4 Ad. & E., 225. Nor is it in violation of the laws of Texas, referred to in argument, nor of the charter of the defendant company. The defendant has the right to run its own cars over its own road. These cars may be purchased or leased by the defendant from any body or company able to supply them.

The alleged contract is one for the lease of cars to be run by the defendant on its own trains over its own roads. The defendant is not obliged by its charter or by the laws of Texas to lease cars from every comer. By simply leasing all the cars it may need from one car manufacturing company, the duties and obligations of the defendant as a common carrier would not be affected, nor would the obligations of the defendant arising under the particular laws of Texas to haul and transport the cars and freight of other roads be thereby affected. Now, taking these views to be correct, and considering that, as alleged in the bill, the contract between the parties is valid and subsisting, and cognizable in a court of equity, and probably in a court of law (see *Pearce v. Cheslyn*, *supra*), it is to be seen whether this court should enforce the contract by equitable remedies, or should remit the parties to damages to be recovered at law, for any violation of the contract suffered by either party.

§ 1488. *No decree should be granted unless there is mutuality of remedy.*

1. Any injunction issued in this case and granting relief to the complainant, whether mandatory to compel the performance or prohibitory to restrain the violation of the contract on the part of the defendant, substantially amounts to a decree or order for the specific performance of the terms of the

contract. No such decree or order should be rendered when there is not a mutuality of remedy between the parties, obtainable from the court. If the position of the parties were reversed, it does not seem that there could be any order for the Pullman Company to comply, because the court could not compel that company to build cars or purchase cars, or furnish cars "sufficient to meet the requirements of travel" over the extensive lines of the railway company. Nor, in such a case, could any order be issued restraining the Pullman Company from furnishing cars to other railway companies until the contract should be complied with, for the contract has no such scope; and, as is shown, the Pullman Company has just as valid contracts to furnish cars to other railway companies as it has with the defendant. As to mutuality in the equitable remedy, see *Pomeroy, Spec. Perf.*, § 162 *et seq.*, and cases cited in note 1, on page 231; *Marble Co. v. Ripley*, 10 Wall., 358.

§ 1489. *No decree can be made when its execution would unduly occupy the attention of the court.*

2. A decree restraining the defendant from violating the contract, amounting, as it would, to a mandate to comply with the contract, compels the court to supervise and control the performance of continuous covenants, with intricate details, running through a period of nine years, over a vast system of railways, involving large discretion, and the employment of an army of expert agents and business men, "unreasonably taxing the time, attention and resources of the court and its officers, and interfering in the general administration of justice." See *Pomeroy, Cont. & Spec. Perf.*, § 307 *et seq.*; also *Marble Co. v. Ripley*, 10 Wall., 358, and 13 Ohio St., 344. There is a wide distinction to be drawn between this case and the *Telegraph Co. Cases* in 1 McC., 541 to 570, and the *Sewing Machine Case* in 1 Holmes, 253 *et seq.*

3. The contract is silent as to the number of cars to be furnished by the complainant and hauled by the defendant. It is also silent as to what passenger trains the cars furnished shall be hauled on or attached to, on day trains, night trains, or excursion trains. The defendant is to procure all the cars of the class needed from the complainant, and the complainant is to furnish cars "sufficient to meet the requirements of travel."

The right then, to determine what cars and what trains are "sufficient to meet the requirements of travel" is vested by the contract and by the nature of things in the defendant company. An injunction to the defendant restraining the hauling of any other cars than those furnished by the complainant takes away the power of the defendant to determine what cars are "sufficient to meet the requirements of travel," and vests it permanently in the complainant (for the defendant can have no other cars than the complainant sees fit to or can furnish), and finally, after necessary delay, and possibly after the occasion has passed or the need lapsed, in the court. It is true that the complainant's failure to perform the stipulations imposed upon him by the contract would at once cause a dissolution of the injunction; but the dissolution of the injunction can only be ordered by the court, and the court can only dissolve after notice, a hearing, and a finding, and the *at once* becomes an indefinite time, controlled by the mutations and delays of a litigation, and that through more than one court.

§ 1490. *A contract tending to create a monopoly will not be favored.*

4. Sleeping cars and drawing-room cars have become a necessity on long lines of railway, such as the defendant is operating. The contract which is the basis of this suit substantially farms out, for a period yet to run of nine years, to the

complainant, the exclusive right to these necessary accommodations over the defendant's "entire line of railway, and on all roads which it controls or may hereafter control, by ownership, lease, or otherwise, and also on all passenger trains on which it may, by virtue of contracts or running arrangements with other roads, have the right to use" such accommodations, to be by the complainant re-let and hired at prices and charges wholly within its own discretion, and beyond the control of the defendant or of the public. It is true that the ninth article of the contract provides that the complainant "shall be entitled to collect from each and every person occupying said cars such sums for said occupancy as may be usual on competing lines," etc.; but such provision is vain and cannot be enforced, unless, indeed, by a master in chancery who should supervise the sale of tickets and seats. And there is no restriction in the contract to prevent the complainant's owning and controlling the usual charges on competing lines, and it is fully within the scope of complainant's business, as set forth in this record.

No provision is made for the introduction and use of the improvements we have a right to expect within the next decade, looking to the increased comfort and security of the traveling public. And there is no provision or guaranty preserving the rights and duties devolving on the defendant under its charter, or preserving and guarding the rights of the public. In short, the contract, in all its essential features, is the granting of a monopoly,—a monopoly in the accommodations which are necessary to the traveling public,—a monopoly which the courts ought not to favor or foster by the invention or application of extraordinary or unusual orders or remedies.

5. The matter of enforcing such contracts by injunction is within the sound discretion of the court. See *Pomeroy*, Spec. Perf., § 35 *et seq.*; *Willard v. Tayloe*, 8 Wall., 566; *Marble Co. v. Ripley*, 10 Wall., 356.

For the reasons given it seems to me that in the exercise of a sound discretion I should refuse the injunction. It is therefore ordered that the restraining order heretofore issued in this cause be annulled and revoked, and that the injunction *pendente lite*, prayed for, be and the same is refused.

HEBERT v. MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for Oregon: 12 Federal Reporter, 807-809. 1882.)

Opinion by DEADY, D. J.

STATEMENT OF FACTS.—This suit is brought to enforce a contract for the delivery of a life insurance policy for the sum of \$15,000, and for a decree that the defendant pay the same to the plaintiff. The bill alleges that the defendant, on June 11, 1878, and since, was and has been a corporation organized under the laws of New York, and doing a life insurance business in Oregon; that on said day Oliver Hebert, of Marion county, Oregon, the husband of the plaintiff, applied to the agents of the defendant in said county for insurance upon his life of \$20,000, payable to the plaintiff, and paid them the first quarter's premium thereon, to wit, \$105.60, which sum was by them forwarded to the defendant upon the condition "that if the amount of the risk should be reduced a proportionate share of the premium should be refunded," and if the whole application should be rejected, it would all be refunded; that subsequently the defendant rejected \$5,000 of said application, and on August 26, 1878, remitted to said Hebert \$26.40 of said payment, and "accepted, received and retained" the remaining \$79.20 as the premium upon the first quarter of

such insurance, and in consideration thereof "did insure the life of said Hebert from such time in the sum of \$15,000," payable upon the death of said Hebert to the plaintiff; and also agreed "to issue and deliver unto said Hebert a 'plain life insurance policy' upon his own life, according to the customary form adopted and in use by the defendant, for said sum payable as aforesaid," which agreement it has hitherto neglected and refused to perform; that about September 8, 1878, at said county, said Hebert died, and the plaintiff thereupon demanded of the defendant said policy and the payment of said insurance, which was refused; and that, by reason of the refusal to issue said policy, the plaintiff is unable to "enforce her rights in an action at law," wherefore she brings this suit and prays the defendant may be required to deliver to her "a plain life insurance policy" upon the life of said Hebert for the sum aforesaid, to take effect from the date of the contract aforesaid, and payable to the plaintiff, and for a decree against the defendant for said sum of \$15,000, with interest.

The defendant demurs to the bill because (1) the plaintiff, upon the case stated, is not entitled to the relief prayed for; (2) the policy is not sufficiently described; and (3) the plaintiff has an adequate remedy at law.

§ 1491. *Equity can compel specific performance of a contract for insurance.*

The jurisdiction of a court of equity to compel the specific performance of a contract for insurance is well established. The policy cannot be obtained by an action at law, although one might be maintained upon it for the insurance after it is issued. But a court of equity having taken jurisdiction for the purpose of compelling the delivery of the policy, will retain it, where there has been a loss or death, for the purpose of decreeing payment of the policy, both to avoid expense and because the latter relief is a mere incident of the former. *Ang. F. & L. Ins.*, § 34; *Perkins v. Washington Ins. Co.*, 4 Cow., 645; *Carpenter v. M. S. Ins. Co.*, 4 Sandf. Ch., 408; *Brugger v. State I. Ins. Co.*, 5 Saw., 304. Nor does there appear to be any uncertainty as to the nature of the contract, or the form or effect of the policy, as stated in the bill. The agreement was for "a plain life insurance policy" upon the life of the deceased for \$15,000, payable to the plaintiff "according to the customary form adopted and in use by the defendant," for which it was paid and had received one quarter's premium. If there is any reason not appearing on the face of the bill why the defendant should not be compelled to perform its contract, as that it was procured by fraud or falsehood, the defendant can set it up as a defense. The demurrer is overruled.

ROUNDTREE v. McLAIN.

(Superior Court of the Territory of Arkansas: Hempstead, 245-249. 1834.)

Opinion by LACY, J.

STATEMENT OF FACTS.—This is an appeal from the Pulaski circuit court. The bill was filed by McLain, the appellee, for the specific performance of a parol agreement in the case of a chattel. It charges that Jesse Roundtree, in his life-time, was considerably indebted by note and account to the complainant, and in consideration of his forbearance to sue and give day, Roundtree, on his part, stipulated to procure an obligation of Allen Martin, as soon as he completed the building of a cotton-gin for Martin, and to assign the same to the complainant or so much thereof as would satisfy and discharge his, Roundtree's, debt to McLain. It was further stated, as agreed between the parties, if Martin's note exceeded the amount due McLain, he was to pay the difference

or excess to Roundtree. The answer denies the allegations of the bill, and puts the complainant to the proof.

§ 1492. *Equity will not enforce performance of an uncertain contract.*

It has been so repeatedly and constantly ruled, that equity will not enforce the specific performance of a contract where either the contract or the proof is uncertain, that reference to the decisions is deemed almost unnecessary and superfluous. *Colson v. Thompson*, 2 Wheat., 336; 1 Fonb. Eq., 172; 4 Johns. Ch., 559; 11 Ves. Jr., 522. The agreement is substantially proved by one witness and very imperfectly by any other testimony. Under all the circumstances of the case, it is questionable whether the proof would be sufficient to sustain the bill; but waiving that objection, and considering the agreement as fully established, the court will proceed to examine what equity the complainant has to ask for the extraordinary interposition of the chancellor.

§ 1493. — *nor where adequate compensation can be recovered at law.*

The jurisdiction to decree the specific performance of the agreement of parties is founded on a legal title to damage and will not be enforced where adequate compensation can be recovered by an action at law. *Flint v. Brandon*, 8 Ves. Jr., 159; *Halsey v. Grant*, 13 id., 73; 1 Pet., 305; *Holly v. Edwards*, Burr., 159; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch., 282; 1 Bibb, 212; 2 id., 273. If McLain has actually sustained an injury, his redress is ample, by an action on the case for damages. It is no answer to say that Roundtree's estate is insolvent. The question is not, whether it is insolvent or solvent; but has the party as full and complete a remedy at law as in equity? If so, he cannot come into this court for relief. What legal or equitable right has McLain to the note, or obligation which Roundtree promised to procure from Martin, and in what way or by what means can he set up his claim? At the time the agreement was entered into, it had no legal existence, for nothing certain was then due Roundtree from Martin, and his indebtedness, which afterwards accrued, depended upon a contingency which might never happen. Could McLain, by bill, or otherwise, have prevented Martin from discharging his own note, after its execution, or Roundtree from assigning it to an innocent purchaser for a valuable consideration? Surely not. If he had exhibited his bill in the lifetime of the intestate, could a court of chancery have decreed the specific performance of the agreement, when it possessed no means by which Martin could be compelled to give the note, or Roundtree to assign it? What sort of legal right had the complainant to the note, which could be enforced? None at all.

He does not claim it by delivery, for it never was in his custody or possession; nor by assignment, for this bill is to effect that object. It is contended, however, that this agreement constitutes an equitable charge upon a particular fund in the hands of Martin, and that equity will consider that done which ought to be done, and consequently enforce the agreement. This doctrine is unquestionably true, when a proper case arrives for its application; but the present case is not embraced by this principle, nor does it fall within the reason of the rule. It is, however, but justice to add, that the position was maintained with much learning and skill, and in a manner highly creditable to the ability of the counsel. The case of *Row v. Dawson*, 1 Ves., 331, was cited and relied on by the counsel for the complainant; but that case and this are widely different, and the principle there settled by Lord Chancellor Hardwicke, so far from sustaining this bill, shows that it should be dismissed for want of equity. There, money was advanced on a draft drawn by the borrower, on certain moneys then due and to become due to him at Michaelmas, and the draft was also placed

in the hands of the proper officer of the exchequer, which the court declared amounted to an assignment, and that the officer could not have paid the money to the drawer without making himself liable, because he had actual notice of the assignment for a valuable consideration. It could not be contended that Martin could not have discharged his note to Roundtree, without making himself liable to McLain. Besides, in that case there was both assignment and delivery of the draft, and a prior lien for the money advanced, which immediately attached. Here none of these requisites existed, which cannot indeed be dispensed with; there was neither assignment nor delivery, nor was anything due or certain, at the time of the contract, nor does the bill allege that advancements were made on the faith of the agreement, or of any particular fund.

§ 1494. *An oppressive agreement will not be enforced. The relief is within the discretion of the court.*

An application to a court of chancery for the specific performance of a contract is always addressed to their sound discretion. 1 Ves. Jr., 565. Lord Somers, in the celebrated case of *Normandy v. Berkley*, 5 Vin. Abr., 589, said that a specific performance ought never to be decreed, though the contract might be good in law, and damages recoverable for its breach, unless it was fair and reasonable in every particular. If an executory agreement is hard or oppressive, it is the constant practice to refuse a specific performance. *Barnardiston v. Lingood*, 2 Atk., 133; *Howell v. George*, 1 Madd. Ch., 15-17; 2 Sch. & Lefr., 554; *Cases Temp. Talbot*, 234. This bill is to compel the specific performance of a contract respecting a chattel, which is never decreed, except in cases of extreme and peculiar hardship, and when there is no adequate remedy at law. *Mason v. Armitage*, 13 Ves. Jr., 37; 1 P. Wms., 570; 3 Atk., 383; *Hardin*, 553; 3 Atk., 389; 2 Ves., 238. And to grant relief would violate the rule that a court of equity will never allow one creditor to gain an inequitable or undue advantage or preference over others. *Riggs v. Murray*, 2 Johns. Ch., 576; *St. John v. Benedict*, 6 Johns. Ch., 112. This contract is certainly executory, and if enforced it would prefer one creditor to another, without any lien, assignment or legal right in his favor. It is neither fair, reasonable nor just for one to appropriate all the estate to his own benefit, without any advancement made in favor of the debtor, on the faith of the particular or expected fund. The bill does not allege that at the time the contract was made Roundtree was solvent and afterwards became insolvent, whereby the complainant lost his debt. This contract is deemed hard and oppressive on the part of Roundtree, for it could easily have been, and probably was, extorted from his fears and necessities. If agreements of this kind should be specifically enforced, then great injustice and oppression might be exercised by creditors adjusting and settling their claims with their debtors, which ought not to be allowed.

The decree of the circuit court, in favor of McLain, must be reversed, and the bill dismissed for want of equity, at his cost.

Decreed accordingly.

BOONE v. MISSOURI IRON COMPANY.

(17 Howard, 340-344. 1854.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal from the circuit court of the United States for the district of Missouri. The bill prays the specific execution of a contract between Thomas and the Missouri Iron Company, dated 15th August,

1839, which requires the defendants to give up and cancel the notes of Thomas to Nancy Bullett, for \$10,000, dated 2d November, 1836; to pay a debt due to Martin Thomas; to sell or transfer on the books of said company, for the use of the complainant, \$43,000 worth of stock of said company, or, in the alternative, that the American Iron Company may be decreed to reconvey the one undivided seventh part of the Iron Mountain tract to the complainant.

The complainant died in 1849, and his death being suggested, an amended bill was filed, praying for an account of rents and profits, for the use of the land and consumption of ores, timber, etc., by the defendants, and for a decree of title, etc. On the 2d November, 1836, Nancy Bullett, widow, sold to her brother, the complainant, one undivided seventh part of a tract of twenty thousand arpens of land, in Washington county, Missouri, known as the Iron Mountain tract; and she executed to him a title-bond of that date, with the condition that she would convey to him the above interest on the payment of two notes for \$5,000 each, one payable at six, the other at twelve, months from the date of the bond. On the 15th of November, 1836, Thomas made a similar title-bond to John L. Van Doren, with the condition to make a deed, upon his paying the two notes of \$5,000 each to Mrs. Bullett; and also three notes, of \$5,000 each, given by him to Thomas, at eighteen, twenty-four and thirty months from the date of the bond.

On the 31st of December, 1836, the Missouri Iron Company was incorporated by the legislature of Missouri, and Van Doren, Pease & Co. were named in the act as corporators. The company was organized; books were opened to sell the capital stock; Van Doren was appointed to obtain subscribers, but being unsuccessful, he failed, made an assignment, and became insolvent. Agents were appointed to visit foreign countries, who returned, making a report that a banker in Amsterdam subscribed \$600,000 of stock. The stock was raised to \$5,000,000, but the company soon became hopelessly embarrassed.

On the 22d of February, 1839, James Bruce, who married Mrs. Bullett, conveyed all their interest in the one-seventh of the Iron Mountain tract to Allen and Sloan, and also assigned the notes of Thomas to them, for the consideration of \$4,500. At the same time Allen and Sloan gave a bond to Bruce and wife, to convey to Thomas all their interest in the one-seventh of the tract, on his paying to them \$9,000, the amount due on the original purchase. On the 15th of August, 1839, A. Jones, president of the company, executed the following receipt to Thomas, under which he claims a specific performance against the Missouri Iron Company, and the other defendants, to wit: "Received of Jesse B. Thomas, of Sangamon county, Illinois, a transfer of \$71,400 of the capital stock of the Missouri Iron Company, \$43,000 of which is to be transferred to Julius Sichel, of Amsterdam, to consummate a contract entered into with him. The residue of the stock to be appropriated to pay the balance due on the two notes given to Mrs. Bullett," etc.

On the 2d September, 1841, the board resolved that the president be authorized to receive back from Thomas the stock issued to him, etc.; and the secretary addressed to him a letter, saying: "You will perceive that, by the above resolution, the president is authorized to cancel the bond or agreement in relation to the transfer of your interest in the Iron Mountain tract. As the chance of doing something with the property is better than the stock, I presume you can have no objection to making the transfer; the company is about to be dissolved, and the stock is worth nothing," etc. It does not appear that this communication was ever answered by Thomas. He never paid, or offered

to pay, the money due to Mrs. Bullett, or to Allen and Sloan, her assignees. He did not transfer to the company the seven hundred and fourteen shares of stock, nor demand the cancellation of Mrs. Bullett's title-bond that he had assigned to the company. Nor does it appear that he did any act to fulfil his contract with Mrs. Bullett.

In January, 1842, it appears the company failed, and all its property was sold on execution. In the amended bill it is averred that in 1842 the Missouri Iron Company was dissolved, being insolvent. C. C. Zeigler became the purchaser, at sheriff's sale, of all the Iron Mountain tract, for which he received the sheriff's deed, dated 6th July, 1841, and, on the 6th of January, 1842, the Missouri Iron Company sold the tract to Zeigler, and executed a deed to him.

A decree had been rendered in the circuit court of St. Francois county, at the suit of Allen and Sloan, assignees of Mrs. Bullett, against Thomas and J. L. Van Doren, for the sum of \$11,475, which was the consideration for the purchase of the undivided seventh part of the Iron Mountain tract, which was declared to be an equitable lien on the interest purchased; and, under the decree of May 8, 1843, the property was sold to Zeigler, and both Thomas and Van Doren were barred and precluded, by the decree, from enforcing any rights against the same. Pending that suit, Zeigler purchased the interest of Allen and Sloan in the title-bond of Mrs. Bullett to Thomas, and the notes of Thomas given to Mrs. Bullett, for \$6,500.

It appears that, on the 24th of January, 1843, the American Iron Company was incorporated, and that Zeigler sold the Iron Mountain tract to the company. There is no evidence showing a connection between the Iron Mountain Company first formed, and the present American Iron Company, except that the latter company is in possession of the same property, claiming it by sheriff's sale and deeds of conveyance under a decree, and from parties who were corporators of the first company and who represented the company.

§ 1495. *A party asking the specific performance of a contract must show diligence; also performance or an offer to perform.*

It would be difficult to find any case where the objections to the specific execution of a contract are more insuperable than in this case. In the first place, the consideration for which the property was purchased has not been paid; and the statute of limitations would have barred a recovery on the notes given, if suit had been brought on them at the time this bill was filed. It is true the purchaser from Thomas, Van Doren, agreed to pay these notes; but, not having done so, the assignment affords no excuse for the negligence of Thomas in his life-time. And there is no principle in equity better settled, than that he who asks a specific execution of his contract must show a performance on his part, or that he has offered to perform. Neither of these has been done in this case. In addition to this, it appears that the property claimed by the representatives of Thomas, which he never paid for, was sold in 1841, under a judgment obtained by Martin v. Van Doren, Pease & Co., the corporators named in the Missouri Iron Company, by the sheriff, and that C. C. Zeigler became the purchaser; and after this, the 6th of January, 1842, the Missouri Iron Company sold the Iron Mountain tract to Zeigler, and executed to him a deed. In the same year the company was dissolved, being insolvent.

It also appears that a decree was rendered for the purchase money, in 1843, which the court held as an equitable lien upon the land, and the land was decreed to be sold for the payment of the consideration money; and one-seventh of the whole tract, the amount purchased by Thomas, was, on the 8th of May,

1843, sold. This proceeding was had on the ground that Thomas had abandoned his claim to the land. By various efforts and contrivances, the stock of the first company was advanced \$5,000,000, but as might be expected, after such an inflation, the stock proved to be worth nothing, and the owners became insolvent. Under the American Iron Company, which succeeded the first company, extensive works have been established, and a prosperous business in mining is carried on.

On a full consideration of this complicated case, there seems to be no ground of equity on which relief can be given to the complainants. On the contrary, their equity appears to have been extinguished by negligence, in not paying the consideration, by the sale of the property by the sheriff, also under a decree of a court having jurisdiction of the case, and also by a conveyance of the Missouri Iron Company. A minute statement of the facts would be tedious, and cannot be necessary, as the case is free from doubts by the outline above given. The decree of the circuit court, which dismissed the complainant's bill, is affirmed.

§ 1496. *Specific performance not a matter of right.*—The specific performance of a contract is by no means a matter of right which a party has a right to demand from a court of equity. It is a matter in the sound discretion of the court, to be granted or withheld according to its own view of the merits and circumstances of the particular case, and never amounts to a peremptory duty. *Tobey v. County of Bristol*, 3 Story, 821.

§ 1497. The specific performance of a contract is a matter resting within the sound discretion of the court, and will not generally be made in favor of a party who has disregarded his reciprocal obligations under the contract. *Marble Co. v. Ripley*, 10 Wall., 857. See § 1459.

§ 1498. *Adequate remedy at law.*—Where every part of a contract has been executed except the payment of money, the remedy at law, if one exists, is fully adequate to the case, for by an action at law it is precisely the unpaid money which is recoverable, with perhaps damages for its detention. The ground of the jurisdiction of the courts to enforce specific performance is the inadequacy of the remedy at law, and where the remedy is adequate at law specific performance will be refused. *Heine v. Levee Commissioners*, 1 Woods, 351. See § 1458.

§ 1499. When a court of law is competent to afford adequate relief to a party for a breach of a contract by the other party, a resort to equity to attempt to enforce specific performance is improper. *Hepburn v. Dunlop*, 1 Wheat., 197.

§ 1500. — and one provided in an arrangement between the parties.—Specific performance of a contract will not be decreed where, in addition to his remedy at law, the party seeking it has a full and adequate remedy already provided in the terms of the arrangement between the parties. *Marble Co. v. Ripley*, 10 Wall., 859.

§ 1501. *Failure of complainant to perform his obligation.*—An agreement to release certain land to the public for a levee on condition that a pending suit in relation to it should be dismissed will not be enforced if the suit was not dismissed as agreed. *Lownsdale v. City of Portland*, Deady, 16.

§ 1502. It seems that, if interest was payable at certain times according to the terms of a contract, a plaintiff could not enforce specific performance unless he could show that he had paid interest as required. But equity might possibly require him to pay the principal and interest within a reasonable time, or be foreclosed of his rights under the contract. *Tufts v. Tufts*, 3 Woodb. & M., 474.

§ 1503. The rule that time is not of the essence of the contract has been, in many cases, recognized by courts of equity. There can be no doubt that a failure on the part of the purchaser or vendor to perform his contract on the stipulated day does not of itself deprive him of his right to demand a specific performance at a subsequent day when he shall be able to comply with his part of the engagement. This rule is not universal. Circumstances may be so changed that the object of the party can no longer be accomplished, or that he who was injured by the failure of the other contracting party cannot be placed in the situation in which he would have stood had the contract been performed. Under such circumstances, it would be iniquitous to decree a specific performance, and a court of equity will leave parties to their remedy at law. *Brashier v. Gratz*, 6 Wheat., 533.

§ 1504. A party through whose fault a contract is not carried into effect cannot obtain specific performance of it. *Hobson v. McArthur*, 16 Pet., 192.

§ 1505. Complainant must show that he has always been ready to perform.—The assignee of one-half interest in a contract to furnish cotton to a manufacturer and receive in return a portion of the proceeds, if he brings his bill for specific performance against the assignee of the other one-half interest, long after the cotton has been supplied by the latter, and seeks to be let into the benefits of the contract, must show that he has always been ready to perform his part of it. *Kendall v. Almy*, * 2 Sumn., 278.

§ 1506. Substantial compliance by complainant.—By the terms of a contract T. was to deliver to R. on a certain date a certificate of deposit on one of two designated Boston banks. T. was unable to procure such certificate for the reason that neither bank would issue such certificate. He procured, however, and tendered to R., a certificate for the same amount upon another solvent Boston bank. *Held*, that T. had substantially complied with his contract and was entitled to a decree for specific performance of it. *Seacombe v. Steele*, 20 How., 104.

§ 1507. Where it would work injustice.—A court will not entertain a bill for the specific performance of an agreement where it is doubtful whether it may not thereby become the instrument of injustice, or deprive parties of rights which they are otherwise fairly entitled to have protected. *Tobey v. County of Bristol*, 8 Story, 821.

§ 1508. The performance of a contract from which injustice would result will not be specifically enforced. *City of Memphis v. Brown*, 1 Flip., 202.

§ 1509. Contract hard and inequitable — Fraudulent or illegal consideration.—Specific performance will not be decreed of a contract which is hard and inequitable; much less will an executory contract be enforced if the consideration was either fraudulent or illegal. *Tufts v. Tufts*, 3 Woodb. & M., 509.

§ 1510. Contract subsequently becoming unfair and unreasonable.—Specific performance of a contract will not be denied because a contract supposed to be fair and equal when made has, by the lapse of time and the operation of unforeseen causes arising from changed circumstances, become unfair and unreasonable, if such hardship is not greater than the parties must reasonably be held to have contemplated at the time of entering into it. Where a contract contemplates a continuous performance extending through a series of years, or perpetually, the question of its hardship is to be judged of at the time it is entered into, and if it then be fair and just, it will be immaterial that it may, by force of subsequent circumstances, or change of events, have become less beneficial to one party, except when those subsequent events have been in some way due to the party who seeks performance of the contract. *Marble Co. v. Ripley*, 10 Wall., 356.

§ 1511. Modification in order to do justice.—Courts will not decree specific performance of a contract according to its letter when, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The court will so modify the agreement as to do justice as far as the circumstances will permit, and refuse specific execution unless the party seeking it will comply with such modification as justice requires. *Mechanics' Bank of Alexandria v. Lynn*, 1 Pet., 382.

§ 1512. Where the terms are not clear, definite and positive.—It seems that equity will not specifically enforce a contract between original parties where its terms are not clear, definite and positive; *a fortiori* will not enforce such a contract against the assignee of one party. *Kendall v. Almy*, * 2 Sumn., 278.

§ 1513. A contract in order to be enforced in equity ought to be clearly proved and precise in its terms, so that neither party could reasonably misunderstand them. If it is vague, uncertain, or if the evidence is insufficient, a court of equity will leave the party to his remedy at law. *Tilghman v. Tilghman*, Bald., 486.

§ 1514. Courts of equity will not direct the specific performance of an agreement where the terms are not all definite and full, and the contract in its nature and extent is not made out by clear and unambiguous proofs. *Smith v. Burnham*, 3 Sumn., 439.

§ 1515. Where the evidence fails to establish the precise terms.—A contract cannot be specifically enforced when the evidence fails to establish its precise terms. *King v. Thompson*, 9 Pet., 218.

§ 1516. An incomplete agreement will not be specifically enforced. *Barr v. Lapsley*, 1 Wheat., 151 (§ 27).

§ 1517. Where the fact of agreement is doubtful.—If it is doubtful whether an agreement has been concluded or is a mere negotiation, equity will not decree a specific performance. *Carr v. Duval*, 14 Pet., 88.

§ 1518. What is a defense.—In an action in the nature of a bill in equity for the specific execution of a contract, the defendant may avail himself of any matter in defense which goes to impair or make void the contract. *Sturges v. Stetson*, 1 Biss., 253.

§ 1519. It is a settled rule to allow a defendant in a bill for a specific performance of a contract to show that it is unreasonable or unconscientious, or founded in mistake or other cir-

cumstances leading satisfactorily to the conclusion that it would be unjust or inequitable to grant the bill. Gross negligence on the part of the complainant has great weight in cases of this kind. A party, to entitle himself to the aid of a court of chancery for the specific execution of a contract, should show himself ready and desirous to perform his part. *King v. Hamilton*, 4 Pet., 328.

§ 1520. Relief can be given against specific performance by an inquiry into considerations besides those written in an instrument. *Fackler v. Ford*, *McCahon*, 34.

§ 1521. Accident or mistake as a defense.—*Bona fide purchaser*.—Where it appears that by accident or mistake a contract is different from and narrower than it was intended to be by the parties, this fact may be set up as a defense in a suit in equity for its specific enforcement, if the clause, so omitted, would furnish a good defense to the suit. But when the rights of *bona fide* purchasers have intervened, which would be seriously prejudiced by allowing the contract to be thus enlarged, it is inequitable to allow such a defense. *Woodworth v. Cook*, 2 Blatch., 158.

§ 1522. Change in value of the article.—A very great change in the value of the article constitutes a serious objection to a decree for a specific performance when claimed by the party whose fault it is that the contract has not been executed. *Garnett v. Macon*, 2 Marsh., 249.

§ 1523. Defense of illegality by one who has violated the laws in making the contract.—One who violates the provisions of law in making a contract cannot resist a demand for specific performance on the ground that such contract was so made in violation of law. *Fackler v. Ford*, *McCahon*, 28.

§ 1524. Delay.—A party who asks a court to aid him in obtaining specific performance of a contract must show reasonable diligence in doing or attempting to do what he has agreed to perform. And if he has failed to execute his part of the contract without sufficient excuse, and there has been no acquiescence in the delay, by the other party, he cannot obtain specific performance of the contract. *Longworth v. Taylor*, 1 McL., 400.

§ 1525. It seems that in case of delay in the performance of a contract, where a sufficient excuse for non-performance is given, and the condition of the parties and the property remains the same, specific performance of the contract may be decreed. But where the delay has been unreasonable and without sufficient excuse, and the property has fallen in value, a court of equity will not enforce it. The fact that the court could not place the parties as they would have been had the contract been performed furnishes the reason for not decreeing specific performance. *Cooper v. Brown*, 2 McL., 497.

§ 1526. — and change of circumstances.—A court of equity will not interfere to decree a specific performance where the party seeking it has been guilty of gross laches, or long voluntary delay, and in the mean time there has been a material change of circumstances. The party will be left to take his remedy at law, where the delay or neglect has been without just excuse, and there is no longer any prevailing equity to sustain his claim. *McNeil v. Magee*, 5 Mason, 259.

§ 1527. — time of the essence.—Time may be made of the essence of the contract by the express stipulations of the parties, or it may arise from the very nature of the property by implication or the avowed object of the purchaser or of the seller. And even when time is not thus expressly or impliedly of the essence of the agreement, if the party seeking specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate period, been a material change of circumstances affecting the rights, interests or obligations of the parties, in such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust. But, except under circumstances of this sort or of an analogous nature, time is not treated by courts of equity as of the essence of the contract, and relief will be decreed to the party who seeks it if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases the party must make out a case free from all doubt, and show that the relief which he asks is equitable under all the circumstances, and to account in a reasonable manner for his delay and apparent omission of his duty. *Taylor v. Longworth*, 14 Pet., 174.

§ 1528. Contract within the statute of frauds, but under which an act has been done.—It seems that specific performance will be decreed where it is clearly shown that though the contract is within the statute of frauds, yet an act has been done which is a part execution of the substance of the agreement, and which would not have been done unless on account of the agreement, and one which unequivocally refers to and results from the agreement, and such that the party would suffer an injury amounting to fraud by a refusal to execute that agreement. *Caldwell v. Carrington*, 9 Pet., 103.

§ 1529. Statute of frauds as a defense.— In case of a suit to enforce specific performance the defendant may set up the statute of frauds, even though he has admitted the making of the agreement. *Thompson v. Tod*, Pet. C. C., 388.

§ 1530. An oral contract to pay the debt of another will not be enforced specifically in equity, if the answer, while admitting the making of the contract, sets up the statute of frauds as a defense. *Thompson v. Jamesson*, 1 Cr. C. C., 295 (§ 1776).

§ 1531. Revocable.— A court of equity will never decree the specific performance of a contract where it contains a power of revocation. *Express Co. v. Railroad Co.*, 9 Otto, 200.

§ 1532. — agreement to arbitrate.— Specific performance of a contract will not be decreed when by its terms it exists during the pleasure of the parties merely, and is at any time revocable. So an agreement to arbitrate will not be specifically enforced because, from its nature, it is liable to be revoked at any time by either party. *Tobey v. County of Bristol*, 8 Story, 824.

§ 1533. A lease contained a covenant to renew on the part of the lessor on terms to be fixed by impartial arbitrators. The lessee, on the faith of this covenant, made extensive improvements. Performance of the covenant was prevented by the lessor and an action was brought by him for use and occupation. A suit was commenced by the lessee to stay the action and for the appointment of an assessor as provided in the lease. *Held*, that while this covenant was an agreement to arbitrate, and as a rule such agreements will not be specifically enforced, yet such rule does not apply where, if applied, it would work great hardship and injustice; and that while as a rule courts can only specifically enforce contracts made by the parties, yet in this case the lessor, having fraudulently prevented the arbitration, was estopped to object to the want of such appraisal. *Tscheider v. Biddle*, 4 Dill., 53.

§ 1534. Want of mutuality.— A contract cannot be enforced which lacks mutuality, or where it provides that the party against whom it is sought may terminate the contract at any time on giving a year's notice. When, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might itself be free from the difficulties attending its execution in the former. *Marble Co. v. Ripley*, 10 Wall., 359.

§ 1535. Contracts relating to personalty.— It seems that specific performance of contracts relating to personalty may be enforced where compensation for the breach cannot be made in damages. *Mechanics' Bank of Alexandria v. Seton*, 1 Pet., 805.

§ 1536. A contract not relating to real estate may be specifically enforced when a judgment at law would not meet the demands of justice, or would be less beneficial than relief in equity, or that damages would not be an adequate satisfaction, or that their extent could not be exactly shown, or that the pursuit of the legal remedy would be attended otherwise with doubt and expense. *Express Co. v. Railroad Co.*, 9 Otto, 200.

§ 1537. Agreement which will operate as a fraud upon third persons.— A secret agreement by a plaintiff with one of several tort-feasors, that, if he will abandon all defense of the action and permit judgment to be rendered against him with the rest, plaintiff will enforce the collection of the judgment against the others alone, is not such an agreement as can be enforced in equity. Parties are bound to act fairly in their dealings with each other, but equity will not enforce an agreement which will operate as a fraud on the rights of third parties. *Selz v. Unna*, 6 Wall., 335.

§ 1538. Other means of compensation.— Specific performance is never decreed where a party can be otherwise fully compensated. *City of Memphis v. Brown*, 20 Wall., 304.

§ 1539. Surprise — Unfitness of plaintiff to perform his part.— Where, in a suit for specific performance, the defendant shows that in making the contract he was surprised, and that the plaintiff is an unfit person to perform the services expected of him, specific performance will be refused and the plaintiff will be remanded to a court of law. *Higgins v. Jenks*, 3 Ware, 21.

§ 1540. Continuous obligation involving skill and personal labor and judgment.— Specific performance of a contract will not be decreed where the duty of the grantee is continuous and involves skill, personal labor and cultivated judgment, as, for example, where it provides for the delivery of marble, of a certain kind, in blocks of a certain size. In such a case the court is incapable of determining whether the marble corresponds with the contract or not, and could not supervise the execution of the decree. *Marble Co. v. Ripley*, 10 Wall., 358.

§ 1541. Where specific performance is a repayment of a loan — As against a receiver.— An express company loaned to a railroad company a certain sum, and in return the railroad company promised to transport all express matter to be carried by the express company at a certain price per hundred weight, which price was to go to pay the loan and interest. Subsequently the bondholders brought a foreclosure suit against the company and a receiver was

appointed therein. The receiver having refused to continue the contract, suit was brought by the express company to enforce the specific performance of the contract. *Held*, that the specific performance of the contract was only another method of procuring payment of the loan, and that as the contract did not in terms give the express company a lien on the property of the company, there could be no specific performance as against the receiver. *Express Co. v. Railroad Co.*, 9 Otto, 200.

§ 1542. Where the complainant has already the benefits of performance.—A specific performance of a contract between telegraph companies, prayed for in this case, was refused, the plaintiff having by an existing arrangement the practical benefits of a full performance. *Compagnie Francaise Du Telegraphe de Paris a New York v. Western Union Tel. Co.*, * 11 Fed. R., 842.

§ 1543. A suit to compel the delivery of instruments in writing to a party who is entitled thereto is not a suit for the specific performance of a contract. *Clarke v. White*, 12 Pet., 187.

§ 1544. Specific performance of a contract of insurance where the policy has not been delivered.—A ship-owner desiring insurance instructed his agent to procure it at three per cent. The agent presented an application which contained all the terms of the policy, including the rate at three per cent. On consultation with the directors of the company, the president declined the risk at three per cent., but offered to take it at three and one-half. The agent applied for instructions and was told to insure at three and one-half. He went to the office of the company, and changed the written application from three per cent. to three and one-half per cent. in the presence of the president. The president thereupon informed the agent that he assented to the proposal contained in the application, and that the policy would be issued on the next day, as they were doing no business on that day. That night the ship was burned, and on the next day the premium was tendered but refused. *Held*, that the contract was completed when the assent of the president was given thereto, and could be specifically enforced, as by the common law a policy of insurance need not be in writing. *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How., 313. See §§ 1491, 1547.

§ 1545. A contract to give collateral security can be specifically enforced. *Robinson v. Cathcart*, 2 Cr. C. C., 597.

§ 1546. A covenant in a lease to renew at a fair valuation can be specifically enforced, and it seems that if the agreement be to fix the amount of rent to be paid on renewal, by arbitration, and the lessor has unlawfully prevented such arbitration, the agreement may still be enforced. *Tscheider v. Biddle*, 4 Dill., 60.

§ 1547. Specific performance of a contract of insurance may be decreed, the court having taken jurisdiction to compel a delivery of the policy. *Tayloe v. Merchants' Fire Ins. Co.*, 9 How., 390 (§§ 167-174). See §§ 1491, 1544.

§ 1548. Marriage settlement by father-in-law.—Where a party, by oral agreement, promises to give to a woman about to marry his son a lot of ground, provided a house be built thereon with her separate means, and the marriage is consummated, and the house built as stipulated, and the party refuses to convey, equity will decree specific performance. To make out a case of this nature, reasonable certainty is all that is required. *Neale v. Neales*, 9 Wall., 1.

§ 1549. Settlement of mutual demands.—Where a contract is made in a spirit of peace and compromise, for the settlement of unadjusted mutual demands, and by a person of experience in business, after plenty of time for consideration, and is witnessed by the counsel of the party, it will be upheld by a court of equity, and the rights of the parties under it will be protected. *May v. Le Claire*, 11 Wall., 228.

§ 1550. Agreement to use borrowed money in a certain way.—If a railroad company, in borrowing money and mortgaging property afterwards to be acquired, promises to employ such money in equipping the road, it seems that this agreement is one which may be specifically enforced. *Pennock v. Coe*, 23 How., 129.

§ 1551. Performance enforceable by injunction.—Although the compulsory specific performance of a contract may be beyond the power of the court, yet its performance may be negatively enforced by enjoining its breach. *Western Union Telegraph Co. v. Union Pacific R'y Co.*, 1 McC., 564; *Western Union Telegraph Co. v. St. Joseph & Western R'y Co.*, 1 McC., 569.

§ 1552. Where it is practicable, and damages cannot be given.—Where a contract is broken, equity will enforce it instead of rescinding it, when it is practicable, and when damages cannot be given. *Hunter v. Town of Marlboro'*, 2 Woodb. & M., 187.

§ 1553. Refunding of price decreed, where specific performance is impossible.—If a contract for the sale of lands is executed in part by a conveyance of a part of the lands, a court of equity may decree that the vendor refund the purchase money for the deficiency, if specific performance has become impossible. *Pratt v. Law*, 9 Cr., 456 (§§ 1043-52).

§ 1554. Damages given where the contract cannot be specifically enforced.—If a contract for the rendition of certain services for a county be entered into in its behalf by a specially constituted board, and the performance of the contract cannot be specifically enforced, equity will give damages on the completion of the work. *County of Mobile v. Kimball*, 12 Otto, 705.

4. Repudiation.

§ 1555. By refusing to do what is necessary in order to a performance by the other.—If a party agreeing to furnish supplies to enable another to get out lumber refuses to perform the contract on his part, the contract may be considered as abrogated. *Chapin v. Norton*,* 6 McL., 500.

§ 1556. It is of the essence of every contract that if one party to it prevents its performance by the other party, the former cannot be allowed to reap any benefit from the fact of such non-performance. *Hamilton v. Mutual Life Ins. Co.*, 9 Blatch., 257.

§ 1557. By giving notice that he will repudiate if the other does not comply.—If the vendee in a contract for the sale of lands gives notice to the vendor that if he does not comply with his contract he will hold himself exonerated, and the vendor does not adopt the alternative offered him, the latter cannot claim that the contract is at an end when sued for a specific performance. *Barry v. Coombe*,* 1 Pet., 640.

§ 1558. Where the other is not at fault.—One party to a contract cannot put an end to it while the other party is not in fault. *Gideon v. United States*,* Dev., 57 (179).

§ 1559. After judgment rendered.—Though a contract may have been void by the law of the place where it was made, yet if an action was instituted thereon and such illegality was not set up as a defense, it cannot be set up by the judgment debtor in an equitable action to restrain the execution of the judgment. *Creath v. Sims*, 5 How., 204.

§ 1560. Suit on note before maturity a disaffirmance of it.—A suit by a bank to recover money advanced by it on a forged note before the note became due is not an affirmance of the note, but is a disaffirmance of it. *Gibson v. Stevens*, 3 McL., 557.

§ 1561. Party defrauded must either affirm or disaffirm the agreement as a whole.—Where there has been fraud in the making of a contract the party seeking redress must disaffirm the contract or proceed for damages against the party perpetrating the fraud. Such party must throw over the agreement altogether, or he must take it as a whole. He cannot adopt it as to one part and reject it as to the rest. *Foreman v. Bigelow*, 4 Cliff., 544.

§ 1562. Repudiation of a purchase by a city on the ground that its bonds given in payment are invalid.—According to the terms of a charter providing therefor, the city of New Orleans purchased the city water-works of a corporation and gave its bonds therefor. The contract was duly executed and the transfers made. The city not denying the validity of the bonds, it was held that the corporation could not repudiate the contract on the ground that the bonds issued were invalid. *Sala v. City of New Orleans*, 2 Woods, 195.

§ 1563. Action for damages for partial failure to deliver goods, not a repudiation.—An action which sets up a contract of sale and a failure to deliver all the property, and which is for damages for such partial failure to deliver, is wholly inconsistent with a repudiation of the contract, and is, in effect, an affirmance of it. *Emma Silver Mining Co. (Limited) v. Emma Silver Mining Co.*, 7 Fed. R., 423.

§ 1564. Revocation of offer.—An offer to sell at a stated price may be revoked at any time prior to acceptance, unless, upon a good consideration, there is a time limited during which the offer shall remain open. *Stitt v. Huidekopers*,* 17 Wall., 384.

§ 1565. Change of sovereignty.—Though a change of sovereignty affects the private rights of individuals, it seems that it in no way affects the rights of persons arising under contracts, unless in contravention of the laws and constitution of the conquering country, or of regulations established by the conquerors. *Leitensdorfer v. Webb*, 20 How., 177.

5. Rescission.

SUMMARY.—On the ground of fraud, § 1566.—For breach of warranty after part of goods have been received, § 1567.—Failure to pay annuity, § 1568.—Recovery of money paid on illegal contract, § 1569.—Right to declare forfeiture if work did not proceed satisfactorily, § 1570.—Damages for terminating a contract, § 1571.—Right to retain a part of money due, § 1572.—Personal services; implied contract that plaintiff is capable, § 1573; notice, §§ 1574, 1575.—Rights of a party who fails to complete contract, § 1576.—Subsequent parol promise, § 1577.—Sale of land; forfeiture of payments, § 1578.

§ 1566. A party who wishes to rescind an executed contract on the ground of fraud must do so as soon as circumstances will permit. So where a contract (alleged to be fraudulent)

was executed August 13, 1878, between defendant and T., and within ten days T. became fully acquainted with the circumstances but did not rescind; and on October 5, 1878, T. failed and plaintiff was appointed his assignee, but failed to bring suit before April 3, 1879, it was held that the contract had been ratified. *Cummins v. Lods*, § 1579.

§ 1567. After a part of the goods sold have been received and used, an entire contract cannot be rescinded for breach of warranty in the description of them. So where plaintiff sold defendant a cargo of "Haxall" flour, in barrels, and the flour was in fact "Gallego," a brand of equal quality, and defendant received and used several barrels of the flour, in an action for the price of the cargo, it was held that the defendant was liable. *Lyon v. Bertram*, §§ 1580-84.

§ 1568. When the right to an annuity vests in covenant, a failure to pay it does not give a right to rescind the contract. *Hartshorn v. Day*, §§ 1585-89.

§ 1569. Money paid by one party in part performance of an illegal contract can be recovered back, the other party not having performed any part of the contract, and both parties having abandoned it before completion. *Spring Co. v. Knowlton*, §§ 1589-94.

§ 1570. Where, by a contract to do work for a railroad company, it was provided that, if the work did not proceed to the satisfaction of the company, it might declare the contract forfeited, it was held that such a forfeiture only extended to the future, and did not deprive the contractor of compensation for work already done. *Philadelphia, etc., R. Co. v. Howard*, §§ 1595-1608.

§ 1571. In an action for breach of contract in fraudulently terminating it, the defendant having a right to terminate it for certain causes, actual damages are all that can be given. But such damages clearly include the profits which the plaintiff would have made, that is, the contract being one whereby plaintiff agreed to do work, the difference between the cost of the work and the price. *Ibid.*

§ 1572. Where a contract provides that in order to secure the faithful and punctual performance of the covenants made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of the contract, the party of the second part shall be authorized to retain, until the completion of the contract, fifteen per cent. of the money at any time due the party of the first part, this sum cannot be retained as a forfeiture, but the party of first part may recover it, unless the other has sustained damage by his default or negligence, in which case he may recover the difference if the damage does not equal the sum retained. It is immaterial that the contract is never completed if it is forfeited before completion. *Ibid.*

§ 1573. In a contract for the personal services of plaintiff there is an implied condition that plaintiff shall be capable of performing such services. So where plaintiff is engaged as superintendent of a hotel, and becomes incapable of attending to the duties of the office, either through insanity or excessive use of opiates, such incapacity operates to terminate the contract immediately, and defendant is not bound to give thirty days' notice as provided in the contract. *Lyon v. Pollard*, §§ 1609-10.

§ 1574. Where a contract for personal service provides that, in order to terminate it by either party, thirty days' notice shall be given, and a notice to terminate it given by the employer is waived or abandoned, a subsequent notice by him is not made ineffectual to put an end to the contract thirty days from its own date, because it refers to the past notice and speaks of the termination of the contract as being already accomplished. *Ibid.*

§ 1575. If an employee brings an action against his employer for being dismissed without receiving the requisite number of days' notice provided for in the contract, the defendant may prove, as bearing on the damages, that notice had been given and a part of the time required had elapsed before the dismissal. *Ibid.*

§ 1576. A party who has advanced money or done an act in part performance of an agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has been thus advanced or done. So where plaintiff agreed to buy land of defendant, payment to be made in instalments at fixed times, and for failure to perform the terms of the contract the vendor was to have the right to declare it at an end, it was held that after failure of plaintiff to perform his part he could not recover of defendant sums paid in part performance of the contract. *Hansbrough v. Peck*, §§ 1611-13.

§ 1577. A subsequent parol promise is not a rescission of a prior written contract, where its obligation is the same as that of the written contract, and all that is done under it is in fulfillment of the writing, and no new consideration has passed between the parties to give it validity. *Ibid.*

§ 1578. A vendor of land, under a contract giving him a right to declare it at an end if the payments are not made at the specified times, in which event all prior payments are to be

forfeited, does not subject himself to a return of such payments by going into equity and regaining possession. Especially is this so if, by proceeding in chancery for possession, he only avails himself of the terms of the contract. *Ibid.*

[NOTES.— See §§ 1614-1644.]

CUMMINS v. LODS.

(Circuit Court for Iowa: 1 McCrary, 888-840. 1880.)

Opinion by McCrARY, J.

STATEMENT OF FACTS.— This is a bill in equity filed by complainant as assignee of the firm of Thornburg & Van Leuven, bankrupts, to set aside the conveyance of a certain tract of land, and cancel a contract, on the ground of fraud. The parties who are represented by the plaintiff as assignee bought from the respondents an eighty-acre tract of land without seeing it, and upon the faith of certain representations made by respondents. It is alleged that these representations were false and fraudulent, and the prayer is for a decree to set aside the contract and restore the parties to their original rights. Upon the question of fact involved in the case, as to whether the representations made by respondents concerning the quality and character of the land were intentionally false and fraudulent, there is a serious conflict in the testimony, and upon some of the most material points it would seem to be almost evenly balanced.

§ 1579. *Inexcusable delay will operate a ratification of a fraudulent contract.*

It is, however, in my judgment, not necessary to decide that question, since the case may well be disposed of upon a question of law which arises upon the record. The claim of the plaintiff here is that the contract should be rescinded, and set aside on account of fraud. By the terms of the contract the said bankrupts were to transfer to respondents a certain stock of hardware, and respondents were to convey to the bankrupts an eighty-acre tract of land in Tama county, Iowa. The contract was executed. The transfer of the stock of hardware was made. A deed to the real estate was executed, acknowledged and delivered. It is a well settled rule of law that where the right to rescind a contract springs from discovered fraud, the party defrauded must rescind as soon as circumstances will permit; or, in other words, at once, on discovery of the fraud. He is not bound to rescind, and any delay, especially if it be injurious to the other party, amounts to a waiver of his right. "The mere lapse of time," says Mr. Parsons, "if it be considerable, goes far to establish a waiver of this right, and if it be connected with an obvious ability on the part of the defrauded person to discover the fraud at a much earlier period, by the exercise of ordinary care and intelligence, it would be almost conclusive." 2 Parsons on Contracts, 781, 782, and cases cited.

The contract alleged in this case to have been fraudulent was executed on the 13th day of August, 1878. It is admitted in testimony that the parties purchasing (the firm of Thornburg & Van Leuven), now represented by the assignee, were fully advised of the condition of the land in about eight or ten days after the date of the contract, which would be as early as the 21st or 23d of August, 1878. They complained to one of the respondents, and said to him that the land was not as represented, and that it must be made right. This, however, did not amount to a rescission of the contract. It is not necessary to determine precisely what is required to constitute a rescission, but the least that can be said is that it was the duty of the bankrupts in this case, upon the discovery of the fraud, to notify the grantor that they had elected to rescind,

demand a return of the stock of hardware which had been delivered to the grantor, and tender a reconveyance to him of the eighty acres of land.

Whether it was necessary to institute legal proceedings, upon the refusal of respondents to recognize such rescission, it is not necessary to decide. It is enough to say that the evidence here does not show any rescission. In less than a week after the said Thornburg & Van Leuven were advised of the alleged fraud they went into bankruptcy, and on the 5th day of October, 1878, the present complainant was elected their assignee. He must be presumed to have inquired into their affairs, and to have ascertained the facts immediately upon his appointment, or within a reasonable time thereafter, especially as no allegation is found in his petition that he did not discover the fraud until a later period. He did not, however, institute this proceeding until the 3d day of April, 1879, about six months from the time of his appointment. I am clearly of the opinion that the evidence shows such delay as amounted to a ratification of the contract. On that ground, without deciding the question of fact, I find for the defendant, and there is decree accordingly.

LYON v. BERTRAM.

(20 Howard, 149-156. 1857.)

ERROR to U. S. Circuit Court, District of California.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—This suit was commenced by the defendants in error, to recover the price for a cargo of flour, bargained and sold to the plaintiff in error, in the city of San Francisco. The judgment of the circuit court was rendered upon a special verdict in favor of the plaintiffs in that court. The verdict finds that on the 13th January, 1853, the plaintiffs, and Flint, Peabody & Co., were, jointly, the owners of a cargo of flour, consisting of two thousand barrels, branded, and which were in fact Gallego, then being on the barque Ork, lying at a public wharf in San Francisco, and composing its entire cargo of flour, which inspected one thousand one hundred and seventy-one barrels superfine, and two hundred and twenty-nine bad. The firm of Flint, Peabody & Co., as agents and part owners, on the day aforesaid, concluded the following agreement with the defendant:

“SAN FRANCISCO, January 13, 1853.

“Sold this day to Joseph H. Lyon, Esq., a cargo of Haxall flour, now on board the barque Ork, lying in this harbor, being about two thousand barrels, on the following terms and conditions, viz.: Joseph H. Lyon, Esq., agrees to pay Messrs. Flint, Peabody & Co., \$30 per barrel for such as shall inspect superfine, and \$27 per barrel for such as shall inspect bad; payment to be made as it may be delivered, and to be received and paid for on or before the expiration of three weeks from date.

“If Messrs. Flint, Peabody & Co. elect, they can land and store the flour at the expiration of one week, or so much as may remain on board at that time, Mr. Lyon paying storage and drayage expenses.

“J. H. LYON,

“FLINT, PEABODY & Co.”

On the 25th January, 1853, the defendant applied to Flint, Peabody & Co. for fifty barrels of flour, so purchased by him, by a written order, as follows:

"SAN FRANCISCO, January 25, 1853.

"Messrs. Flint, Peabody & Co. will please deliver Mr. William R. Gorham, or bearer, fifty barrels of flour, out of the lot purchased from the ship Ork, and oblige
J. H. LYON."

Paying them therefor the contract price, amounting to the sum of \$1,500, and received from Flint, Peabody & Co. the following order:

"SAN FRANCISCO, January 25, 1853.

"*Captain of Barque Ork:* Please deliver the bearer fifty barrels superfine flour, and oblige
FLINT, PEABODY & Co."

Fifty barrels of Gallego flour, inspecting superfine, being part of said cargo of flour on board the barque Ork, were delivered from the barque to William R. Gorham, a baker, to whom the defendant had sold and transferred the delivery order and the said flour. When the order was made for William R. Gorham, the defendant represented that the flour was Haxall. On the 29th January, 1853, the defendant sold to Dunne & Co. fifty barrels of flour, which he represented to be Haxall, and gave the following order bearing date on that day:

"Messrs. Grey & Doane will please deliver Messrs. Dunne & Co. fifty barrels of Haxall flour from Ork.
J. H. LYON."

The said Dunne & Co., on discovering that the flour was not Haxall, but Gallego, refused to take it, and so notified the defendant. On the 31st of January, 1853, the defendant made further application for one hundred barrels of flour, being part of the flour so purchased as aforesaid, and gave his check on his bankers for the price, and received the following delivery order from Flint, Peabody & Co., bearing that date:

"*Capt. Hutchings, Barque Ork:* Please deliver to J. H. Lyon, or to the order of Grey & Doane, one hundred barrels superfine flour, and oblige," etc.

The check was not paid on presentation. Upon the refusal of Dunne & Co. to take the flour, the defendant, on learning the fact, notified the plaintiffs that he would not take the flour, and countermanded the payment of the check he had given for the one hundred barrels last mentioned.

On the 3d of February, 1853, the plaintiffs informed the defendant that they were prepared to deliver the remainder of the cargo, and requested the defendant to receive it. And subsequently, on the same day, they addressed him a note in which they advised him they would sell the flour on the 5th of February, at public auction, for his account, and would hold him responsible for the difference there might be in the net proceeds of the proposed sale and the contract price, and for charges and expenses, he (Lyon) having declined to take the flour under the contract. All the flour on the barque was of the brand known as Gallego, and the barrels were branded Gallego in printed characters from two to two and one-half inches in length, on both heads. In the opinion of some experts, there existed no difference in the quality or price of the flour of either brand (Haxall and Gallego), each inspecting superfine; but, in the opinion of other experts, there was a difference, some preferring the one brand and some the other.

Subsequently to the sale and up to and including the 28th January, 1853, Gallego and Haxall flour had advanced to \$35 per barrel in San Francisco; and between that and the 5th of February the price of both declined to \$18 per barrel. On the 5th of February the plaintiffs caused the remainder of the cargo to be sold at public auction, according to their notice to the defendant, for his account, and at a great reduction of price. The verdict does not find any

fact to impugn the fairness of this sale. Before this suit was commenced, Flint, Peabody & Co. assigned their interest in this suit to the plaintiffs, of which the defendant had notice. The verdict is silent in reference to the negotiations that preceded the contract, and does not inform us whether the cargo was at any time visible to the defendant; nor does it discriminate with exactness the qualities of Haxall and Gallego flour, or affirm that there is any specific difference between them.

It is evident from the verdict that the error in the description of the cargo did not bear on the substance, or on any substantial quality of the subject of the sale. The subject of the sale was a cargo of flour of about two thousand barrels, on board of a vessel lying at a wharf in the city; of a quality to be ascertained by an inspection; and from that inspection, and not from the brand, the price was to be ascertained. The brands Haxall and Gallego are understood to refer to different mills in Richmond, Virginia, at which flour is manufactured. The verdict sufficiently determines that the difference between them in the market of San Francisco is inappreciable, at least by the mass of purchasers and consumers. The case clearly does not belong to that class in which the subject-matter of the contract was of a nature wholly different from that concerning which the parties to the contract made their engagements. The brand on the exterior of the barrels of flour was certainly not of the substance of the contract. *Young v. Cole*, 3 Bing. (N. C.), 724; *Gompertz v. Bartlett*, 2 El., 849. The defendant does not resist the fulfillment of his agreement for any fraud, nor does the verdict impute any *mala fides* to the plaintiffs.

The case rests upon these facts. There was a sale of a cargo of flour at a price dependent upon the fact whether the component parts inspected superfine or bad, which was described as of one brand, but which proved to be of another. There was no material difference in the credit of the brands, and the market price of the flour was but little affected by the question whether the brand was of the one or the other mill. A portion of the flour has been delivered to, and paid for, and consumed by the defendant. He made no offer to return this flour. The flour remained in the Ork from the 13th of January till the 31st of January, subject to the exigencies of the contract. During that period there was no complaint on the part of the defendant. From the 28th of January till the 5th of February, when the refusal to accept the remainder of the flour and the sale of it on account took place, the price of flour was steadily declining.

§ 1580. *A description of an article as of a certain manufacture is a warranty.*

It may be admitted that the description of the flour as Haxall imported a warranty that it was manufactured at mills which used that brand; and that the purchaser would have been entitled to recover the amount of difference in the value of that and an inferior brand. *Powell v. Horton*, 2 Bing. (N. C.), 668; *Henshaw v. Robins*, 9 Metc., 83. But it cannot be admitted that the purchaser was entitled to abandon this contract. In the note to *Cutter v. Powell*, in *Smith's Lead. Cas.*, 1, the annotator says: "It is settled, by *Street v. Blay*, and *Poulton v. Lattimore*, where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue. 1. He may refuse to receive the article at all. 2. He may receive it, and bring a cross action for the breach of the warranty. 3. He may, without bringing a cross action, use the breach of warranty in reduction of damages in an action brought by the vendor for the price." The annotator proceeds to

say, "that it was once thought, and, indeed, laid down by Lord Eldon, in *Curtis v. Hannay*, 3 Esp., 83, that he might, on discovering the breach of warranty, rescind the contract, return the chattel, and, if he had paid the price, recover it back. This doctrine, which was opposed to *Weston v. Downes*, 1 Doug., 23, is overruled by *Street v. Blay*, 2 Barn. & Ad., 456, and *Gompertz v. Denton*, 1 Crompt. & M., 205; and it is clear that, though the non-compliance with the warranty will justify him in refusing to receive the chattel, it will not justify him in returning it, and suing to recover back the price."

§ 1581. — *can a purchaser rescind for breach of such warranty?*

The second and third propositions of this learned author are indisputable, and have received the sanction of this court. *Thornton v. Wynn*, 12 Wheat., 183, as modified by *Withers v. Greene*, 9 How., S. O. R., 213. The first proposition, concerning the right of the purchaser to reject the article because it varies from the warranty, is an open question. In *Dawson v. Collins*, 10 Com. B., 527 (70 E. C. L. R.), the judges dissent from it. The chief justice expressed his favor for the conclusion "that the buyer has no right to repudiate the article," because it did not correspond to the warranty; and Creswell, Justice, said: "Where the rule is of an individual and specific thing, the vendee can only defend himself, altogether, against an action for not accepting it, if the thing be utterly worthless, as in *Poulton and Lattimore*; or, in part, by giving the breach of warranty in evidence in reduction of damages." And this corresponds with the conclusions of this court in the case of *Thornton v. Wynn*, 12 Wheat., 183, where very similar language is used.

§ 1582. *There can be no rescission after article has been used.*

But while the first proposition of the note in the Leading Cases is a matter of dispute, there is none in respect to the conclusion that the purchaser who has received and used the article, and derived a benefit from it; cannot then rescind the contract. This principle is stated in *Hunt v. Silk*, 5 East, 449, in which Lord Ellenborough says: "Where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*." And, "if the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be gotten rid of. The parties cannot be put *in statu quo*." In *Perley v. Balch*, 23 Pick., 283, the same principle is applied to contracts of sale of chattels. The court say: "The purchaser cannot rescind the contract, and yet retain any portion of the consideration. The only exception is, where the property is entirely worthless to both parties. The purchaser cannot derive any benefit from the purchase, and yet rescind the contract. It must be nullified *in toto* or not at all. It cannot be rescinded in part and enforced in part." In *Burnett v. Stanton*, 2 Ala. R., 183, the court say: "A contract cannot be rescinded without mutual consent, when circumstances have been so altered by a part execution that the parties cannot be put *in statu quo*; for if it be rescinded at all, it must be rescinded *in toto*." To the same effect is *Christy v. Cummins*, 3 McL., 386; 2 Hill, N. Y. R., 288, per C. J. Nelson; *Kase v. John*, 10 Watts, 107. In *Thornton v. Wynn*, 12 Wheat., 183, this court say: "That if the sale of a chattel be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return in a reasonable time."

If the verdict had found that the defendant had sustained any damage from the difference in the brands of the flour, the price would have been diminished accordingly; and so the defendant might have been indemnified upon an action commenced by himself, alleging a breach of the contract. But, without considering whether he could refuse to accept any portion of the flour for the variance from the letter of his contract, we decide that he lost this power when he applied to have, paid for, and sold the parcels, on the 25th and 31st of January, 1853.

§ 1583. *Plea of the statute of limitations must be certain and specific.*

The defendant pleaded that the several causes of action in the complaint mentioned did not accrue within two years before the commencement of the suit. The code of California provides that "an action upon any contract, obligation or liability, founded upon an instrument of writing, except those mentioned in the preceding section, shall be brought within three years, and within two years if founded upon a contract, obligation or liability, not in writing, except in actions on an open account, for goods, wares and merchandises, and for any article charged in a store account." The plea of the defendant does not allege that the cause of action is founded upon a contract, obligation or liability, not in writing, nor show that it falls within the limitation of two years, as pleaded. The complaint is framed so as to admit evidence of a contract in writing quite as well as an oral contract, and the evidence shows this action is founded on a written contract. The plea should have contained an averment that the cause of action was not in writing, with such other averments as to show that the bar of the statute pleaded was applicable. A plea cannot be sustained which rests for its validity upon a supposed state of facts which may not exist. The plea must be an answer to any case which may be legally established under the declaration. *Winston v. The Trustees' University, etc., etc.*, 1 Ala., 124.

§ 1584. *Parties having an interest in the relief demanded are properly joined, without stating in the declaration the specific interest of each.*

It was objected that the proof shows that the assignment by Flint, Peabody & Co. was made to the plaintiffs in the suit, and that the declaration alleges that they assigned their interest in the claim to John Bertram, one of the plaintiffs. The code of California requires that actions shall be prosecuted in the name of the real party in interest, and that all parties having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs. The plaintiffs are shown to be the parties jointly interested in the subject of the action, and in the claim for relief. It is quite immaterial in what proportions they may be concerned. Their case is substantially established when their joint interest is shown, and the error in respect to the degree of the interest of the several parties is not such a variance as will be considered.

Judgment affirmed.

HARTSHORN v. DAY.

(19 Howard, 211-224. 1856.)

Opinion by Mr. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the judgment of the circuit court of the United States, holden by the district judge in and for the district of Rhode Island. The action was brought by Day against the defendants below, for an alleged infringement of a patent for the preparation and applica-

tion of India rubber to cloths, granted to E. M. Chaffee, August 31, 1836, and renewed for seven years from the 31st August, 1850. The plaintiff claimed to be the assignee of the patent from Chaffee. The defendants sought to protect themselves under a license derived from Charles Goodyear, whom they insisted was the owner, and not Day, of the renewed patent. Goodyear became the owner of the unexpired term of the original patent on the 28th July, 1844, and on the same day granted to certain persons, called "The Shoe Associates," the exclusive use of all his improvements in the manufacture of India rubber, patented, or to be patented, during the term of any patents or renewals which he might own, or in which he might be interested, "so far as the same are, or may be, applicable to the manufacture of boots and shoes." The defendants claimed a license under the Shoe Associates.

Chaffee, the original patentee, made application to the commissioner of patents, the 22d May, 1850, for the renewal of his patent, in which he states that the then present owners were willing and desirous that it should be renewed, and in that event that they ought to make him further compensation for the invention. And on the next day, 23d May, 1850, he entered into an agreement with Goodyear, in which he stipulated to convey to him the patent, on its renewal for the extended term, in consideration of \$3,000. There seems to have been some agreement or understanding that the then owners of the patent, and their licensees, should be at the expense of the renewal. William Judson had become interested in one-eighth of the patent in 1846, by an assignment from Goodyear; and in 1848 he, in conjunction with Seth P. Staples, was appointed by Goodyear his attorney and agent, in taking out, renewing, extending and defending his patents; and a fund was provided by Goodyear for defraying the expenses of these proceedings, and placed in the hands of Judson. By the consent of Goodyear, Judson subsequently became his sole agent and trustee of the fund for the purposes mentioned.

The patent was renewed, in pursuance of the application, on the 30th August, 1850. Soon after this renewal, to wit, on the 5th September, 1850, an agreement was entered into between Chaffee and Judson, which recites the renewal, and that the expenses were large, and also that at the time of the renewal the patent was held by Goodyear for the benefit of himself and his licensees; and, further, that he had agreed with Chaffee, for himself and those using the patent under him, that they would be at the expense of the extension, and make an allowance to him, Chaffee, of \$1,200 per annum, payable quarterly, during the period of the extension; and reciting also that Judson had had the management of the application for the renewal, and had paid, and became liable to pay, the expenses thereof, and had agreed to guaranty the payment of the annuity of \$1,200; and the agreement then provided as follows: "Now, I (Chaffee) do hereby, in consideration of the premises, and to place my patent so that in case of my death, or other accident or event, it may inure to the benefit of said Charles Goodyear, and those who hold a right to the use of said patent, under and in connection with his licensees, according to the understanding of the parties interested, nominate, constitute and appoint said William Judson my trustee and attorney, irrevocable, to hold said patent, and have the control thereof, so as no one shall have a license to use said patent or invention, or the improvements secured thereby, other than those who had a right to use the same when said patent was extended, without the written consent of said Judson first had and obtained."

At the close of the agreement, Judson stipulates with Chaffee to pay all the

expenses of the renewal, and also the annuity of \$1,200, and also to be at all the expense of sustaining and defending the patent; and Chaffee reserves to himself the right to use the improvement in his own business.

This contract was entered into without the privity of Goodyear, and changed materially the terms and conditions of that made by him with Chaffee on the 23d May. He was at first dissatisfied with the change when it came to his notice, but afterwards acquiesced. The contract continued in operation down to the 12th November, 1851, when a modification of the same took place.

This last contract recites that there was an omission in that of 6th September, in not stating that if the said licensees continued to use the improvements, they should pay their just proportion of the expenses and services in obtaining the renewal, which it was intended they should pay to Judson; and recites also that there was no stipulation on the part of Judson to pay Chaffee \$1,500 per annum, as claimed by him; and it is then agreed that the licensees shall pay their share of the expenses to Judson as a condition to the granting of a license by him to them; and that, on the payment of such share of the expenses, a license shall be granted to them. And it was further agreed that Judson should pay Chaffee the \$1,500 per annum; and also that Judson might use Chaffee's name in the prosecution of infringements of the patent, or for any other purpose in relation to the use of it, he holding Chaffee harmless from all costs, etc., and he, Judson, to have all the benefits to be derived from said suits.

It will be perceived that the only provision in this agreement differing from that of 6th September, in which Chaffee has any interest, is the one providing for an annuity of \$1,500, instead of the \$1,200. All the other provisions are for the benefit of Judson. This annuity was paid down to the 1st December, 1852, when some difficulty arose between Judson and Chaffee, and the payment ceased. And on the 1st July thereafter, Chaffee undertook, in consequence of this default, to revoke and annul the power and control of Judson over the patent, and to forbid his acting in any way or manner under the agreements of the 6th September, and of the 12th November, above referred to. And on the same day, for the consideration of \$11,000, assigned the renewed patent to Day, the plaintiff in this suit. Day, on the 2d July, 1853, gave notice to Judson of the assignment, offering to pay, at the same time, all sums there might be due him, if any there were, for moneys advanced in procuring the extension of the patent, or in any other way paid for Chaffee on account of said patent. The above is the substance of the case, as appears from the written agreements of the parties in the record. The questions involved turn essentially upon the points:

1. As to the operation and effect to be given to the three agreements which have been referred to, and especially of that of the 6th September, 1850, between Chaffee and Judson; and
2. The force and effect of the attempted rescindment of these agreements by Chaffee, on the 1st July, 1853, on account of the neglect or refusal of Judson to pay the annuity of \$1,500.

§ 1585. *A contract to assign a future patent or renewal is valid and gives assignee the equitable title.*

1. It is not important to examine particularly the agreement between Goodyear and Chaffee of 23d May, as that was, in effect, superseded by the one entered into with Judson, the 6th of September, to which Goodyear afterwards assented. It is important only as leading to the latter agreement, and may therefore assist in explaining its provisions. By this first agreement,

Chaffee bound himself to assign to Goodyear the renewed patent, as soon as it was obtained, for the consideration of \$3,000. Goodyear became thus equitably entitled to the entire interest in the patent during the extended term, and could have invested himself with the legal title on the payment, or offer to pay, the \$3,000, had he not subsequently acquiesced in the modification of it with Judson. Judson was the owner, jointly with Goodyear, of one-eighth of the patent. He was also the agent and attorney of Goodyear, generally, in his applications for patents, in obtaining renewals, and in the litigation growing out of the business; and was the trustee of a fund provided by Goodyear to meet the expenses. It was, doubtless, on account of this interest of Judson in the improvement, and his general authority from Goodyear in the management of his patent concerns, that led him to enter into the new arrangement with Chaffee, of the 6th September, in the absence of his principal. Goodyear might have repudiated it and insisted upon the fulfillment of the first agreement. He thought fit, however, after a full knowledge of the facts, to acquiesce; and his rights, therefore, and those claiming under him, must depend upon this second agreement.

In respect to this agreement, whether the title which passed from Chaffee, in the renewed patent to Judson, was legal or equitable, the court is of opinion that the entire interest and ownership in the same passed to him for the benefit of Goodyear, and those holding rights and licenses under him. The instrument is very inartificially drawn, but the intent and object of it cannot be mistaken. Chaffee, in consideration of the premises, which included the annuity of \$1,200, "and (in his own language) to place my (his) patent so that in case of death or other accident or event, it (the patent) may inure to the benefit of said Charles Goodyear, and those who hold a right to the use of said patent, under and in connection with his licensees," etc., nominates and appoints "said William Judson, my trustee and attorney irrevocable, to hold said patent, and have the control thereof, so that no one shall have a license, etc., other than those who had a right to use the same when said patent was extended, without the written consent of said Judson;" and at the close of the agreement, he reserves the right to use the improvement in his own business. At this time, as we have seen, Judson was the owner of one-eighth of the patent, and was the general agent and attorney of Goodyear in all his patent business transactions. It is apparent that the only interest in the patent, left in Chaffee, was the right reserved for his own personal use. The annuity and indemnity against the expenses of the renewal were the compensation received by him for parting with the improvement. The contract of the 12th November has no material bearing upon this part of the case. Most of the provisions were for the benefit of Judson, in relation to the licensees under Goodyear. The only provision important to Chaffee is the stipulation for the increased annuity of \$1,500.

§ 1586. *An executed contract cannot be rescinded on account of the failure of a party to perform his covenants.*

2. Then, as to the attempted rescindment of the contracts. The agreement of 6th September had been in force from its date down to the 1st July, 1853, a period of two years and nearly ten months. During all this time, the licensees of Goodyear, at the date of the renewal of the patent, and those whom Judson may have granted a license to since the renewal, had a right to use the improvement, and especially the Shoe Associates, referred to in their agreement with Goodyear, 1st July, 1848. Besides this stipulation with Goodyear, their

right was expressly recognized by Chaffee himself, in the agreement with Judson of 6th of September. The effect of the rescindment as claimed, and which would be necessary to enable the plaintiff to succeed in his action against the defendants, would be to break up the business of these licensees, by divesting them of their rights under this agreement — rights acquired under it from all parties connected with or concerned in the patent, and especially from Chaffee, the patentee, who placed it in the hands of Judson, for the benefit of Good-year and those holding under him. The effect would also be to deprive Good-year or Judson, or whichever of them had paid the expenses of obtaining the renewal, of the equivalent for those expenses, except as they might have a personal remedy against Chaffee. To the extent above stated, the agreement of the 6th September was already executed, and, in respect to parties concerned, the abrogation would work the most serious consequences.

As we have already said, the ground upon which the right to put an end to the agreement is claimed is the refusal to pay the annuity of \$1,500 after December, 1852. Judson proposed to Chaffee to resume the payment in June, 1853, which was declined; but we attach no importance to this fact, especially as we are in a court of law. But, in looking into the agreements of the 6th of September, and also the one of the 12th of November, the court is of opinion that the payment of the annuity was not a condition to the vesting of the interest in the patent in Judson, and of course that the omission or refusal to pay did not give to Chaffee a right to rescind the contract, nor have the effect to remit him to his interest as patentee. The right to the annuity rested in covenant, under the agreement of the 12th of November. One of the objects of that agreement was, to obtain from Judson this covenant. From the terms and intent of the agreement, the remedy for the breach could rest only upon the personal obligation of Judson, as, by the previous one of the 6th of September, the interest in the patent had passed to Goodyear and his licensees, and no default or act of Judson could affect them. Chaffee chose to be satisfied with the covenant of Judson, without stipulation or condition as it respected the other parties, and he must be content with it. The cases of *Brooks v. Stolley*, 3 McL., 526, and *Woodworth v. Weed*, 1 Blatch., 165, have no application to this case. The attempt to rescind the contracts being thus wholly inoperative and void, in the opinion of the court, of course no interest in the patent passed to Day, under the assignment of the 1st July, 1853.

§ 1587. *In an action at law on a sealed instrument, fraud in the consideration or failure of consideration cannot be shown between the parties.*

Evidence was given on the trial in the court below, for the purpose of proving that the agreement of the 6th of September was procured from Chaffee by the fraudulent representations of Judson, which was objected to, but admitted. The general rule is, that in an action upon a sealed instrument in a court of law, failure of consideration or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed; and, more especially, where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the states where the two systems of jurisprudence prevail, of equity and the common law, a court of law refuses to open the question of fraud in the consideration or in the transaction out of which the consideration arises in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the

parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed.

§ 1588. *Fraud in execution of sealed instrument may be shown in court of law.*

Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence. 2 J. R., 177; 13 id., 430; 5 Cow., 506; 4 Wend., 471; 6 Munf., 358; 2 Rand., 426; 10 S. and R., 25; 14 id., 208; 1 Ala., 100; 7 Mo., 424; 4 Dev. and Bat., 436; C. and H. Notes, part 2, p. 615, note 306, ed. Gould & Banks, 1850. It is said that fraud vitiates all contracts, and even records, which is doubtless true in a general sense. But it must be reached in some regular and authoritative mode; and this may depend upon the forum in which it is presented, and also upon the parties to the litigation. A record of judgment may be avoided for fraud, but not between the parties or privies in a court of law.

The case in hand illustrates the impropriety and injustice of admitting evidence of fraud to defeat agreements of the character in question in a court of law. We have a record before us of one thousand and fifty-five closely-printed pages of evidence submitted to the jury, and a trial of the duration of some six weeks. Goodyear and his licensees had acquired vested and valuable rights under the agreements in this patent, and who were in no way privy to, or connected with, the alleged fraud, nor parties to this suit; and yet it is assumed, and without the assumption the fraud would be immaterial, that the effect of avoiding the agreements would be to abrogate these rights. They had been in the enjoyment of them for nearly three years, and may have invested large amounts of capital in the confidence of their validity. They were derived from Chaffee himself, the patentee of the improvement. A court of equity, on an application by him to set aside the agreements on the ground of fraud, would have required that these third parties in interest should have been made parties to the suit, and would have protected their rights, or secured them against loss, if it interfered at all, upon the commonest principles of equity jurisprudence.

Some slight evidence was given in the court below upon the question whether the agreement of the 6th of September was sealed at the time of the execution. But the instrument produced was sealed, and is recited in the subsequent agreement of the 12th November as an agreement signed and sealed by the parties.

A question was also made as to the authority of the Shoe Associates to grant a license to the defendants. But they held under Goodyear the right to the exclusive use of the improvement for the manufacture of boots and shoes. They were competent, therefore, to confer the right upon the defendants. Besides, the point is not material in the view the court have taken of the case, as upon that view no interest in the patent vested in the plaintiff under the assignment from Chaffee. It will be seen, by a reference to the bill of exceptions, that upon our conclusions in respect to several points raised in the case, the rulings in the court below were erroneous, and consequently the judgment must be reversed, and a *venire de novo* awarded.

SPRING COMPANY v. KNOWLTON.

(18 Otto, 49-62. 1880.)

ERROR to U. S. Circuit Court, Northern District of New York.

STATEMENT OF FACTS.—The Congress and Empire Spring Company, a corporation of New York, with a capital stock of \$1,000,000, proposed to increase it by \$200,000, and to issue new stock in that proportion to all its old shareholders who wished to take it. Sheehan, an old stockholder, subscribed for the new stock in the proportion of one share of new to five shares of old stock. Knowlton agreed with Sheehan to take his new stock and pay the calls as they were made by the company. He also borrowed from Sheehan the dividends on his old stock, amounting to \$13,988, and gave his notes therefor, which he afterwards paid. The first call on the new stock so assumed by Knowlton was paid by him in Sheehan's dividends, to wit, \$13,988, for which the company gave Knowlton a receipt. Calls were made upon Sheehan and Knowlton for further instalments, but they refused to pay anything more, and the company declared their new stock forfeited. Afterwards the company resolved to abandon the increase of the capital stock, and arranged with other shareholders to issue to them bonds in reimbursement for money paid on calls for the new stock. It never tendered to Knowlton bonds in repayment of the money he had paid, nor did he demand them. He claimed the return of the \$13,988 which he had paid, and brought this suit to recover it. After his death the suit was carried on by his administrators, and they recovered judgment. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE WOODS.

The plaintiff in error claims that the plan adopted by it to increase its capital stock, by which certificates as for full-paid stock were to be issued on the payment of eighty per cent. thereof, was against the law and public policy of the state of New York, and was therefore void; that Knowlton, having been an active party in devising this scheme, and having paid his money in part execution of it, his legal representatives cannot recover the sum so paid. It is conceded by the defendants in error that the plan adopted by the company to increase its stock was in violation of the law of New York, and therefore void. It has been so held, in effect, by the court of appeals of the state of New York, in the case of *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y., 518.

§ 1589. *Where money has been paid by one party in part performance of an illegal contract not malum in se, he can recover the money back from the other party.*

We are, then, to consider whether, upon the hypothesis that the plan for the increase of the stock was illegal, there can be a recovery upon the facts of the case as found by the circuit court. We think it clear that there was only a part performance of the illegal contract between the company and Knowlton in reference to the new stock, for which Sheehan subscribed and which he agreed to transfer to Knowlton. The company, in fact, created no new stock. It only proposed to do so. To increase the stock of the company it was not only necessary that the meeting of the stockholders should be called, as prescribed by the law, and a vote of two-thirds of all the shares of stock should be cast at the meeting in favor of the increase, but that there should be a certificate of the proceedings, showing, among other things, a compliance with the provisions of the law, and the amount of the increase of the stock, signed and verified by the affidavit of the chairman of the meeting at which the in-

crease was voted, and countersigned by the secretary, and such certificate should be acknowledged by the chairman and filed, as required by the first section of the act. And the law declared that "when so filed the capital stock of such corporation shall be increased to the amount specified in such certificate."

It does not appear from the findings of the circuit court that any such certificate was ever made or filed. Consequently it does not appear that the steps necessary, under the law, to an increase of the stock were ever taken. Neither does it appear that any scrip or certificates were ever issued to the subscribers to the new stock. So that all that was done amounted only to a proposition by the company, on the one hand, to increase its stock, and an agreement by Knowlton to take certain shares of the new stock when issued, and the payment by him of an instalment of twenty per cent. thereon. There was no performance of the contract whatever by the company, and only a part performance by Knowlton. It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud.

§ 1590. *Money paid by one party in part performance of a contract illegal as malum prohibitum and not as malum in se may be recovered back, the other party mean time having performed no part of the contract.*

The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in performance can be recovered, the other party not having performed the contract or any part of it, and both parties having abandoned the illegal agreement before it was consummated. We think the authorities sustain the affirmative of this proposition.

§ 1591. — *rule as laid down by text writers.*

Their result is fairly stated in 2 Comyn on Contracts, 361, as follows: "Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are *in pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, that where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover."

Mr. Parsons, in his work on Contracts, vol. II, p. 746, says: "All contracts which provide that anything shall be done which is distinctly prohibited by law, or morality, or public policy, are void; so he who advances money in consideration of a promise or undertaking to do such a thing may at any time before it is done rescind the contract and prevent the thing from being done and recover back his money." To the same effect see 2 Addison, Contracts, sec. 1412; Chitty, Contracts, 944; 2 Story, Contracts, sec. 617; 2 Greenl. Ev., sec. 111.

§ 1592. — *and as laid down by the English courts.*

The views of the text-writers are sustained by a vast array of authorities,

both English and American. A few will be cited. *Taylor v. Bowers*, 1 Q. B. D., 291, was an action to recover property assigned for the purpose of defrauding creditors. A verdict was rendered for the plaintiff, with leave to move to enter a verdict for the defendant. A rule was obtained on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant. The queen's bench sustained the verdict, the chief justice, Cockburn, delivering the opinion. The defendant then appealed to the court of appeals, where the judgment was affirmed. Both courts agreed that an illegal contract partially performed might be repudiated and the money paid upon it recovered.

Lord Justice Mellish, in the court of appeals, said: "If the illegal transaction had been carried out, the plaintiff himself, in my judgment, could not afterwards have recovered the goods. But the illegal transaction was not carried out; it came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action; the law will not allow that to be done." The same rule substantially is laid down in the following English cases: *Lowry v. Bourdieu*, 2 Doug., 452; *Tappenden v. Randall*, 2 Bos. & Pull., 467; *Hastelow v. Jackson*, 8 Barn. & Cress., 221; *Bone v. Ekless*, 5 H. & N., 925; *Lacaussade v. White*, 7 Term R., 531; *Cotton v. Thurland*, 5 id., 405; *Mount v. Stokes*, 4 id., 561; *Smith v. Bickmore*, 4 Taunt., 474.

§ 1593. — *and as laid down by the American courts.*

In *Morgan v. Groff*, 4 Barb. (N. Y.), 524, it was held that money paid on an illegal contract, which remains executory, can be recovered back in an action founded on a disaffirmance, and on the ground that it is void. To the same effect are the following cases: *Utica Ins. Co. v. Kip*, 8 Cow. (N. Y.), 20; *Merritt v. Millard*, 4 Keyes (N. Y.), 208; *White v. Franklin Bank*, 22 Pick. (Mass.), 181; *Lowell v. Boston & Lowell Railroad Corp.*, 23 id., 24. In *Thomas v. City of Richmond*, 12 Wall., 349, this court cites with approval the note of Mr. Frere to the case of *Smith v. Bromley*, 2 Doug., 696, to the effect that a recovery can be had as for money had and received when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus penitentiae*; the *delictum* is incomplete; the contract may be rescinded by either party.

The rule is applied in the great majority of the cases, even when the parties to the illegal contract are *in pari delicto*, the question which of the two parties is the more blamable being often difficult of solution and quite immaterial. We think, therefore, that the facts of this case present no obstacle to a recovery by Knowlton's administrators of the sum paid by him on the stock which had been subscribed for by Sheehan. The law of New York does not in express terms forbid a corporation from issuing certificates for full-paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress and Empire Spring Company was organized, namely, sections 38, 40, 41 and 49. We think it is fairly

inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal, and that when they discovered that it was forbidden by the law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy.

It is suggested by counsel for the plaintiff in error that the court of appeals of the state of New York has in this identical suit, upon the same state of facts, adjudicated the rights of the parties, and that this court ought to consider the questions raised in this case as *res judicata*. The reply to this suggestion is that it nowhere appears in the record that this case was ever before the court of appeals, or that it was ever decided by any court except the United States circuit court for the northern district of New York, from which it has been brought to this court on error. We cannot consider facts not brought to our notice by the record.

Judgment affirmed.

§ 1594. *The decision of the New York commission of appeals was final in this case, which ought not to have been removed into the federal courts.*

Dissenting opinion by MR. JUSTICE HARLAN.

This action was commenced in the supreme court of the state of New York. The present transcript is imperfect in that it does not contain all the proceedings in the courts of the state up to the removal of the case into the circuit court of the United States. It is, however, conceded, in the briefs of counsel, that Knowlton recovered in the supreme court a judgment which, upon a writ of error from the commission of appeals, was reversed upon the grounds stated in *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y., 518. The learned district judge who tried the case commences his opinion, which is incorporated in the transcript, with the statement that "this case comes here by removal from the state court, after a decision adverse to the plaintiff by the commission of appeals, reversing the judgment of the supreme court in favor of plaintiff, and ordering a new trial. 57 N. Y., 518." He then proceeds to determine it upon principles of law different from those announced in that decision. Had it been again tried in the supreme court, judgment must have been rendered against these defendants in error, because the reversal was upon such grounds as precluded any recovery whatever by them. That decision should, in my opinion, have been accepted as the law of this case, although the proceedings in the commission of appeals are not set forth in the transcript. The reported case shows, beyond question, that it is the identical case now before us; at any rate, that it was between these parties and involved the same issues. We know that the adjudication of that court was long prior to the removal of this case, and that the questions arising upon this record have been once determined by a court of competent jurisdiction in a suit between the same parties touching the subject-matter now in controversy. All this plainly appears by that decision, the legal effect of which the defendants in error should not be permitted to escape by removing the case into the circuit court.

Upon these grounds, and without expressing my own views upon the propositions of law discussed in the opinion of the court, I dissent from the judgment just rendered.

PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY v. HOWARD.

(18 Howard, 307-344. 1851.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—Sebre Howard brought his action of covenant broken in the circuit court of the United States for the district of Maryland, and upon the trial the defendants took seven bills of exception, which are here for consideration upon a writ of error. Each of them must be separately examined.

§ 1595. *Where the law governing the tribunal does not require a formal record, the entries made instead thereof are competent evidence.*

The first raises the question whether Howard could prove that a certain suit was pending in Cecil county court by the testimony of the clerk of that court to the verity of a copy of the docket entries made in that suit by him, as clerk. It is not objected that a copy of the docket entries was produced instead of the original entries, because no court is required to permit its original entries to go out of the custody of its own officers, in the place appointed for their preservation; but the objection is that a formal record ought to have been shown. There are two distinct answers to this objection, either of which is sufficient.

By the act of assembly of Maryland, 1817, ch. 119, the clerk of the county court is not required to make up a formal record. The docket entries and files of the court stand in place of the record. When a formal record is not required by law, those entries which are permitted to stand in place of it are admissible in evidence. Several judicial decisions in England have been referred to by the counsel of the plaintiff in error, to the effect that the finding of an indictment at the sessions cannot be proved by the production of the minute-book of the sessions, from which book the roll containing the record of such proceedings is subsequently made up. See 2 Phil. Ev., 194. But the distinction between those cases and a case like this is pointed out in a recent decision of the court of king's bench, in *Regina v. Yeoveley*, 8 Ad. & Ell., 806, in which it was held that the minute-book of the sessions was admissible to prove the fact that an order of removal had been made, it appearing that it was not the practice to make up any other record of such an order; and Lord Denman fixes on the precise ground on which the evidence was admissible in this case when he says: "The book contains a caption and the decision of the sessions, and their decision is the fact to be proved."

So in *Arundell v. White*, 14 East, 216, the plaintiff offered the minute-book of the sheriff's court in London, containing the entry of the plaint, and the word "withdrawn" opposite to the entry, and proved it was the usual course of the court to make such an entry when the suit was abandoned by the plaintiff; it was held to be competent evidence to prove the abandonment of the suit by the plaintiff and its final termination. In *Commonwealth v. Bolkom*, 3 Pick., 281, it was decided that the minute-book of the sessions, showing the grant of a license to the defendant, was legal evidence of that fact, there being no statute requiring a technical record to be made up. And in *Jones v. Randall*, Cowp., 17, copies of the minute-book of the house of lords were admitted in evidence of a decree, because it was not the practice to make a formal record. The principle of all these decisions is the same. Where the law which governs the tribunal requires no other record than the one a copy of which is presented, that is sufficient. In Maryland no technical record was required by law to be made up by the clerks of the county courts; and, therefore, no other record

than the one produced was needful to prove the pendency of an action in such a court.

§ 1596. *The docket entry of an action is admissible in evidence to prove that it is pending in court.*

But there is another point of view in which the evidence was clearly admissible. The fact to be proved was the pendency of an action. An action is pending when it is duly entered in court. The entry of an action in court is made by an entry on the docket of the title of the case by the proper officer, in the due course of his official duty. Proof of such an entry being made by the proper officer, accompanied by the presumption which the law entertains that he has done his duty in making it, is proof that the action was duly entertained in court, and so proof that the action was pending; and if the other party asserts that it had been disposed of, at any particular time after it was entered, he must show it. The docket entry of the action was therefore admissible for this special purpose, because it was the very fact which, when shown, proved the pendency of the action, until the other party showed its termination.

§ 1597. *That a corporation, by its attorney, at a trial, treated an instrument as its deed is competent evidence to show an admission by the corporation that it was sealed with its seal.*

The second bill of exceptions was taken to the ruling of the court admitting a witness to testify that he was present at the trial of the above mentioned case in Cecil county court, in December, 1847, in which Sebre Howard and Hiram Howard were shown by the docket entries to have been plaintiffs, and the Wilmington & Susquehannah Railroad Corporation defendant; that the plaintiffs at that trial relied on a paper writing, shown to the witness, and set out in the bill of exceptions; that one of the counsel of the defendant had in his possession another paper writing, also shown to the witness, and being the deed declared on in this suit; and that the defendant's counsel handed this last-mentioned paper to the presiding judge, and spoke of it as the true and genuine contract between the parties. To render the ruling to which this bill of exceptions was taken intelligible, it is necessary to state that the Wilmington & Susquehannah Railroad Corporation was the defendant in that action, which was *assumpsit*, founded on the paper first spoken of by the witness, which did not bear the seal of the corporation; that by the act of assembly of 1837, ch. 30, the Baltimore & Susquehanna Company, the Baltimore & Port Deposit Company, and the Philadelphia, Wilmington & Baltimore Company were consolidated under the name of the Philadelphia, Wilmington & Baltimore Railroad Company, and that this action being covenant, against the Philadelphia, Wilmington & Baltimore Railroad Company, and the plea *non est factum*, the plaintiff was endeavoring to prove that the paper declared on bore the corporate seal of the Wilmington & Susquehannah Railroad Company. This being the fact to be proved, evidence that the corporation, through its counsel, had treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, was undoubtedly admissible. It is objected that the parties to that suit were not the same as in this one; but this is wholly immaterial. The evidence does not derive its validity from any privity of parties. It tends to prove an admission by the corporation that the instrument was sealed with its seal. It is further objected that the admission was not made by the defendants in this action, but by the Wilmington & Susquehannah corporation. It is true the action in the trial of which the admission

was made, being brought before the union of the corporations, was necessarily in the name of the original corporation; but as, by virtue of the act of union, the Wilmington & Susquehannah Company, the Baltimore & Port Deposit Company, and the Philadelphia, Wilmington & Baltimore Company were merged in and constituted one body corporate, under the name of the Philadelphia, Wilmington & Baltimore Railroad Company, it is very clear that, at the time the trial took place in Cecil county court, all acts and admissions of the defendant in that case, though necessarily in the name of the Wilmington & Susquehannah Company, were done and made by the same corporation which now defends this action. This exception must, therefore, be overruled.

§ 1598. *As soon as any evidence of its execution, fit to be weighed by the jury, is given, a deed may be read in evidence.*

The third exception is that the court permitted the deed to be read to the jury, although only vague and inconclusive evidence had been given that it bore the corporate seal. We do not consider the evidence was vague, for it applied to this particular paper, and tended to prove it to be the deed of the company. Whether it would turn out to be conclusive or not depended upon the fact whether any other evidence would be offered to control it, and upon the judgment of the jury. But the deed was rightly admitted to be read as soon as any evidence of its execution, fit to be weighed by the jury, had been given by the plaintiff. It was argued that this evidence was not sufficient to change the burden of proof; and it is true that, upon the issue whether the paper bore the corporate seal, the burden of proof remained on the plaintiff throughout the trial, however the evidence might preponderate, to the one side or the other (*Powers v. Russell*, 13 Pick., 69); but the court did not rule that the burden of proof was changed, but only that such *prima facie* evidence had been given as enabled the plaintiff to read the deed to the jury.

The subject-matter of the fourth exception became wholly immaterial in the progress of the cause, and could not be assigned for error, even if the ruling had been erroneous. *Greenleaf v. Birth*, 5 Pet., 132. But we think the ruling was correct.

§ 1599. *Proof that a deed was not to be the deed of a party until a certain condition was complied with.*

The fifth exception was taken to the refusal of the court to allow a question to be answered by James Canby, one of the defendant's witnesses. This witness had already testified as follows: "Leslie and White were the first contractors, and they were induced to relinquish it at the instance of the board, and it was then let to Sebre and Hiram Howard; the terms and price, and other essentials of the contract, were entered into on the 12th July, 1836; and on that day two papers were prepared, and were then signed by him, and also signed by Sebre Howard; and deponent, as president of the company, expressly directed the secretary, Mr. Brobson, that the seal of the company was not to be fixed to either paper until Hiram Howard signed and sealed both of them. The two papers, respectively marked A and B, being shown to him, he stated that they are the two papers to which he refers; that the impression of the seal on said paper A is the seal of the Wilmington & Susquehannah Railroad Company, but that said seal was not placed there, he is very positive, at any time whilst he was president of said company, and was never placed there by his authority or by the authority of the board."

The defendant now insists he had a right to prove by this witness, that, although the paper bore the corporate seal of the company, it was not its deed,

because of an understanding between the witness and the plaintiff that Hiram Howard was to execute the paper. If the offer had been to prove that, at the time the corporate seal was affixed, it was agreed the instrument should not be the deed of the company, unless, or until, Hiram Howard should execute it, the evidence might have been admissible. *Pawling v. United States*, 4 Cranch, 219; *Derby Canal Co. v. Wilmot*, 9 East, 360; *Bell v. Ingestre*, 12 Ad. & Ell. (N. S.), 317. But the understanding, to which the question points, was prior to the sealing, and in no way connected with that act, of which the witness had no knowledge. It did not bear upon the question whether the instrument was the deed of the company, and was properly rejected.

§ 1600. *To enable a party to read the deposition of a deceased witness taken in a former cause, touching the same subject-matter, it is not necessary that the parties should be identical.*

The sixth exception rests on the following facts: The plaintiff offered to read the deposition of a deceased witness, taken by the defendants in the case in Cecil county court, to prove that the paper in question bore the seal of the corporation, placed there by the deponent, an officer of the corporation. The defendant objected, but the court admitted the evidence. We consider the evidence was admissible upon two grounds; to prove that in that case the defendant had asserted this instrument to be the deed of the corporation, and relied on it as such; and also, because the witness being dead, his deposition, regularly taken in a suit in which both the plaintiff and defendant were parties, touching the same subject-matter in issue in this case, was competent evidence on its trial. It is said the parties were not the same. But it is not necessary they should be identical, and they were the same, except that Hiram Howard was a co-plaintiff in the former suit, and this diversity does not render the evidence inadmissible. 1 Greenl. Ev., 553; 1 Ad. & Ell., 19.

§ 1601. *Where a party has not opportunity to show an estoppel by pleading, he may exhibit the matter thereof in evidence on the trial under any issue involving the fact, and both court and jury are bound thereby.*

The seventh and last bill of exceptions covers nine distinct propositions given by the court to the jury as instructions. The first of the instructions excepted to was as follows: "If the jury find from the evidence that this instrument of writing was produced in court, and relied upon by the present defendant as a contract under the seal of the Wilmington & Susquehannah Railroad Company, in an action of *assumpsit* brought by Sebre and Hiram Howard, against the last-mentioned company in Cecil county court, and that the said suit was decided against the plaintiffs upon the ground that this instrument was duly sealed by the said corporation as its deed, then the defendant cannot be permitted in this case to deny the validity of said sealing, because such a defense would impute to the present defendant itself a fraud upon the administration of justice in Cecil county court."

It is objected that this instruction applied the doctrine of estoppel, where the matter of the estoppel had not been relied on in pleading. The rules on this subject are well settled. If a party has opportunity to plead an estoppel, and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel, and commits the matter to the jury, who are to find the truth. 1 Saund., 325 a., n. 4; 2 B. & A., 668; 2 Bing., 377; 4 Bing. N. C., 748. But if he have not opportunity to show the estoppel by pleading, he may exhibit the matter thereof in evidence on the trial, under any issue which involves the fact, and both the court and the jury are bound thereby. 1 Salk., 276; 17

Mass., 369. Now the plea in this case was *non est factum*, which amounts to a denial that the instrument declared on was the defendant's deed at the time of action brought. If sealed and delivered, and subsequently altered or erased in a material part, or if the seal was torn off before action brought, the plea is supported. 5 Coke, 23, 119 b.; 11 Coke, 27, 28; Co. Lit., 35 b., n. 6, 7. It follows that a replication to the effect that on some day, long before action brought, the instrument was the deed of the defendant, would be bad on demurrer, for it would not completely answer the plea.

The plaintiff cannot be said to have opportunity to plead an estoppel, and voluntarily to omit to do so, when the previous pleadings are such that, if he did plead it, it would be demurrable. Besides, a plea of *non est factum* rightly concludes to the country, and so the plaintiff has no opportunity to reply specially any new matter of fact. He can only join the issue tendered, and if he were prevented from having the benefit of an estoppel, because he has not pleaded it, it would follow that the plaintiff can never have the benefit of an estoppel when the defendant pleads the general issue, for in no such case can he plead it. This was clearly pointed out in *Trevivan v. Lawrence*, 1 Salk., 276, where the court say, "that when the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel." And it is in this way that the numerous cases of estoppels *in pais* which are in the recent books of reports have almost always been presented.

§ 1602. *When a party is estopped by his statements.*

It is further objected that the facts supposed in the instruction did not amount in law to an estoppel. We think otherwise. *Hall v. White*, 3 Car. & P., 137, was detinue for certain deeds. The defendant wrote to the plaintiffs' attorney, and spoke of the deed as in his possession under such circumstances as ought to have led him to understand a suit would be brought upon the faith of what he said. Best, C. J., ruled: "If the defendant said he had the deeds, and thereby induced the plaintiffs to bring their action against him, I shall hold that they may recover, though the assertion was a fraud on his part." In *Doe v. Lambly*, 2 Esp., 635, the defendant had informed the plaintiffs' agent that his tenancy commenced at Lady-day, and the agent gave a notice to quit on that day. This not being heeded, ejectment was brought, and the tenant set up a holding from a different day. But Lord Kenyon refused to allow him to show that he was even mistaken in his admission, for he was concluded. *Mordecai v. Oliver*, 3 Hawks, 479; *Crockett v. Lasbrook*, 5 T. B. Mon., 530; *Trustees of Congregation, etc., v. Williams*, 9 Wend., 147, are to the same point. These decisions go much further than this case requires, because the defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil county court by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false; fraud in law, if he does not know it to be true. *Polhill v. Walter*, 3 Barn. & Ad., 114; *Lobdell v. Baker*, 1 Metc., 201.

§ 1603. — *assertions made in a court of justice.*

Certainly, it would not mitigate the fraud, if the false assertion were made in a court of justice and a meritorious suit defeated thereby. We are clearly of opinion that the defendant cannot be heard to say that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defend-

ant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form should sustain another on a like point.

§ 1604. *Where in a deed two are named as "the party of the first part" and only one seals the deed, he is the only "party of the first part," and may sue alone on the covenants therein without joining the other.*

The next instruction is objected to on the ground that Hiram Howard ought to have been joined as a co-plaintiff. By reference to the indenture, it will be seen that it purports to be made between Sebre Howard and Hiram Howard, of the first part, and the Wilmington & Susquehannah Railroad Company, of the second part. The covenants are not by or with these persons *nominatim*, but throughout the party of the one part covenants with the party of the other part. Sebre Howard alone and the corporation sealed the deed. It is settled that if one of two covenantees does not execute the instrument, he must join in the action, because whatever may be the beneficial interest of either, their legal interest is joint, and if each were to sue, the court could not know for which to give judgment. *Slingsby's Case*, 5 Coke, 18, b.; *Petrie v. Bury*, 3 Barn. & C., 353. And the rule has recently been carried so far as to hold, that where a joint covenantee had no beneficial interest, did not seal the deed and expressly disclaimed under seal, the other covenantee could not sue alone. *Wetherell v. Langston*, 1 Wels., H. & G., 634. But this rule has no application until it is ascertained that there is a joint covenantee, and this is to be determined in each case by examining the whole instrument. Look at this deed, it appears the covenant sued on was with "the party of the first part," and the inquiry with whom the covenant was made resolves itself into the question, what person or persons constituted "the party of the first part," at the moment when the deed took effect?

The descriptive words, in the premises of the deed, declare Sebre and Hiram Howard to be the party of the first part; but, inasmuch as Hiram did not seal the deed, he never in truth became a party to the instrument. He entered into no covenant contained in it. When, in the early part of the deed, the party of the first part covenants with the party of the second part to do the work, it is impossible to maintain that Hiram Howard is there embraced, under the words "party of the first part," as a covenantor. And when, in the next sentence, the party of the second part covenants with the party of the first part to pay for the work, it would be a most strained construction to hold that the same words do embrace him as a covenantee. There can be no sound reason for the construction that the words party of the first part mean one thing, when that party is to do something, and a different thing when that party is to receive compensation for doing it. The truth is, that the descriptive words are controlled by the decisive fact that Hiram did not seal the deed, and so *error demonstrationis* plainly appears. An examination of the numerous authorities cited by the counsel for the plaintiff in error will show that they are reconcilable with this interpretation of the covenants; for, in all the cases in which one of the persons named in the deed did not seal, he was covenanted with *nominatim*. Our conclusion is, that the action was rightly brought by Sebre Howard alone.

§ 1605. *Covenants are dependent or independent according to the intention of the parties, which is to be deduced from the whole instrument.*

The next instruction excepted to was as follows: "The omission of the plaintiff to finish the work within the times mentioned in the contract is not

a bar to his recovery for the price of the work he actually performed; but the defendant may set off any damage he sustained by the delay, if the delay arose from the default of the plaintiffs." The time fixed for the completion of the contract was the 1st day of November, 1836. The company agreed to pay twenty-six cents per cubic yard, in monthly payments, according to the measurement and valuation of the engineer. These monthly payments were made up to December, 1837; and when the contract was determined by the company, January 18, 1838, under a power to that effect in the instrument, which will be presently noticed, there remained due the price of the work done in December, and on eighteen days in January.

The question is, whether the covenant to pay was dependent on the covenant to finish the work by the 1st day of November. So far as respects each monthly instalment, earned before breach of the covenant to finish the work on the 1st day of November, it is clear the covenants were independent. Or, to state it more accurately, the covenant to pay at the end of each month for the work done during that month was dependent on the progress of the work so far as respected the amount to be paid; but was not dependent on the covenant to finish the work by a day certain. The only doubt is, whether, after the breach of this last mentioned covenant, the defendants were bound to pay for work done after that time. There is an apparent, and perhaps some real, conflict in the decisions of different courts on this point. 2 Johns., 272, 387; 10 id., 203; 2 H. Bl., 380; 8 Mass., 80; 15 id., 503; 5 Gill & J., 254. We do not deem it needful to review the numerous authorities, because we hold the general principle to be clear, that covenants are to be considered dependent or independent, according to the intention of the parties, which is to be deduced from the whole instrument; and in this case we find no difficulty in arriving at the conclusion that the covenants were throughout independent. There are, in this instrument, no terms which import a condition, or expressly make one of these covenants in any particular dependent on the other. There is no necessary dependency between them, as the pay for work done may be made though the work be done after the day. The failure to perform on the day does not go to the whole consideration of the contract, and there is no natural connection between the amount to be paid for work after the day, and the injury or loss inflicted by a failure to perform on the day. Still, it would have been competent for the parties to agree that the contractor should not receive the monthly instalment due in November, if the work should not be then finished, and that he should receive nothing for work done after that time.

But we find no such agreement. On the contrary, the covenant to pay for what shall have been done during each preceding month is absolute and unlimited, and the parties have provided a mode of securing the performance of the work and the indemnification of the company from loss, wholly different from making these covenants in any particular dependent on each other. They have agreed, as will be presently more fully stated, that the company may declare a forfeiture of the contract in case the work should not proceed to their satisfaction, and may retain fifteen per cent. of each payment to secure themselves from loss. Without undertaking to apply to this particular case any fixed technical rule, like that held in *Terry v. Duntze*, 2 H. Bl., 389, we hold it was not the intention of these parties, as shown by this instrument, to make the payment of any instalment dependent on the covenant to finish the work by the 1st day of November; and that consequently the instruction given at the trial was correct.

§ 1606. *Declaring a contract forfeited under a power reserved therein to the party affects only the work still to be done thereunder, but does not deprive the contractor of compensation for the work already done.*

The sixth instruction, which is also excepted to, must be read in connection with the fifth and the provision of the contract to which they refer. The contract contains the following clause: "Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then, and in such case, he shall be authorized to declare this contract forfeited, and thereupon the same shall become null, and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to or question the same in any place, under any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part for the damages occasioned by the said non-compliance, irregularity or negligence."

The instructions thereon were: 5. "If the defendants annulled this contract, as stated in the testimony, under the belief that the plaintiff was not prosecuting the work with proper diligence, and for the reasons assigned in the resolution of the board, they are not liable for any damage the plaintiff may have sustained thereby, even although he was in no default, and the company acted in this respect under a mistaken opinion as to his conduct. 6. But this annulling did not deprive him of any rights vested in him at that time, or make the covenant void *ab initio*, so as to deprive him of a remedy upon it for any money then due him for his work, or any damages he had then already sustained."

The law leans strongly against forfeiture, and it is incumbent on the party who seeks to enforce one to show plainly his right to it. The language used in this contract is susceptible of two meanings. One is the literal meaning, for which the plaintiff in error contends, that the declaration of the company annulled the contract, destroying all rights which had become vested under it, so that if there was one of the monthly payments in arrear and justly due from the company to the contractor, and as to which the company was in default, yet it could not be recovered, because every obligation arising out of the contract was at an end. Another interpretation is that the contract, so far as it remained executory on the part of the contractor, and all obligations of the company dependent on the future execution by him of any part of the contract, might be annulled. We cannot hesitate to fix on the latter as the true interpretation.

In the first place, the intent to have the obligation of the contractor, to respond for damages, continue, is clear. In the next place, though the contractor expressly releases all right to except to the forfeiture, he does not release any right already vested under the contract, by reason of its part performance, and *expressio unius exclusio alterius*. And finally, it is highly improbable that the parties could have intended to put it in the power of the company to exempt itself from paying money, honestly earned and justly due, by its own act declaring a forfeiture. The counsel for the plaintiff in error seemed to feel the pressure of this difficulty, and not to be willing to maintain that vested rights were absolutely destroyed by the act of the company; and he suggested that though the covenant were destroyed, *assumpsit* might lie upon an implied promise. But if the intention of the parties was to put an end to all obliga-

tion on the part of the company arising from the covenant, there would remain nothing from which a promise could be implied; and if this was not their intention, then we come back to the very interpretation against which he contended; for if the obligation arising from the covenant remains, the covenant is not destroyed. We hold the instruction of the court on this point to have been correct.

The next instruction excepted to was in these words: "The increased work occasioned by changing the width of the road and altering the grade having been directed by the engineer of the company under its authority, was done under this covenant and within its stipulations, and may be recovered in this action without resorting to an action of *assumpsit*."

The covenant of the plaintiff was "to do, execute and perform the work and labor in the said schedule mentioned." And the schedule mentions "all the grading of that part of section 9, etc., according to the directions of the engineer," etc. We think this instruction was correct. The plaintiff in error insists that the covenant was to do the grading precisely as shown by a profile made before the contract was entered into. If this were so, the company would have been disabled from making any change either of width or grade, without the consent of the defendant. We do not think this was the meaning of the contract, and both the company and the contractor having acted on a different interpretation of it, the company must now pay for the increased work of which they have had the benefit.

The ninth instruction was as follows: 9. "Also, if from any cause, without the fault of the plaintiff, the earth excavated could not be used in the filling up and embankments on the road and at the river, it was the duty of the defendant to furnish a place to waste it. And if the company refused, on the application of the plaintiff, to provide a convenient place for that purpose, he is entitled to recover such damages as he sustained by the refusal, if he sustained any; and he is also entitled to recover any damage he may have sustained by the delay of his work or the increase of his expense in performing it, occasioned [by] the negligence, acts or default of the defendant."

To this the plaintiff in error objects, "that it assumes that the company was bound to provide a place on which to waste the earth." The contract says the contractor is to place earth, not wanted for embankment, "where ordered by the engineer." He can rightfully place it nowhere until ordered by the engineer; and if such an order was refused or delayed, and the contractor was thereby injured, he had a clear right to damages. It cannot be supposed such an order was to be given or obeyed, if obedience to it would be a trespass. Before giving it the company was bound to make it a lawful order, the execution of which would not subject the parties to damages for a wrong, and therefore was bound to provide a place, and, of course, a reasonably convenient place, as well as seasonably to give the order.

§ 1607. *Where in a contract it is stipulated that a party may retain fifteen per cent. of the monthly payments "to indemnify and protect him," etc., it cannot be retained as a forfeiture.*

The plaintiff in error also excepted to the tenth instruction, which must be taken together with the clause of the contract to which it relates, to be intelligible. The contract contains the following provision: "And provided, also, that in order to secure the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this con-

tract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the money at any time due to the said party of the first part; thus covenanted and agreed by the said parties, this 12th day of July, 1836, as witness their seals."

The instruction was: 10. "Also, the plaintiff is entitled to recover the fifteen per cent. retained by the company, unless the jury find that the company has sustained damage by the default, negligence or misconduct of the plaintiff. And if such damage has been sustained, but not to the amount of fifteen per cent., then the plaintiff is entitled to recover the balance, after deducting the amount of damage sustained by the company."

It is argued that here is a stipulation that the fifteen per cent. may be retained by the company until the completion of the contract by the defendant; that it never was completed by him, and so the time of payment had not arrived when this action was brought. Now, it is manifest that one of the events contemplated in this cause was a forfeiture, such as actually took place; that in that event the contract never would be completed by the defendant, and so its completion could not with any propriety be fixed on as to the limit of time during which the company might retain the money, unless it was the intention of the parties that the fifteen per cent. so retained should belong absolutely to the company in case of a forfeiture of the contract. But the parties have not only failed to provide for such forfeiture of the fifteen per cent., but have plainly declared a different purpose. Their language is, that this money is retained "to indemnify and protect the party of the second part from loss, in case of default and forfeiture of this contract."

There is a wide difference, both in fact and in law, between indemnity and forfeiture; yet it is the former and not the latter which the parties had in view. Whether an express stipulation for a forfeiture of this fifteen per cent. could have been enforced, it is not necessary to decide. But when the parties have shown an intent to provide a fund for indemnity merely, the legal as well as the just result is, that after indemnity is made and the sole purpose of the fund fully executed, the residue of it shall go to the person to whom it equitably belongs. Rightly construed, the words, "until the completion of the contract," refer to the time during which all monthly payments were to be made, and give the right to retain the fifteen per cent. out of each and every payment, rather than fix an absolute limit of time during which these sums might be retained. In neither event, contemplated by this clause, would this limit of time be strictly proper. If a forfeiture of the contract took place, it was manifestly inapplicable; and if no forfeiture did take place, but damage were suffered by the company, from default of the contractor, equal to the fifteen per cent., it cannot be supposed their right to retain was to cease with the completion of the contract. This objection, therefore, must be overruled.

The plaintiff in error also excepts to the twelfth instruction. We do not deem it needful to determine whether there was evidence to go to the jury that the company did not use reasonable diligence to obtain a dissolution of the injunction, because we consider so much of the instruction as relates to this subject to be a proper qualification of the absolute and peremptory bar, asserted in the first part of the instruction; and if the company desired to raise any question concerning the proper tribunal to decide on the matter of diligence, or respecting the evidence competent to justify a finding thereon, some prayer for particular instructions respecting these points should have been preferred. But we con-

sider there was some evidence bearing on this question of diligence, and that it was for the jury and not the court to pass thereon.

§ 1608. *Measure of damages where a party is prevented from completing his contract. Probable profits.*

Two objections are made to the thirteenth instruction. The first is, that this instruction assumed the existence of evidence, competent to go to the jury, to prove that the defendants fraudulently terminated the contract under the clause which enabled them to declare it forfeited. To this objection it is a conclusive answer that the defendants themselves prayed for an instruction substantially like that given. The other objection is, that the jury were instructed to allow, by way of damages, such profit as they might find the plaintiff had been deprived of by the termination of the contract by the defendants, if they should find the act of termination to be fraudulent. It is insisted that only actual damages, and not profits, were in that event to be inquired into and allowed by the jury. It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are to be allowed, understanding, as we must, the term profits in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam*.

And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital and assumes the risks which attend the enterprise. And to deprive him of it, when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost. See *Masterton v. Mayor of Brooklyn*, 7 Hill, 61, and cases there referred to. We hold it to be a clear rule, that the gain or profit of which the contractor was deprived, by the refusal of the company to allow him to proceed with and complete the work, was a proper subject of damages.

We have considered all the exceptions; we find no one tenable, and the judgment of the court below is affirmed, with costs.

LYON v. POLLARD.

(20 Wallace, 408-407. 1874.)

ERROR to the Supreme Court for the District of Columbia.

STATEMENT OF FACTS.—Mrs. Pollard was engaged to manage a hotel, the contract being that either party might terminate the connection upon giving thirty days' notice. The notice was given by Lyon on the 11th day of July, 1870, and, on the 19th September, 1870, another notice was given that the time limited had expired. Mrs. Pollard was dismissed on October 4, 1870. There was testimony tending to show that the first notice was withdrawn. Mrs. Pollard sued for damages. Defendant offered to prove that she was of unsound mind and addicted to the use of opiates. Judgment for plaintiff.

Opinion by MR. JUSTICE MILLER.

The offers as to the use of opiates and the unsound mental condition are the subjects of the first bills of exception.

§ 1609. *When an employee has become wholly unfit to perform the duties which he engaged to perform, the employer may terminate the engagement, even without giving the stipulated notice.*

We do not agree with counsel that, for the insanity of plaintiff or her mental incapacity to perform her part of the contract, whether from natural infirmities or from the use of opium, the only remedy of the defendant is an action against her on the contract. The plaintiff was employed to perform important and specific duties. Her compensation for this was to be one-fifth of the net proceeds of the business which she had agreed to superintend. If she rendered herself, or otherwise became, incapable of performing these duties, that of itself authorized defendant to rescind or terminate the contract. He was not bound to continue as the superintendent of a large hotel a person who was a lunatic, or who was so stupid under the influence of narcotics that her presence was a danger and an injury, and who could render no reasonable service. The contract on her part implied such capability of performing the duties she had assumed, of rendering some service. If she could render none, defendant was not bound to continue it even for the thirty days which the termination of it by notice required. The court below erred in refusing to admit this evidence.

§ 1610. *Where a notice to terminate a contract is given and withdrawn, and later another notice is given that the time fixed by the first has expired, this last operates as a renewal of the first notice.*

The defendant offered evidence of a service of notice on the 11th July on plaintiff, under the contract, to terminate it. Also evidence of service of a notice on the 19th September of his intention to act on the first notice, and that the time had expired. Testimony was also given tending to show a waiver or withdrawal of the first notice. The plaintiff was dismissed about the 4th of October. On this testimony the court was asked by defendant to instruct the jury that, even if the notice of July 11th had been wholly withdrawn, the subsequent notice of September 19th was, in legal effect, a renewal of the former notice, and of itself operated to terminate the said contract at the expiration of thirty days from its date.

Assuming, as the bill of exceptions seems to show, that the date of the notice of September 19th was the date of its service on plaintiff, we think the court erred in refusing this prayer. The only object or purpose of any notice in the case was to apprise the party on whom it was served that the other party intended to terminate the contract. The contract itself fixed the time when this should take place, namely, thirty days after the service. The fact that the notice refers to a past notice, and speaks of the termination of the contract as being already accomplished, does not destroy its effect as a notice of present intent to put an end to the arrangement. This notice of intent the contract makes effectual at the end of thirty days, and so the court was asked to instruct the jury. In declining to do this the court left the jury to infer that it had no effect whatever.

It is probable that if the first notice was wholly waived or abandoned, the defendant had no right to dismiss the plaintiff until the 19th day of October. But even in reference to damages defendant had a right to show that under the contract and the notice she had only fifteen days to remain, and was injured only to that extent.

Judgment reversed.

HANSBROUGH v. PECK.

(5. Wallace, 497-509. 1866.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—Hansbrough and Hardin, in 1857, bought of Peck certain real estate located in the city of Chicago. The terms of the contract, in reference to forfeiture, etc., on default in payment, are stated in the opinion. The purchasers went into possession, and made payments to a large amount, and also expended large sums in improvements. After a time they made default, and in 1861 the vendor filed a bill in the state court to prevent the threatened removal of the buildings, and for possession of the property. The decree was in accordance with the object of the bill, and declared, also, that the premises should be discharged from all incumbrances on account of the contract of sale. The purchasers then filed this suit to recover back the money paid on the contract, and for the value of the improvements. The bill was dismissed on demurrer.

Opinion by MR. JUSTICE NELSON.

It will be seen from the facts in this case that the plaintiffs were in default on account of the non-payment of the interest for more than a year, and also that the principal fell due a few days after the filing of the bill in chancery in the state court, on account of this default in the payments. The contract was a very stringent one. Time was, in terms, made the essence of it, in respect to the payments; and, further, in case of a default in any one payment, for thirty days, the agreement was to be null and void, and no longer binding, at the option of the vendor, and all payments that had been made were to be forfeited to him; and also in case of default in any of the payments it was agreed that the contract, at the election of the vendor, was to be at an end, and the purchasers deemed to be in possession as tenants at will, liable for a rent equal to the amount of interest of the purchase money.

The decree in chancery in the state court is relied on as having rescinded the contract at the instance of the defendant, by reason of which the plaintiffs have become entitled to recover back the purchase money paid, together with the value of the improvements. The position is, that there is no longer a subsisting contract, as an end has been put to it by the vendor, and he has in consequence resumed the possession, and claims to hold the estate the same as if no contract had ever existed, and that in such case the purchaser, upon settled principles of law and equity, is at liberty to recover back the consideration paid and the value of the improvements. But the difficulty is, that the vendor has only availed himself of a provision of the contract, which entitled him to proceed in a court of chancery, by reason of the default of the purchaser in making his payments, to put an end to it and be restored to the possession. It is a proceeding in affirmance, not in rescission of it, by enforcing a remedy expressly reserved in it. Indeed, without such clause or reservation, the remedy would have been equally available to him. It is a right growing out of the default of the purchaser, as the law will not permit him both to withhold the purchase money and keep possession and enjoy the rents and profits of the estate; nor will it subject the vendor to the return of the purchase money if he is obliged to go into a court of equity to be restored to the possession.

In case of a default in the payments there are several remedies open to the vendor. He may sue on the contract and recover judgment for the purchase money, and take out execution against the property of the defendant, and,

among other property, the lands sold; or he may bring ejectment, and recover back the possession; but in that case, the purchaser, by going into a court of equity within a reasonable time and offering payment of the purchase money, together with costs, is entitled to a performance of the contract; or the vendor may go in the first instance into a court of equity, as in the present case, and call on the purchaser to come forward and pay the money due, or be forever thereafter foreclosed from setting up any claim against the estate. In these contracts for the sale of real estate the vendor holds the legal title as a security for the payment of the purchase money, and in case of a persistent default, his better remedy, and, under some circumstances, his only safe remedy is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. The court will usually give him a day, if he desires it, to raise the money, longer or shorter, depending on the particular circumstances of the case, and to perform his part of the agreement.

§ 1611. *A party cannot recover back money advanced when he refuses to complete his contract, if the other party is willing to perform.*

This mode of selling real estate in the United States is a very common and favorite one, and the principles governing the contract, both in law and equity, are more fully and perfectly settled than in England or any other country. The books of reports are full of cases arising out of it, and every phase of the litigation repeatedly considered and adjudged. And no rule in respect to the contract is better settled than this: That the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done. *Green v. Green*, 9 Cow., 46; *Ketchum v. Evertson*, 13 Johns., 364, *Spencer, J.*; *Leonard v. Morgan*, 6 Gray, 412; *Haynes v. Hart*, 42 Barb., 58. The same doctrine has been repeatedly applied by the courts of Illinois, the state in which this case arose. *Chrisman v. Miller*, 21 Ill., 236, and other cases referred to in the argument. This principle would of itself have defeated the plaintiffs in this suit, independently of the decree foreclosing their equity in the contract.

§ 1612. *The Illinois usury law in force in 1857 did not invalidate usurious contracts, but merely fixed a penalty for usury.*

It appears in the case that the parties agreed upon the rate of ten per cent. interest for the forbearance of the purchase money unpaid, when, at the time, as is admitted, it was only six per centum. But this law did not invalidate the contract. It authorized the party to recover of the party taking usury three-fold the amount above the legal rate, at any time within two years after the right of action accrued. This bill was filed the 23d August, 1862. The last payment of interest was made 31st January, 1860. More than two years, therefore, had elapsed before the suit was brought. We should add, it is not admitted by the defendant that this arrangement had the effect to make the contract usurious; and would not according to the case of *Beete v. Bidgood*, 7 Barn. & Cress., 453, if the excess of interest stipulated for was in fact a part of the purchase money.

§ 1613. *A contract not in writing, and without consideration, cannot be set up as a rescission of a written contract.*

After the default of the purchasers, and when they were disposed to surrender the contract, the vendor proposed to them, if they would abandon the idea,

and pay up the taxes in arrears and interest that had accrued, he would indulge them, and to that end, and until a revival of business in Chicago, he would be satisfied with the net income from the property over and above the taxes and insurance; and it is averred that they agreed to the propositions and paid the taxes and interest, but that the vendor declined to carry out the agreement and enforced the contract, though there had not been any considerable increase of income from the property or revival of trade and business in Chicago. This provisional arrangement is very loosely stated in the bill, but is, of course, admitted by the demurrer. It admits the revival of business, to some extent, before the enforcement of the contract. There is great difficulty, however, in determining the extent of increase contemplated by the arrangement from the statement in the bill. It was entered into in November, 1859, and this suit was not instituted till August, 1862, some two years and nine months afterwards. But the true answer to this part of the case is, that the arrangement was not in writing, nor any consideration passing between the parties that could give validity to it. The promise by the purchasers was but in affirmation of what they were bound to perform by their written agreement, and all that was done was but in fulfillment of it.

We have thus gone carefully over the case as presented, and considered every ground set up on the part of the plaintiffs for the relief prayed for; but, with every disposition to temper the sternness of the law as applicable to them, we are compelled to say that, according to the settled principles both of law and equity, a case for relief has not been established. The truth of the case is, that these plaintiffs improvidently entered into a purchase beyond their means, and, doubtless, relied very much upon the rise of the value of the estate, and of the income, to meet the payments and expenditures laid out upon it. Their anticipations failed them, and a heavy debt was the consequence, beyond their ability to meet. Of the \$93,000 purchase money, they have paid only \$10,000. Of interest, some \$28,000. They expended for improvements \$18,000. There still remained due against them \$83,000 purchase money and over \$20,000 interest, at the time the vendor went into possession. The plaintiffs themselves had been in the possession and enjoyment of the premises for a period exceeding that for which the interest on the purchase money had been paid, which, at least, must be regarded as an equivalent for the money thus paid.

Decree affirmed.

§ 1614. *Option to affirm or rescind.*—It is competent for a party, upon discovering a breach of a contract, to rescind it; but he may, at his option, affirm the contract and sue for damages. *Cheongwo v. Jones*, * 3 Wash., 359.

§ 1615. *Rule as to rescission and giving damages.*—In rescinding a contract courts should go as far as they can *pro tanto*, and give proportionate damages for the residue. *Warner v. Daniels*, 1 Woodb. & M., 113.

§ 1616. *Liability for voluntary rescission.*—One party to a contract cannot rescind it of his own mere will without responsibility for the damages the other contracting party may suffer thereby. *Gideon v. United States*, * Dev., 56 (170).

§ 1617. *Must be in the way provided.*—Where a contract provides that it shall be annulled in a certain way, it must be annulled in that way and in no other. *McKay v. Carrington*, 1 McL., 54.

§ 1618. *Rescission for fraud or mistake must be made at once.*—Where a party desires to rescind a contract on the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred. He will not be permitted to play fast and loose. His rights will be forfeited by his delay, especially where the property is speculative in value and liable to great fluctuations. *Grymes v. Sanders*, 3 Otto, 63.

§ 1619. **Inadequacy of consideration and fraud.**—A county becoming entitled to certain swamp lands given by the United States to the state in trust, was informed by S., its agent at Washington, that its claim was rejected by the department of the interior, and that its claim was probably hopeless. Under this impression the question of selling its rights to a certain company was submitted by the supervisors to the vote of the county, and it was voted to sell to the company. The price which the county was to receive was \$500, to be paid in any improvement which the county should designate. In making the sale the voters and the county officers acted in ignorance of the value of the property conveyed, but the officers of the company were well informed, and made no disclosures. After the transfer S. became the agent of the company, procured a reversal of the ruling of the department, and secured \$981 in cash, several hundred acres of land and six thousand acres of land in scrip. Not making the stipulated improvements, the county filed a bill against the company to annul the contract. *Held*, that as the land was a trust fund, the company, in dealing with it, should have acted in the utmost good faith; that as the contract provided for its diversion, was for an inadequate consideration, and was in fraud of the rights of the public, it should be annulled. *Emigrant Co. v. County of Wright*, 7 Otto, 340.

§ 1620. **Whether certain negotiations amounted to a rescission of a policy.**—The owner of a ship and cargo, which was blockaded in a foreign port by hostile cruisers, inquired of the insurer if they would cancel the policy if the consent of the foreign government could be obtained. The insurance company, after some further negotiations, replied that they would cancel the policy on the merchandise, and requested the insured to forward the policy for cancellation. The note thus assenting was entirely without a signature. Before it was received by the insured he had notice that the ship had sailed and had been captured, and therefore insisted on his policy. *Held*, that the negotiations in this case were preparatory to an agreement, but were not the agreement itself, and that as the assent of the company was not conveyed in a form in which the company could act under its charter, there was no rescission of the policy, and that the company was liable. *Head v. Providence Ins. Co.*, 2 Cr., 168.

§ 1621. **Where specific performance is more appropriate.**—Where a city agreed with its creditor to set apart a certain portion of the taxes levied and collected for a certain year for the payment of the judgments held by him, and failed to keep its contract, such failure, there being no fraud on the part of the city in making the agreement, was held to furnish no ground for setting aside the contract altogether, specific performance, by decreeing that the city should set apart taxes theretofore or thereafter collected, for the payment of the balance of the judgments, being more appropriate. *Loudon v. Taxing District*,* 14 Otto, 771.

§ 1622. **Amending of the contract by the court instead.**—A mortgagor by falsely representing the value and status of the security obtained an agreement from the mortgagee that if he would pay him one-half the face of the mortgage in cash and give a satisfactory mortgage securing the other half, he would throw off the interest and cancel the mortgage. The money was paid and retained by the mortgagee and the mortgage tendered. In a suit to obtain performance of the contract which was refused by the mortgagee, it was held that though the contract was obtained by fraud and might for that reason have been rescinded, yet as a court of equity could so amend the contract as to make it conform to fair dealing and enter a decree that would be just and fair, it was not necessary for the mortgagee to have offered to return the money received, and that the court would therefore enter a decree in favor of the mortgagor conditioned upon his paying to the mortgagee the interest agreed to be thrown off. *Elfelt v. Hart*,* 1 McC., 11.

§ 1623. **By payment of stipulated penalty.**—Where a penal sum is mentioned in a bill neither party has a right to pay such sum and put an end to the contract on his part. *Robinson v. Cathcart*, 2 Cr. C. C., 609.

§ 1624. **Revocation of agency.**—If the owner of land agree with an agent that he may sell it and retain as his compensation all he gets or it beyond a certain sum, the owner may withdraw and revoke the agency before the sale is completed, without liability to the agent, unless the owner is bound by a contract to ratify and accept a sale made by the agent at any time. *Stitt v. Huidekopers*,* 17 Wall., 834.

§ 1625. **By party at fault.**—The owner of a patent assigned it to a corporation on payment of a certain amount in cash and the issue of a certain number of shares of stock of the corporation. The contract exacted, on penalty of forfeiture, the use of due diligence on the part of the corporation to make the corporate scheme a success. On the other hand the granting party agreed to exercise reasonable diligence to promote the success of the enterprise, under the penalty of forfeiture of all right of reversion. The owner received more than the full value of his patent, was a large stockholder of the corporation, and caused the formation of the corporation—a speculative scheme—upon his own representations. It was through his failure to do what he promised to do that the scheme failed. *Held*, that he had no right of reverter, forfeiture or rescission. *Buckley v. Sawyer Manuf'g Co.*,* 2 McC., 850.

§ 1626. A notice of rescission may be given lawfully on Sunday. *Pence v. Langdon*, 9 Otto, 579 (§§ 752-755).

§ 1627. When cancellation does not destroy the contract.—A cancellation of a sealed instrument does not *per se* operate as a destruction of its legal validity. If canceled by mistake, accident or fraud, against the intention and without the co-operation of the obligee, it is still good. *Johnson v. United States*, 5 Mason, 439.

§ 1628. The cancellation of a bond does not *per se* destroy its validity. If the cancellation has been by fraud or mistake, the instrument may be declared and recovered on as a valid subsisting obligation. *United States v. Williams*, 1 Ware, 182.

§ 1629. Revival of rescinded contract.—Where one contract is rescinded and another is substituted in its place, and that is afterwards rescinded, the former contract is not revived unless by express words or by necessary implication. *Oakley v. Ballard*, Hemp., 477.

§ 1630. Burden of proof—Reasons must be sufficient.—Where contracts are in writing and perfectly fair upon their face, and are given for a full money consideration, without any pretense of fraud or unfair dealing, the burden of making a clear case for setting them aside is upon the complainant. Contracts so deliberately entered into, upon adequate consideration, without fraud, should not be set aside for light or transient reasons, or on mere suspicion of being contrary to law. *Clark v. Foss*, 17 N. B. R., 269.

§ 1631. Mistake as to construction.—A contract will not be set aside because of a mutual mistake of the parties thereto as to its construction. *Chesapeake & Ohio Canal Co. v. Dulany*, 4 Cr. C. C., 85.

§ 1632. On refusal of the other party to perform.—The consignee of a cargo sold the same and delivered the bill of lading to a person who agreed to give his note or pay cash therefor. The purchaser refused to receive the cargo except on terms he had no right to impose, and failed to make the payment or deliver the note as agreed. *Held*, that the consignee had a right to rescind the sale and receive the cargo. *The Schooner Treasurer*, 1 Spr., 474.

§ 1633. A contract between a county and an emigrant company provided that the company should pay a certain sum and make certain improvements, introduce certain settlers, and pay a certain claim against the county arising out of the lands. Not performing these acts, a suit was brought by the county to rescind the contract. *Held*, that these agreements on the part of the company were mere agreements, resting in covenant merely, and that though their breach furnished a good cause of action, yet it was no ground for the rescission of the contract. *Emigrant Co. v. County of Adams*, 10 Otto, 70.

§ 1634. Article sold must be returned.—To authorize the rescission of a contract for the sale of chattels they must be returned unless they are worthless to both parties. *Christy v. Cummins*, 3 McL., 386.

§ 1635. In order to disaffirm a contract of sale for fraud, the vendee must return the property or offer to return it. *Henckley v. Hendrickson*, 5 McL., 171.

§ 1636. A party who desires to rescind a sale on the ground of fraud must offer to return the thing purchased, whether it be real estate or personalty. *Murphy v. McVicker*, 4 McL., 252.

§ 1637. — law of Louisiana.—If a purchaser of chattels desires to rescind the contract on account of what are known in Louisiana as redhibitory defects, he must offer to return the property within a reasonable time, though the statute of that state gives him one year within which to bring an action to rescind the sale. *Andrews v. Hensler*, 6 Wall., 258.

§ 1638. By the law of Louisiana if one party wishes to rescind a contract on account of the failure of the other party to perform his part, the first party must return to the other whatever has been received under the contract. *Gay v. Alter*, * 12 Otto, 79.

§ 1639. Agreement to rescind—Return of the goods sold.—Where a sale of goods has been made, and an agreement has been entered into to rescind it, the sale remains valid till the property is received back. To constitute an actual rescission of the contract there must be a redelivery of the goods. Until this is done the agreement to rescind is *in fieri*. *Miller v. Smith*, 1 Mason, 487.

§ 1640. Securities exchanged must be returned.—After a contract which, among other things, provided for an exchange of securities has been executed by the actual delivery of such securities, one party cannot rescind the contract without offering to deliver up the securities received. *Farmers' Bank of Virginia v. Groves*, 12 How., 53.

§ 1641. Where the contract is illegal and is only partially executed and there is a locus penitentiae.—A corporation, in contravention of the statute under which it was organized, arranged to issue an increase of stock. K. subscribed to certain shares and paid a part of the purchase price. By the terms of his subscription, if he failed to pay for his shares as called for, he was to forfeit all he had paid. Having made such failure, the corporation declared the subscription forfeited. Afterwards the scheme for increasing the stock was abandoned. K. sued for the money he had paid. *Held*, that as the contract was illegal and was only par-

tially performed, there was a *locus pœnitentiæ*, and that he was entitled to rescind the contract. *Knowlton v. Congress & Empire Spring Co.*, 14 Blatch., 384.

§ 1642. Contract with agent to prosecute a claim.—Subsequent prosecution of it by agents of the government.—Abandonment.—A person having a claim for the value of slaves freed by British authorities contracted in general terms with three persons living in Washington that they should prosecute his claim, and should receive therefor one-half of the sum recovered, and that, if they should not recover, they should have nothing. Two years afterwards a treaty was entered into by which a commission was provided for to sit in London and decide on this among other claims. The commissioners gave the claimant a certain sum. In an action by the agents for their half of the amount recovered, it was held that the contract related only to the prosecution of the claim in Washington, and not before the commission in London; and that as, before the commission, each party was represented by the agents of the government, and it appeared that there had been a practical abandonment of the contract by the agents, it was held that there could be no recovery by the agents. *Pemberton v. Lockett*, 21 How., 263.

§ 1643. Cancellation in equity.—A court of equity as well as a court of law must act upon a contract as it is, but for sufficient reasons a court of equity may order it delivered up and canceled. *Brooks v. Stolley*, 8 McL., 528.

§ 1644. — on account of burdensomeness.—A contract will not be rescinded simply because it has proved more burdensome to one of the parties than was anticipated. Though the specific performance of a contract might be refused because it had become unconscionable, yet a contract will not be canceled for that reason. It is not the province of a court of equity to undo a bargain because it is hard. *Marble Co. v. Ripley*, 10 Wall., 835.

6. Waiver, Merger and Discharge.

SUMMARY.—Prior contract not extinguished by one under seal, § 1645.—Receipt of obligation of third party in satisfaction, § 1646.

§ 1645. An agreement under seal, in which one party agrees to forbear to sue and the other party agrees to make a settlement, does not operate of itself to extinguish a prior simple contract debt. *Baits v. Peters*, § 1647.

§ 1646. When a creditor receives in satisfaction of his debt the obligation of a third party, the debt is thereby discharged. *Underwriters' Wrecking Co. v. The Katie*, §§ 1648-49.

[NOTES.—See §§ 1650-1677.]

BAITS v. PETERS.

(9 Wheaton, 556, 537. 1824.)

ERROR to U. S. District Court, District of Alabama.

STATEMENT OF FACTS.—Plaintiff declared on an agreement on the part of defendants to account with him for goods delivered for sale on commission, and for money had and received. The defendants pleaded for their third plea an agreement under seal, made after the said promises and undertakings, by which it was alleged that plaintiff covenanted not to sue defendants within six months, and to send an agent within that time to settle accounts with defendants; also that defendants agreed to settle with the agent, and pay the balance found to be due. The court sustained a demurrer to this plea, and the opinion herein is on the sufficiency of the plea.

§ 1647. *A covenant under seal to make settlement does not extinguish a simple contract, when.*

Opinion by MARSHALL, C. J.

The agreement stated in the plea, although under seal, did not operate as an extinguishment of the simple contract debt. The agreement was but a collateral undertaking to come to a settlement within a limited period, which had elapsed before the commencement of the suit, and to pay the balance found due upon such settlement. There was no averment in the plea that any such settlement had been had under that agreement, and, consequently, the covenant to pay the balance did not appear to have attached upon the demand.

UNDERWRITERS' WRECKING COMPANY v. THE KATIE.

(Circuit Court for Louisiana: 8 Woods, 182-187. 1878.)

STATEMENT OF FACTS.—The steamer Katie was built at Louisville, Kentucky, by J. W. White, her owner. One Davis had a bill of \$50,000 against her for work done and materials furnished. He agreed with White to accept payment partly in cash and partly in drafts upon J. Pinckney Smith, of New Orleans, and he (Davis) received the money and drafts and accepted his bill in full. The drafts were not paid at maturity. The boat was afterwards sold by White to Owen, who substituted his drafts on Smith for those of White. The drafts were not paid. The boat was enrolled at New Orleans, which became her home port, before she was sold to Owen. In August, 1872, Owen executed a mortgage on the Katie, to secure a large number of debts contracted for her supplies, etc. She was libeled for salvage, and sold in 1873, and brought, after paying costs and admiralty liens, \$20,922.86. Davis intervened, setting up his lien, and the mortgage creditors set up their lien. The decision of the district court was in favor of the latter.

Opinion by Woods, J.

A consideration of the evidence in this case satisfies me that the debt due to Davis for his work done and materials furnished for the Katie was novated by the taking of the drafts of White on J. Pinckney Smith. The only parties to the contract for furnishing engine and boiler for the boat were J. M. White, her owner, and J. B. Davis. Davis was not examined, but White, who was, testified distinctly and repeatedly that the drafts drawn by him on J. Pinckney Smith were received by Davis in payment and settlement of the balance due Davis, and that their contract was that such balance was to be paid in that way. All the circumstances corroborate this view. Davis acknowledged payment of his account against White for labor and materials by receipting it in full. The drafts on Smith were all renewed at least once, and afterwards Davis received the drafts of Miles Owen on Smith in substitution for a large portion of the drafts of White. All these drafts were protested for non-payment, but no steps were taken to charge White, the drawer, and no claim of a lien upon the proceeds of the sale of the Katie was ever made by Davis until April 10, 1876, more than three years after her sale.

§ 1648. *Where a creditor receives in satisfaction a third person's draft, his debt is discharged.*

It is true that J. Pinckney Smith testifies that the debt due to Davis was not to be considered as paid until the drafts were paid. But the weight of the evidence is decidedly in favor of the proposition that the taking of the drafts by Davis was intended both by him and White to be a novation of the debt—that Davis intended that his account should be settled and paid by the drafts. When a creditor receives in satisfaction of his debt the note of or a draft upon a third person, it is a novation of the debt, which is thereby extinguished with all its accessory rights and privileges. *Hunt v. Boyd*, 2 La., 109; *Walton v. Bemiss*, 16 La., 140; *Cammack v. Griffin*, 2 La. Ann., 175; *White v. McDowell*, 4 La. Ann., 543; *Wallace v. Agry*, 4 Mason, 336; *Maneely v. McGee*, 6 Mass., 143; *Watkins v. Hill*, 8 Pick., 522. It follows, if my view of the facts is correct, that Davis has no lien against the proceeds of the sale of the Katie.

§ 1649. *A lien upon a vessel by the local law of one state is lost by her removal to another state as against subsequent creditors unless the law as to registration, etc., of the new home port be complied with.*

But, conceding that there was no novation of the debt and that Davis had a

lien by the law of Kentucky for the work and materials supplied by him in that state in the construction of the Katie, the question still remains whether that lien is to take rank in the distribution of the proceeds of the sale by this court, sitting in Louisiana and administering the laws of this state and of the United States, over a subsequent mortgage of the steamboat executed at this port, where the boat was registered, and enrolled and recorded according to the act of congress.

If Davis had any lien on the Katie, it was by virtue of the local law of the state of Kentucky. The *Lottawanna*, 21 Wall., 558; The *EJith*, 94 U. S., 519. Generally speaking, the courts of one country recognized the existence and validity of liens created by the law of foreign countries, but according to Mr. Justice Story this is not to be confounded with the giving them a superiority or priority over all other liens and rights justly acquired in the country where the court sits under its own laws. Conflict of Laws, sec. 323. In *Harrison v. Sterry*, 5 Cranch, 289, Chief Justice Marshall says: "The words of the act of congress which entitle the United States to a preference do not restrain that privilege to contracts made within the United States or with American citizens. To authorize this court to impose that limitation on them, there must be some principle in the nature of the case which requires it. The court can discern no such principle; the law of the place where a contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits, which is to decide the case."

Under the law of this state the debt of Davis has no lien upon the Katie, because here registration is necessary to the validity of a lien. In the case of *Lee v. His Creditors*, 2 La. Ann., 599, the supreme court of this state held that privileges established by the laws of another state for work and labor furnished for the construction of a steamboat form no part of the contract itself, and cannot follow the property into this state, when no such privilege exists here.

And in the later case of *Swasey v. The Montgomery*, 12 La. Ann., 800, the same court refused to recognize a lien upon a steamer given for tolls by the law of Alabama. Without going so far as these decisions, and denying Davis any lien whatever, I think it is clear that the lien granted to him by the local law of Kentucky should not in this forum be allowed to override a lien authorized by a law of the United States, and perfected according to that law, over property situate within the jurisdiction of this court. I should feel bound to respect his lien, but I should also feel bound to postpone it to the lien of the mortgage creditors, under the facts of this case. The result is that the proceeds of the sale must be first applied to the payment of the claims of the mortgagees, and as the proceeds will be largely insufficient to pay those claims the intervention of Davis must be dismissed.

§ 1650. Waiver of breach.—Breaches of conditions subsequent may be waived by the grantor, expressly or *in pais*. *Davis v. Gray*, 16 Wall., 232.

§ 1651. Where property on which work has been done by contract with the owner is taken possession of and retained and used by him, he is liable for the reasonable value of the work done, though the work was not strictly according to the provisions of the contract, and certain tests of the work had not been made as agreed. Taking the property into his possession and keeping and using it was an admission of liability, and an action could at once be commenced against him. *The Isaac Newton*, *Abb. Adm., 11.

§ 1652. The building of a saw-mill seventy-eight feet in width by one hundred in length is

not, as a conclusion of law, a substantial compliance with an agreement to build one fifty feet in width by one hundred and fifty in length, although the former may cost more, is of greater value, and better adapted to the purposes to be accomplished; and even though the contract attempted to be satisfied by such a building is that a mortgagee will surrender for cancellation a mortgage, and accept as security instead insurance policies, to a certain amount, upon the saw-mill when completed according to the dimensions stated. But if the mortgagee acquiesces in the departure from the plan and dimensions, and accepts the policies of insurance thereon, he waives all objections to the variation in the construction of the mill, and cannot, on account of such variation, refuse to cancel or surrender the mortgage. *Swain v. Seamens*, 9 Wall., 254 (§§ 1742-46).

§ 1653. A. contracted with B. for three thousand hogs to be delivered as required according to notice to be given. There was some failure to deliver the hogs as required by the contract, but A., without giving notice of the termination of the contract, demanded and received from B. a certain number of hogs, and then declined to receive any more. *Held*, that by demanding and receiving such hogs, A. had waived the breach of the contract, and was liable to B. for the difference between the contract price and the market price at the time of his refusal. *McNaughten v. Cassally*,* 4 McL., 530.

§ 1654. Waiver of forfeiture.—Where a contract to furnish materials by a certain time stipulates that if not so furnished the builder shall forfeit ten per cent., and the builder continues to furnish materials after the expiration of the time, the acquiescence of the other party will be construed to be a waiver of the forfeiture. *Lester v. United States*,* 1 Ct. Cl., 58.

§ 1655. Waiver of fraud.—If a party, with knowledge that a contract is affected by fraud, offers to perform it upon the performance of a condition he has no right to exact, such offer is a waiver of the fraud. *Blydenburgh v. Welsh*, Bald., 838.

§ 1656. Failure to object to account rendered.—In the case of a continuing contract objections to accounts made and rendered between the parties should be made at the time the accounts are rendered. It is too late after the contract is in suit. *Chapin v. Norton*,* 6 McL., 500.

§ 1657. Merger.—Where parties to one contract execute a second which differs from the first, they must be deemed to have voluntarily abandoned the first contract, and they cannot recover under the first when performing under the second. *Parish v. United States*,* 1 Ct. Cl., 806.

§ 1658. Where a new contract has been substituted for an old one, and then has been repudiated by the plaintiff, that fact forms a good defense in an action on the original contract. *Hitchcock v. City of Galveston*, 3 Woods, 293.

§ 1659. Where a new contract is made between the same parties and in relation to the same subject-matter, the old will not be merged in the new unless it be delivered up and canceled, or it seems unless they are wholly inconsistent with each other. *Avery v. Hackley*, 20 Wall., 411.

§ 1660. A simple contract debt is not extinguished by a later sealed instrument which merely recognizes the debt and provides a mode to ascertain its amount and liquidation. *Bank of Columbia v. Patterson*, 9 Cr., 299. Nor where such subsequent instrument is but a collateral undertaking to come to a settlement within a limited period, and pay the balance found due, where the period has elapsed before suit, and it is not alleged that such settlement has been made. *Baits v. Peters*, 9 Wheat., 556 (§ 1617).

§ 1661. An executed agreement is not extinguished by the mere recital of it in a later one, although the latter be under seal. *Bank of Columbia v. Patterson*, 7 Cranch, 203 (§§ 32-39).

§ 1662. After the execution of a chattel mortgage the parties entered into a new agreement by which, on his giving proper security, the mortgagor should receive back the goods and sell them, and apply the proceeds to the debt. In an action on such contract, it was held to be no defense to the action that the mortgage had been assigned to the security, and that the new agreement was a substitute for the mortgage, and that the creditor relied on the personal security of the debtor and the security rather than on the mortgage. *Harper v. Neff*, 6 McL., 891.

§ 1663. The agent of an insurance company entered into a bond to the company conditioned that he should faithfully perform his duties and faithfully pay over all moneys, etc., and which provided that it should continue in force during the continuance of the agreement as to commissions under which it was entered into, and during the continuance of any future agreement. Two years afterwards a new contract was entered into between the company and the agent, which provided for a different compensation, and which provided that it should abrogate all former contracts as far as new business was concerned. *Held*, that the bond was not abrogated by the new contract. *Boogher v. Insurance Co.*, 13 Otto, 93.

§ 1664. Discharge—By impossibility.—When the performance of a contract is rendered impossible by a fortuitous event, the parties are freed from its obligations. So where the

prosecution of a voyage has become impossible because of shipwreck, seamen and vessel are discharged from the obligation of the contract as to the prosecution of the voyage. *The Dawn*, Dav., 127.

§ 1665. An impossibility of performance which will release a party from the obligation of his contract must be a real impossibility and not a mere inconvenience. While such an impossibility may release the party from liability for non-performance, it does not so stand for performance as to enable the party to sue and recover as if he had performed, or to recover the prospective profits of his contract. *Smoot's Case*, 15 Wall., 46.

§ 1666. — by the admission of new partners.—A contract between a bank and a firm is terminated if new partners are admitted into the firm without the knowledge and consent of the bank. *National Bank v. Hall*, 11 Otto, 43 (§§ 11-14).

§ 1667. — by subsequently becoming illegal.—If a contract of insurance was lawful when it was made, and the performance of it is rendered illegal by a subsequent law, the parties are both discharged from its obligation. The insured loses his indemnity and the premium may be recovered back. *Gray v. Sims*, 8 Wash., 230.

§ 1668. — where the other party prevents a performance.—If the plaintiff is a consenting party to a proceeding which of itself puts it out of the power of the defendant to perform his contract, he cannot recover on it, for promisors will be discharged from all liability when the non-performance of their obligation is caused by the act or fault of the other contracting party. *Clearwater v. Meredith*, 1 Wall., 39.

§ 1669. A release without consideration.—A release by a person of his rights, under a contract which was entirely without consideration on his part, is a total abandonment of it, and this is true, though the release was without consideration. *Dorsey v. Puckwood*, 12 How., 138.

§ 1670. Where there is no compromise, a payment of a sum of money smaller than a debt does not discharge the larger amount. One party to a contract cannot, without the assent of the other, discharge a debt by the payment of a smaller sum than the amount due. *Baird v. United States*, * Dev., 41 (117).

§ 1671. A gift of what is due on a contract cannot be made to the person who owes it, otherwise than by a release under seal. If a part of a debt be paid, and the creditor gives a receipt expressing that the money is received in full of all demands, still it seems that the obligation to pay the balance will remain wholly unaffected, unless there be some additional consideration to discharge it. *Wood v. United States*, * Dev., 57 (175).

§ 1672. A written renunciation, not under seal, of a portion of the profits arising under a contract under seal, cannot operate as a release or defeasance. *Culbertson v. Stillinger*, Taney, 79.

§ 1673. Accommodation acceptor released by contract between maker and indorser.—Where the maker and indorser of a bill enter into an agreement by which the accommodation acceptor of the bill is relieved from liability, the fact that one party to such agreement has failed to perform is not available as against the acceptor to continue his liability. The acceptor is released by the agreement, and questions of non-performance must be settled between the parties to the contract. *Farmers' Bank of Virginia v. Groves*, 12 How., 53.

§ 1674. Agreement by third person to stand in place of one of two sureties.—A. and B. by an instrument under seal promised to become sureties for a sum due from C. to D. By an indorsement in writing on an instrument not under seal, P. promised to perform A.'s part of the engagement. *Held*, that this agreement, if between P. and D., did not discharge B., the other obligor, as P. was a stranger to the bond, and that if the agreement was between A. and D., then it could not release B., because it was only an agreement in parol, and as such could not release a writing under seal. *Garnett v. Macon*, 2 Marsh., 224.

§ 1675. Discharge of surety by modification of the contract.—Where the terms upon which a person is employed by another are substantially changed, the surety for the faithful performance of the original contract will be released if he did not assent to the modification. *Gass v. Stinson*, 2 Sumn., 439.

§ 1676. Where a release is given to one of two joint obligors the obligation is extinguished as to all, and although it is most apparent that such was not the intention of the obligee, yet equity will not relieve. *Willings v. Consequa*, Pet. C. C., 307.

§ 1677. A covenant not to sue one joint promisor or obligor is not a release even of that one, and a fortiori not of the others. *Tuthill v. Babcock*, 2 Woodb. & M., 302.

VII. ALTERATION OF CONTRACTS.

§ 1678. Alterations in bonds.—The tearing off of the seals of a bond by the obligor is not such an alteration as will avoid it. *Cutts v. United States*, 1 Gall., 71.

§ 1679. If the seal to a written instrument is torn off with the assent of the obligee, either by mistake or by fraud, or imposition practiced by the obligor, it may still be declared on as a bond, and the obligee can recover. *United States v. Spaulding*, 2 Mason, 483.

§ 1680. A bond forty years old appeared to have been altered by substituting Virginia for North Carolina, and the signature of the obligor seemed to have been scratched out and re-written. There being no proof that these alterations were made by the obligee, and no motive which would lead him to make them being apparent, and it appearing that they could not in any sense increase the obligation of the obligor, or increase the interest of the obligee, it was held that the alterations did not affect the validity of the bond. If the alterations had increased the sum to be paid, or the quantity of land to be conveyed, or had shortened the time within which the obligation was to be discharged, a motive might have been assigned for the alteration, and the part altered being material, it would have vitiated the bond. *Walton v. Coulson*, 1 McL., 122.

§ 1381. After a bond was given by consent of all parties, the name of one of the obligors was erased and another substituted. *Held*, that the alteration did not invalidate the bond. At common law an alteration or addition in a deed, as by adding a new obligor, or an erasure in the deed, as by adding a new obligor, if done with the consent and concurrence of all the parties to the deed, does not avoid it; and this is equally true whether the alteration or erasure be made in pursuance of an agreement and consent prior or subsequent to the execution of the deed. (*LIVINGSTON, J.*, dissented.) *Speake v. United States*, 9 Cr., 36.

§ 1682. It seems that if seals are subsequently affixed by the obligee to names signed to a bond, then such sealing is such an alteration that it renders the bond invalid, but that if the alteration is made by a stranger it is immaterial. *United States v. Linn*, 1 How., 110.

§ 1683. Alterations in a bond by changing the state of the obligor's residence, and erasing and writing in again the obligor's name, made subsequently to the death of the obligee, do not enlarge or affect the liabilities of the obligor, and are immaterial. Where such bond was for a time in the possession of parties holding adversely to the bond, it will be presumed that the alterations were made at that time. *Coulson v. Walton*, 9 Pet., 78.

§ 1684. An interlineation made in the bond of a collector after it was signed by the surety, by which certain additional duties were required of the collector, is such an alteration as discharges the bond not only as to the conditions inserted, but as to the conditions embraced in it at the time it was signed. The alteration renders the contract void. *Miller v. Stewart*, 4 Wash., 28.

§ 1685. Two persons signed their names as sureties to a printed form of a bond in which none of the blanks were filled and before it was signed by the principal. The bond was afterwards filled up, but without the express direction or assent of either of the sureties. *Held*, that as to the sureties the bond was void. *United States v. Nelson*, 2 Marsh., 69.

§ 1686. An alteration made in a bond by a clerk in the custom-house, who was a witness to it, by erasing one word and substituting another, which made the bond sensible and unambiguous, and which made it as it was intended to be by the parties, was held not to be material and not to avoid the bond. *United States v. Hatch*, 1 Paine, 342.

§ 1687. Alterations in commercial paper.—The alteration of a note, whereby the time of payment is extended, does not make the note void as against the maker. *Union Bank v. Cook*, 2 Cr. C. C., 218.

§ 1688. If a note is drawn payable in sixty days, and so indorsed is presented at a bank for discount and is there altered to forty-five days at the request of the bank, such alteration renders the note void as to all the parties not authorizing it, or ratifying it thereafter. *Bank of Washington v. Way*, 2 Cr. C. C., 250.

§ 1689. An alteration of a note by the erasure of the words indicating the place of payment is not a material alteration. The rights of the maker are enlarged thereby and in no way limited, and he has no right to complain. *Major v. Hansen*, 2 Biss., 196.

§ 1690. Where, after a note is made and delivered to the payee at a place in Pennsylvania, the words "Washington, D. C.," are added to the signature without the maker's knowledge and consent, for the purpose of using such words as a part of the date of the note for the purpose of making it negotiable according to the laws of such District, then such alteration is such a material alteration as makes the note void. *Commercial & Farmers' Bank v. Patterson*, 2 Cr. C. C., 343.

§ 1691. An alteration of the date of payment in any commercial paper is a material alteration, and if made without the consent of the party to be charged it extinguishes his liability.

ity. The law regards such security after it is altered as an entire forgery with respect to the party who has not consented, and so far as he is concerned it deals accordingly. *Wood v. Steele*, 6 Wall., 81.

§ 1692. Alteration in deeds.—The testimony of witnesses, that a deed has been altered by erasing the name of the grantee and inserting another, will not affect the validity of the deed when it appears from an inspection of the deed that there has been no such alteration, and that the witnesses are laboring under an obvious mistake of fact. *Tucker v. Ormes*,* 1 MacArth., 654.

§ 1693. While a deed is in force between parties both must resort to it to ascertain their rights, and cannot claim such rights from any inferior or different source. Any action to enforce the provisions of such deed must be upon the instrument itself. But where the terms of the contract as contained in the deed have been altered or modified by agreement of the parties, actions originally arising out of the deed may be varied in conformity with such new agreements. *Fresh v. Gilson*,* 16 Pet., 327.

§ 1694. A Mexican grant was altered while in the hands of the claimants, and though apparent on the face of the paper the alteration was unexplained. The supreme court refused to confirm the grant for this and other reasons. *United States v. Galbraith*, 23 How., 93.

§ 1695. Written contract altered by oral one.—When parties have reduced their contracts to writing, conversations controlling or changing their stipulations are, in the absence of fraud, no more received in a court of equity than in a court of law. *Willard v. Tayloe*, 8 Wall., 573.

§ 1696. A written contract sometimes may be varied by a subsequent oral agreement resting on a new consideration. *Emerson v. Slater*, 23 How., 29 (§§ 1783-90).

§ 1697. In trover for certain notes the defendant proved an oral agreement that he was to retain the notes as counter security, and it was held that the oral agreement controlled a written agreement to return the notes on demand. *McIntosh v. Summerr*,* 1 Cr. C. C., 41.

§ 1698. A written contract may be modified, and either enlarged or restricted by a subsequent valid parol agreement. But if such parol agreement enlarged the original contract, and extended it to matters not before embraced in it, then the rights of the parties in respect thereto arise under the parol contract and are determined by it. It is, in this event, a new contract, and it is a parol contract, though it may refer for part of its terms to another contract in writing of the same character existing between the parties; but such reference does not make the new contract a written contract, nor does it alter the meaning, force or operation of the written contract. *Hening v. United States Ins. Co.*, 2 Dill., 37.

§ 1699. Contract under seal varied by subsequent parol one.—Whatever the rule at law may once have been, it is now the rule in equity that the terms of a contract under seal may be varied by a subsequent parol agreement. *Canal Co. v. Ray*, 11 Otto, 523 (§ 1851).

§ 1700. Parol authority to alter a sealed instrument.—A parol authority is adequate to authorize an alteration or addition to a sealed instrument, or the filling of blanks left in it at the time of execution. *Drury v. Foster*, 2 Wall., 38.

§ 1701. Lease under seal varied by subsequent final settlement.—A lease under seal may be put an end to by a new agreement in relation to the same premises in the nature of a final settlement, which has received the sanction of a court of chancery and has been performed by the party who sets up the new agreement. *Scott v. Hawsman*, 2 McL., 181.

§ 1702. A material alteration of a written instrument renders it void. The agent of an insurance company negotiated a loan from it to B. B. forwarded a proper mortgage therefor, and by agreement was to receive in return the amount of the loan in drafts to his order. At the request of the agent, B. signed a printed order in blank, which read: "To — — —: Pay to — — —, — — — dollars, on account of — — —, in drafts to the order of — — —." The signature of B. was in the last blank, immediately after the printed word. The agent promised to fill out the blanks and obtain the money for him; but, in filling the blanks, he erased the words "in drafts to the order of," and wrote instead, "in current funds." The agent drew the money and absconded. *Held*, that the alteration by the agent vitiated the order, and that the loss must fall on the company. *Angle v. Northwestern Mutual Life Ins. Co.*, 2 Otto, 335.

§ 1703. Alteration discharges surety.—A surety cannot, either at law or in equity, be bound further than he is by the very terms of his contract; and, if the parties to the original contract think proper to change its terms without the consent of the surety, he is discharged. *Miller v. Stewart*, 4 Wash., 28.

§ 1704. Alterations in a contract excuse a guarantor, unless made with his consent. So where E. guaranteed the credit of R. in a contract between him and D., and these two subsequently altered the mode of payment under the contract, without consent of E., it was held that E. was excused from liability as guarantor. *Edmondston v. Drake*, 5 Pet., 624 (§§ 217-220).

§ 1705. **Party producing instrument must account for alterations.**—It seems that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent on inspection or made so by extraneous evidence, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration. *Smith v. United States*, 2 Wall., 232.

§ 1706. — **presumption.**—Where an alteration is apparent in a contract it is incumbent upon the party setting up the contract to account for and explain the alteration, and not having explained it, it must be presumed that the alteration was made after the execution of the contract. *The Cypress, Bl. & How.*, 87.

§ 1707. **Presumption as to interlineations and erasures.**—Where a material erasure and interlineation are found in a deed or in a settled account, the presumption is that it was made after execution, and is sufficient to avoid the deed upon a plea of *non est factum*. *Prevost v. Gratz*, Pet. C. C., 360.

§ 1708. If an interlineation in a contract is in itself suspicious, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words, or if it is in a handwriting different from the body of the instrument, or it appears to have been written in a different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the usual handwriting with the original instrument, bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith and before execution. *Cox v. Palmer*, 1 McC., 434.

§ 1709. **The fact of alteration for the jury—Materiality for the court.**—The question whether or not an alteration has been made in a written contract is one of fact for the jury. The question whether or not an alteration is material is a question of law for the court. *Steele v. Spencer*, 1 Pet., 560; *Wood v. Steele*, 6 Wall., 81.

§ 1710. **Changes assented to by the other party.**—Where the changes in a contract necessarily imply an increased price, and the employer expressly authorizes it, or silently with full knowledge assents to it, then he is bound to pay the increased price. *Huston v. United States*,* Dev., 57 (174).

§ 1711. **Alteration against the interest of the party claiming under it.**—An alteration of an instrument which is obviously against the interest of the person claiming under it cannot be imputed to him, and is consequently immaterial as to him. *United States v. De Haro*, 22 How., 298.

§ 1712. **An oral alteration in an oral contract made by consent of parties after the making of the contract becomes a part of it.** *Walker v. Johnson*, 6 Otto, 421 (§§ 1702-96).

§ 1713. **Change in quantity and price of tea sold not a change as to quality.**—If a contract be entered into for the delivery of a certain quantity and quality of tea at a certain price, a subsequent change in the quantity and price does not change the obligation of the contract as to the quality, unless it appears that such was the intention of the parties. *Youqua v. Nixon*,* Pet. C. C., 223.

§ 1714. **Alteration supersedes prior proposed terms.**—Where negotiations have been pending for the supply of certain articles, and an alteration is made in the proposed terms, though under protest, the parties cannot be heard to deny that it did not supersede the proposed arrangement. *Parish v. United States*, 8 Wall., 490.

§ 1715. **Modification as affecting third party.**—Where a written contract provides for the security up to a certain amount of persons making advances contemplated by the contract, no modification of the contract will affect the right of the third party making such advances to the contemplated security, whether such modification is made before or after the making of the advances. *Hubbard v. Beelew*,* 10 Fed. R., 849.

• § 1716. **Amendment construed most strongly against party signing it.**—Where an amendment to a contract is not clear in its terms, and is signed by only one of the parties, it will be construed most strongly against the party signing it, especially where the change was made for his accommodation, and the construction contended for corresponds with the intention of the party suggesting the alteration as expressed by his acts thereunder. *Garrison v. United States*, 7 Wall., 390.

VIII. CONTRACTS AS AFFECTED BY THE STATUTE OF FRAUDS.

SUMMARY — *Executed contract*, §§ 1717, 1718. — *Part performance*, § 1719. — *Parol agreement between mortgagor and mortgagee*, § 1720. — *Varied by subsequent agreement*, § 1721. — *Agreement to accept other securities in lieu of a mortgage*, § 1722. — *Settlement of division line*, § 1723. — *Acceptance of part of goods*, §§ 1724, 1725. — *Memorandum of sale*, §§ 1726-1730. — *Original undertaking; parol evidence*, § 1731. — *Equity will not enforce contract*, § 1732. — *Agreement to pay, in consideration of forbearance*, § 1733. — *Promise to pay a check*, § 1734. — *Object of promisor to subserve some purpose of his own*, § 1735. — *Contract to marry*, § 1736. — *Agreement not to be performed within a year*, §§ 1737, 1738.

§ 1717. The execution of a contract takes it out of the statute of frauds; and the question of whether the contract has been executed is one for the jury. *Weightman v. Caldwell*, § 1739.

§ 1718. Where a contract has been performed by both parties, except as to a formal act by one, the latter cannot set up the statute of frauds as a defense against the performance of that formal act. *Swain v. Seamens*, §§ 1742-46.

§ 1719. If part performance is relied on to take a contract out of the statute of frauds, the party must show by clear and satisfactory proof the existence of the contract as laid in the pleading, and the act of part performance must be of the identical contract set up and alleged. The terms of the contract must be clearly proved or admitted. A sufficient part performance must be made out to show that fraud and injustice would be done if the contract was held to be inoperative, and the acts of part performance must be such as are referable to the contract and consistent with it. The part performance must be substantial and not merely ancillary or preparatory. It must be an act which would not have been done but for the contract; and it must be directly in prejudice of the party doing the act, who must himself be the party calling for the completion of the contract. *Williams v. Morris*, §§ 1753-59. See § 1838.

§ 1720. To prove a parol agreement between a mortgagor and mortgagee, pending foreclosure proceedings in which the mortgagee became the purchaser, that the mortgagor should make no defense, but allow the sale to take place; that the mortgagee should still hold the premises as security for the mortgage debt, and when the rents had been sufficient to discharge the same, reconvey the premises to the mortgagor; and that the grantee of the mortgagee took with knowledge of these facts, paying the amount of the debt to the mortgagee, and entering into the same agreement as to his interest remaining a mortgage interest only, the same degree of proof is required as is required in order to reform a written instrument, on the ground that by mistake it does not correctly set forth the intention of the parties. If the evidence is not plain and conclusive, the presumption from the deeds cannot be overcome. If the equity of redemption of the mortgagor is not kept alive by the agreement, the agreement, being one creating by parol a trust or interest in lands, cannot be sustained under the statute of frauds. *Howland v. Blake*, §§ 1740-41. See § 1803.

§ 1721. A written contract within the statute of frauds cannot be varied by any subsequent agreement unless such new agreement is also in writing. And the rule is the same at law and in equity. *Swain v. Seamens*, §§ 1742-46.

§ 1722. Although under the local law the fee of mortgaged premises remains in the mortgagor till after foreclosure and sale, a stipulation by the mortgagee to accept fire insurance policies on a saw-mill in place of a mortgage is an agreement for the surrender of an "estate or interest in lands," and therefore within the statute of frauds. *Ibid.* See § 1803.

§ 1723. The division line between two parcels of land was in dispute, and the parties orally agreed to settle the true line by reference to a surveyor; both parties afterwards accepted the line as determined by him. *Held*, that the agreement was not affected by the statute of frauds. *Boyd v. Graves*, §§ 1747-48.

§ 1724. Defendants bought liquors of plaintiffs, who furnished as part of the goods sold certain copyrighted labels for bottles; these labels were delivered to one defendant at his hotel in New York city, while the liquors were forwarded to Michigan. *Held*, that the jury were authorized to find an acceptance and receipt of part of the goods sold sufficient to satisfy the statute of frauds. *Garfield v. Paris*, §§ 1749-51.

§ 1725. Certain goods were weighed in vendee's presence, the precise articles agreed on, the shrinkage determined, and at vendee's request the articles were set apart and marked with his name; he was to take them away when he chose. While still stored in the vendor's warehouse the goods were destroyed by fire. *Held*, that there had been an acceptance and receipt of the goods sufficient to satisfy the statute of frauds. *Ex parte Safford*, §§ 1752-53.

§ 1720. The following memorandum:

"NEW YORK, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first-quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters ($12\frac{3}{4}$) cents per pound, gold, cash, actual tare. Iron due about Sept. 1, '67.

"WHITE & HAZZARD, Brokers."

proved to have been made and signed by the agents of both parties, is sufficient under the statute of frauds to bind the purchaser although it does not recite any purchase. It recites a sale, and there cannot be a sale without a purchase. Nor is there any objection to it, as a contract of purchase, upon common law principles. *Butler v. Thomson*, § 1754. See § 1824.

§ 1727. In a contract for the sale of lands, the writing, in order to satisfy the statute of frauds, must be such, either in itself or by reference in it to something else, that the essential terms of the contract can be ascertained from it. It must mention the price, and not be so ambiguous as to leave it in doubt what land is the subject of the purchase. Such a writing as the following:—

"Received of Thomas B. Florence forty dollars, to be accounted for in the settlement for the purchase of the property at the corner of Pennsylvania avenue and 17th street, now in his occupancy and sold by me to him.

JAS. WILLIAMS.

"Washington, Jan. 1, 1857."

Or the following:

"WASHINGTON, May 1, 1857.

"Received of Thomas B. Florence one hundred dollars, on account of purchase of building 17th st. and Pa. av. \$100.

"JAS. WILLIAMS,"

is not sufficient to satisfy the statute. *Williams v. Morris*, §§ 1755-59.

§ 1728. A writing which in no way indicates the vendor is not a memorandum of the contract sufficient to satisfy the statute of frauds of New Hampshire. *Grafton v. Cummings*, §§ 1760-61.

§ 1729. The following memorandum:

"Sept. 19. W. W. Goddard, 12 mos.

Three hundred bales S. F. drills..... $7\frac{1}{4}$

One hundred cases blue do. $8\frac{3}{4}$

"Credit to commence when ship sails, not after Dec. 1,—delivered free of charge for truckage.

"The blues, if color satisfactory to purchasers.

"R. M. M.

"W. W. G."

was held to be sufficient to satisfy the Massachusetts statute of frauds. *Salmon Falls Manuf. Co. v. Goddard*, §§ 1762-37.

§ 1730. A memorandum, to be sufficient to satisfy the statute of frauds, must contain all the essential terms of the contract. A statement of the consideration is one of these terms. An administrator licensed to sell real estate at auction, and who acts as auctioneer at the sale, has no implied authority to make a memorandum binding upon the purchaser at such sale. *Smith v. Arnold*, §§ 1763-71.

§ 1731. Defendant agreed to ship plaintiffs five hundred boxes sugar, in consideration that they would allow one George D'Wolf to draw on them for one hundred thousand francs. In the action upon this contract, defendant claimed that it was an agreement to pay the debt of another, and consequently within the statute of frauds. To satisfy the statute plaintiffs introduced a letter, as follows:

"NEW YORK, November 15, 1825.

"Mr. James D'Wolf, Jr.:

"DEAR SIR—You will please ship for my account, on board such vessel as I shall direct, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., Marseilles, and oblige your friend and obedient servant.

(Signed) "GEORGE D'WOLF.

"Agreed to. (Signed) JAMES D'WOLF, Jr."

Defendant contended that this letter contained no contract binding on him, and that its defects could not be supplied by parol evidence. *It seems* that defendant's agreement was an original one and not within the statute, and held that, under the law of New York, parol evidence was admissible to show the consideration. *D'Wolf v. Rabaud*, §§ 1772-75. See § 1799.

§ 1732. Equity will not enforce an oral contract to pay the debt of another, although the making of the contract is admitted, in the answer to the bill in equity, if at the same time defendant sets up and relies on the statute of frauds as a defense. *Thompson v. Jamesson*, § 1776.

§ 1733. Plaintiffs held a judgment against one W., secured by levy on his real estate. In consideration that they would release such levy, forbear to collect a certain portion of the judgment, and give time for the payment of the balance, defendant orally promised to pay said balance at the end of the time. *Held*, that defendant's promise was original and not collateral, and hence need not be in writing under the statute of frauds. *Stewart v. Hinkle*, §§ 1777-79.

§ 1734. Plaintiff presented to defendant a check drawn upon it by B., who at the time had no funds on deposit with defendant. In consideration that plaintiff would deposit the check in some other bank in the city and so present it through the clearing-house, defendant orally promised to pay the check. *Held*, that such promise was one to pay the debt of another and therefore void under the statute of frauds. *Morse v. Massachusetts National Bank*, §§ 1780-84. See § 1799.

§ 1735. Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability. In November, 1834, plaintiff agreed with defendant to complete the bridges along the line of a certain railroad, and defendant agreed to pay him certain sums in cash and other sums in notes. Before that date plaintiff had made a contract with the railroad company to build the bridges, but at that time the company was insolvent and in default, and plaintiff had stopped work on his contract. *Held*, that defendant's promise was original and was not an "undertaking to answer for the debt, default or miscarriage of another." *Emerson v. Slater*, §§ 1785-90. See § 1799.

§ 1736. A contract to marry, which is not by its terms to be performed within a year, is within the statute of frauds, and must be in writing. *Ullman v. Meyer*, § 1791. See §§ 1820, 1823.

§ 1737. When it appears from a contract itself that it is not to be performed within a year from its inception, and is not intended to be performed within that time, such contract is within the statute of frauds; if it is one which may be so performed or one which plaintiff may require defendant to perform within a year, then it is not within the statute. *Walker v. Johnson*, §§ 1792-96.

§ 1738. An agreement not to be performed within one year from its date was signed by plaintiff but not by defendant, and then delivered to defendant, who retained continuous possession of it until suit brought. About two years after date of the agreement and while plaintiff was executing it, defendant wrote two letters to him, in both of which he referred to "the agreement," and declared his intention to adhere to it. *Held*, that the agreement was not void by the statute of frauds. *Beckwith v. Talbot*, §§ 1797-98.

[NOTES.—See §§ 1799-1854.]

WEIGHTMAN v. CALDWELL.

(4 Wheaton, 85-89. 1819.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—The suit below was instituted on a promissory note by the defendant in error. Although it is in fact an indorsed note, and so declared on, yet it is admitted to have originated in a negotiation between the maker and indorser; and whatever defense would be good as against the promisee is admitted to be maintainable against this indorser, the indorser standing only on the ground of a security or ordinary collateral undertaker to the maker. The defense set up is the statute of frauds, not under the supposition that a promissory note is a contract within the statute, but on the ground that this note was given for a consideration which was void under the statute. The case was this: Caldwell having an interest in a cargo afloat, agrees with Weightman for the sale of it, and Weightman signs the following memorandum, expressive of the terms of their agreement:

"John Weightman agrees to purchase the share or interest of Elias B. Caldwell in the cargo of the ship *Aristides*, W. P. Zantzinger, say \$2,522.83, at

fifteen per cent. advanced on said amount, payable at five months from this date, and to give a note or notes for the same, with an approved indorser.

"Washington, May 20, 1816."

JOHN WEIGHTMAN."

In compliance with that agreement, Weightman gives his note for the sum agreed upon, which is afterwards renewed, and this note taken on which this action is instituted. At the trial below, Weightman's counsel moved the court to instruct the jury that "if no bargain or agreement for the sale of the plaintiff's share of the said ship *Aristides*, nor any note or memorandum in writing of the same, was ever signed by the plaintiff, binding him in writing to sell his said share to defendant, and if defendant did never actually receive or accept any part of said cargo, and gave nothing in earnest to bind said bargain or in part payment, and if plaintiff has never made or tendered any written transfer or bargain of his said share to the defendant; but if the entire obligation, reciprocally binding plaintiff to sell said share, was verbal, and formed the sole consideration for the said note, then there is no adequate consideration for the said note, and plaintiff is not entitled to recover upon said note." This instruction the court refused to give, but instructed the jury that if they should be of opinion, from the evidence, that the defendant executed and delivered to the plaintiff the note upon which this action is brought, and that the said note was given in consideration of the purchase of the plaintiff's share or interest in the said cargo of the said ship *Aristides*, as stated in the aforesaid writing, etc., and that the said cargo was then on the high seas on its passage from France to the United States, and that the same has since arrived, and has never come to the possession of the plaintiff; that the plaintiff had an interest in the said cargo, and that the defendant never demanded of the plaintiff any written assignment of his share of the said cargo, then the statute of frauds is no bar to the plaintiff's recovery, and that the said note is not, by reason of the said statute, void as being given without consideration.

§ 1739. *In a suit on a note given for the price of goods, where the statute of frauds is set up, the question whether the contract was executed is for the jury.*

Taking the charge prayed for and the charge given together, they appear to make out the following case: The defendant moved the court to instruct the jury that the note which was the cause of action was void for want of consideration, inasmuch as it was given in compliance with an agreement signed by one party and not the other, and which, being unattended with any actual delivery of the article sold, was, as he contended, void under the statute of frauds. The court, without denying the principles laid down by the defendant, submit the whole case to the jury, and instruct them that upon that evidence they were at liberty to infer an actual execution of the agreement by both parties, and thus take the case entirely out of the operation of the statute of frauds. Under this construction of the bill of exceptions, for it must, like all other instruments, be the subject of construction, we are decidedly of opinion that the judgment below must be affirmed. Whether right or wrong, the defendant had all the benefit of the law that his case admitted of, and, therefore, this court is not called upon to express a judgment on its correctness. The court below were clearly right in submitting the question of execution to the jury. If there had ever been a doubt entertained on this point, it is now removed by numerous adjudications.

Judgment affirmed.

HOWLAND v. BLAKE.

(7 Otto, 624-628. 1878.)

APPEAL from U. S. Circuit Court, Eastern District of Wisconsin.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—This suit was commenced in 1873, and the claim may be stated thus: In 1857 Isaac Taylor loaned to Eugene Howland, upon a mortgage, the sum of \$7,000, to enable him to complete the erection of certain buildings upon premises in the city of Racine, the entire cost of which was about \$24,000, and which, when completed, produced an annual rent of \$2,200. Soon after the buildings were completed an agreement was made between the parties, which was carried out, that the possession of the property should be surrendered to Taylor, who should enter into possession and receive the rents until the net proceeds thereof should pay the principal and the interest of the mortgage.

In 1861, while thus in possession, Taylor commenced a suit to foreclose his mortgage, claiming the sum of about \$7,000 as due to him. Judgment was rendered, a sale had, and Taylor becoming the purchaser for the sum of \$9,800, a deed was executed to him by the sheriff. It is claimed that while this foreclosure suit was in progress, it was agreed that Howland should make no defense, but allow a sale to take place; that Taylor should still hold the premises as security for the payment of the mortgage debt, and, when the rents had been sufficient for that purpose, reconvey the premises to Howland.

It is alleged that, under this agreement, Taylor purchased and remained in possession until April, 1863; that about that time he desired the payment of his money, and requested Howland to procure some other person to advance it; that Howland thereupon informed Blake and Elliott of all the facts before stated, requesting them to advance the money and take a conveyance from Taylor; that a conveyance to them from Taylor, absolute in form, was thereupon made, but upon the agreement that they would pay Taylor's debt, retain the premises until the rents thereof should reimburse them; and then would reconvey the premises to Howland; that, from that time until the commencement of the present action against them, they have been in possession, receiving the rents, which greatly exceeded the mortgage debt, with interest, taxes, insurance and repairs. An account and a reconveyance are demanded.

An answer on oath having been waived, Blake and Elliott, the defendants, denied all the equities of the bill, and alleged other matters in defense. Taylor died in November, 1865.

At the hearing upon the pleadings and proofs, the bill was dismissed upon the ground that, where a mortgage had been foreclosed by action, and the equity of redemption sold by a decree of the court, and an absolute title given by the proper officer to the purchaser at such sale, evidence to show that a parol agreement was made pending the litigation, by which the interest to be obtained under the sale should remain a mortgage interest only, was incompetent. Howland appealed to this court. The appellees, in addition to this ground of defense, insist that the evidence does not establish the alleged agreement, and that the complainant had no equity of redemption in the premises after the 22d day of May, 1860, when his interest in the same was sold by the sheriff of Racine county to Daniel P. Rhodes for \$1,000, in pursuance of a decree of the circuit court of that county in proceedings to foreclose the lien of Wiltzie & Hetrick for materials used in erecting the buildings on the said premises. We do not think it necessary to pass formally upon the legal posi-

tion assumed by the circuit court, that parol evidence is not admissible to impeach a title acquired at a judicial sale, nor upon the contention that the sale to Rhodes, upon the proceeding to foreclose the lien of a material-man, terminated any alleged interest of Howland in the property.

§ 1740. *To reform a written instrument on the ground of mistake, the burden of proof is on the party seeking the relief, and the evidence must be plain and conclusive.*

The case may be decided upon a principle governing a class of cases of the same nature. Among them are the following: Where a written instrument is sought to be reformed upon the ground that, by mistake, it does not correctly set forth the intention of the parties; or where the declaration of the mortgagor, at the time he executed the mortgage, that the equity of redemption should pass to the mortgagee; or where it is insisted that a mortgagor, by a subsequent parol agreement, surrendered his rights. These and the case we are considering are governed by the same principle. In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory; if there is a failure to overcome this presumption by testimony entirely plain and convincing, beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence. Story, Eq. Jur., sec. 152; Kent v. Lasley, 24 Wis., 654; Harrison v. Juneau Bank, 17 id., 340; Harter v. Christoph, 32 id., 246; McClellan v. Sanford, 26 id., 595.

In this case the evidence falls far short of affording this satisfactory conviction. It is not necessary to say that the complainant's claim is not made out, or that such claim is overthrown by the evidence of the defendants. We are all, however, of the opinion that the presumption of the deeds is not overcome by satisfactory and convincing proofs.

The testimony is voluminous and conflicting. It is enough to say that the only direct evidence of an agreement by Isaac Taylor that the foreclosure should not operate as such, but that the transaction should continue to be a mortgage, is that of R. W. Howland, a brother of the mortgagor. Throughout the whole transaction he was the person conducting the business on the part of the complainant, who was an absentee. He occupies very nearly the position of a party, and upon the unsupported testimony of a party two of the cases above cited adjudge that such a decree cannot be sustained. Much also depends upon the value of the property in 1862; and upon this point the testimony is quite conflicting, the opinions as to its value ranging from \$3,000 to \$26,000. Russell v. Southard, 12 How., 139 (Conv., §§ 491-509).

The warranty title given by Isaac Taylor, the party who it is alleged made the agreement, was not challenged until eight years after his death and ten years after the sale on the foreclosure. He is proven to have been not only an upright, honest man, but skilful and astute in the transaction of his business. His one peculiarity was that of reducing to writing his most ordinary transactions, that there might be neither misunderstanding nor mistake. Taylor took his mortgage of \$7,000 in October, 1857. Soon after the buildings were completed he entered into possession and received the rents. He did this, in pursuance of his habit, by virtue of a written authority from the mortgagor. In August, 1861, he commenced a foreclosure suit, and in June, 1862, perfected his title thereunder by a judicial sale and a sheriff's deed.

§ 1741. *Unless the continuance of an equity of redemption be clearly shown, a parol promise to reconvey is void by the statute of frauds.*

To show that he deliberately agreed that these proceedings should stand for nothing, and he be a mortgagee still, requires much more conclusive evidence than is here presented. There is, undoubtedly, evidence produced by the complainant to sustain his claim; but, after a careful perusal of it, we are by no means satisfied that it is of the character and extent required by the principles above laid down. The same is true of the agreement alleged to have been made by the defendants Blake and Elliott. Its existence is denied by each of them, and it is not sufficiently proved for the purpose of this action.

This is not, however, so important. Unless the equity of redemption of Howland was kept alive by the alleged agreement with Taylor, he had no interest which could sustain a parol agreement by the defendants to buy the property for his benefit, and to convey to him when required. Such an agreement is one creating by parol a trust or interest in lands, which cannot be sustained under the statute of frauds. It is a naked promise by one to buy lands in his own name, pay for them with his own money, and hold them for the benefit of another. It cannot be enforced in equity, and is void. *Levy v. Brush*, 45 N. Y., 589; *Richardson v. Johnsen*, 41 Wis., 100; *Payne v. Patterson*, 77 Penn. St., 134; *Bander v. Snyder*, 5 Barb. (N. Y.), 63; *Lathrop v. Hoyt*, 7 id., 59; *Story*, Eq. Jur., sec. 1201a (11th ed.).

Decree affirmed.

SWAIN v. SEAMENS.

(9 Wallace, 254-274. 1869.)

APPEAL from U. S. Circuit Court, District of Wisconsin.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Subsequent to the removal of the case from the state court to the circuit court a new bill of complaint was filed by the consent of the respondent, so that it is not necessary to refer to the proceedings in the suit before the petition for the removal was granted.

Swain, the appellant and respondent, owned certain real estate situated in the state of Michigan, and on the 14th of April, 1855, he sold the same to John W. Medbery and James F. Aldridge for the consideration of \$52,000, as appears by the pleadings. Pursuant to the terms of the sale the purchasers paid \$10,000 in cash when the deed was executed, and gave back a mortgage on the same real estate to secure the balance of the purchase money, which was payable in instalments at different times. Medbery at that time was the owner of an undivided third part of certain lots situated in Milwaukee, in the state of Wisconsin, together with a flouring-mill erected thereon, called the Empire Mill, and he and his wife, on the same day and as a part of the same transaction, gave a mortgage of the same lots and mill to the appellant as additional security for the balance remaining unpaid of the purchase money of the first-mentioned real estate.

Prior to the purchase and sale of the Michigan real estate the foundation for a saw-mill, fifty feet by one hundred and fifty feet, to be erected on the premises, had been commenced, and the mortgagee, at the time the second mortgage was executed as additional security, stipulated and agreed with the mortgagors therein that if the mortgagors in the first mortgage built and completed the saw-mill there described in a proper manner upon the foundation so commenced, within two years from that date, he would accept as security in the

place of that mortgage proper fire insurance policies on said saw-mill, and would thereupon cancel and discharge the said second mortgage. Reference is made to the stipulation for its exact phraseology, as more fully set forth in the record, and it will be seen that it was duly executed under the hand and seal of the appellant, and was indorsed at large on the second mortgage, which was given as additional security.

Substantial compliance on the part of the mortgagors in the first mortgage with all the conditions of that agreement, and within the time therein specified, is set up by the appellees and complainants; and they also allege that the mortgagors in the second mortgage subsequently sold and conveyed, by deed of warranty, all their interest in and to the said lots and mill, and that they, the complainants, afterwards became the purchasers of the same lots and mill; and they allege that at the time the suit was commenced they were the owners of the same in fee, as alleged in the bill of complaint. They do not claim that the mill built and completed, as aforesaid, was of the precise dimensions mentioned in the agreement, but they allege that it was of larger dimensions and of greater value, and that it was better adapted to the purposes to be accomplished; and they aver that the mill as built and completed was recognized and accepted by the appellant as a compliance with that agreement. Based on these and other allegations, the prayer of the bill of complaint is that the mortgage of the lots and mill, called the second mortgage for the purpose of identification, may be ordered and decreed to be canceled and discharged, and that the complainants may have such other and further relief as the nature of the case shall require.

I. Special reference to the evidences of title exhibited by the complainants is unnecessary, as the parties before the hearing in the circuit court entered into a written stipulation that the complainants at the time the bill of complaint was filed were the owners in fee of the lots in question and of the flouring-mill located on the premises. Possessed of the title to the lots and mill as previously held by the mortgagors, the claim of the complainants is that the mortgage thereon held by the appellant should be canceled and discharged, because, as they insist, the conditions of the stipulation and agreement indorsed on the same, providing for that result, have all been fulfilled.

Such is the claim of the complainants, but the respondent denies that proposition and every element of it, and he contends that the complainants have no claim to any relief, because he insists that the mortgagors in the first mortgage never fulfilled any of the conditions specified in that stipulation and agreement; that they never built and completed the saw-mill therein described; and he expressly denies that they ever procured the policies of insurance, as alleged, or that he ever accepted the mill which they did build on the premises as a compliance with that stipulation and agreement. Both parties were fully heard in the circuit court, and a decree was entered for the complainants canceling and discharging the mortgage, and the respondents appealed to this court.

§ 1742. *A saw-mill seventy-eight by one hundred feet is not in compliance with a contract to build a mill fifty by one hundred and fifty feet.*

II. Relief cannot be decreed to the complainants on the ground that the mortgagors in the principal mortgage built and completed a saw-mill on the premises embraced in that mortgage, of the dimensions specified in the written stipulation and agreement which is indorsed on the second mortgage; as the bill of complaint concedes that they did not, in terms, comply with that con-

dition, and the complainants do not claim in argument that the saw-mill which those parties built thereon was of that form or of those dimensions. Strict compliance, therefore, with the conditions of the stipulation cannot be maintained, as the proposition finds no support either in the pleadings or proofs, but is contradicted by both in every part of the record.

Proof of strict performance failing, the next proposition of the complainants is that the saw-mill which those mortgagors did build constitutes a substantial compliance with the conditions of that stipulation, but it is not possible to decide as a conclusion of law that a saw-mill seventy-eight feet in width by one hundred feet in length is a substantial compliance with an agreement which required that the saw-mill to be constructed should be of the dimensions described in that instrument, even though it be shown that it cost more and was of greater value and better adapted to the purposes to be accomplished, as the appellant, having stipulated that the saw-mill to be built should be fifty feet in width by one hundred and fifty feet in length, had a right to stand upon the contract and to insist that it should be fulfilled according to its terms. Substantial performance, it is true, is all that is required to satisfy any such agreement, and it may also be conceded that in the adjudication of controversies growing out of building contracts slight differences in the dimensions between the building constructed and the terms of the contract may, under many circumstances, be overcome by a reasonable application of that rule, but the differences in the case before the court are far too great to fall within that principle, as the effect would be to make a new contract and substitute it in the place of the stipulation executed by the parties.

§ 1743. — *waiver of objections.*

III. Suppose neither of those propositions can be sustained, still the complainants contend that the decree of the circuit court should be affirmed, because they insist that the appellant acquiesced in the departure from the plan and dimensions as specified in the written instrument, and that he expressly accepted the said mill which those parties built and completed as a compliance with that stipulation. Considerable conflict exists in the proofs upon that subject, and in view of that fact it becomes necessary to examine with some care the circumstances attending the transaction as bearing upon the probabilities of the case. Duplicate agreements were executed between the parties to the before-mentioned deed of conveyance for the purchase and sale of the lands therein described six months before the deed of the same and the mortgage back, as aforesaid, were signed and delivered, by which the appellant agreed to sell, and the grantees in the deed and the mortgagors in the mortgage back agreed to purchase, those tracts of land, with certain exceptions, which are unimportant in this investigation, and also with certain reservations, of which two only need be noticed:

1. He reserved the house where he resided and the premises connected therewith for his benefit for one year from the date of the agreement. 2. Also the use and occupancy of the shop and fixtures connected with the same then in the possession of his brother, a deaf-mute, together with the use of the water "as now used, or in a similar way," so long as the said brother chooses to occupy the same, "to be free of rent, let or unnecessary hindrance, otherwise than if in the way of other important improvements it may be removed" sufficiently to be out of the way, "and where he can have the same use and privileges as before."

By the terms of the agreement, as amended, the purchasers were to pay

\$10,000 in cash, and they were to give their bond for \$42,000 for the balance of the purchase money, together with a mortgage back of the whole real estate purchased to secure the payments, and they also covenanted to give "good and satisfactory security upon other property" for the sum of \$6,666.66 $\frac{2}{3}$. They also agreed to keep an insurance in some safe insurance company upon the insurable property on the premises, to the amount of one-third of its value, for the benefit and security of the mortgagee. No provision was made for any insurance upon the "other property" to be conveyed to the appellant as additional security, but when the mortgage back was executed, six months later, it was therein stipulated that the mortgagors should "well and truly keep the buildings erected, and the large saw-mill to be erected, upon the premises," insured in some safely reputed fire insurance company or companies against loss by fire, and that they should assign the said policy or policies to the appellant or his assigns; and it contained the further stipulation that in default thereof it should be lawful for the appellant or his assigns to effect the said insurance, and that the premiums paid for effecting the same and the costs and charges should be a lien on the said mortgaged premises.

Evidently the deed of conveyance and the two mortgages, together with the stipulation indorsed on the second mortgage, must be construed together, as they constitute parts of the same transaction; and reference may also be made to the written agreement for the purchase and sale of the real estate embraced in the deed, as that agreement remained in force when the other instruments were drafted and until the transaction was finally closed.

Security, it is stipulated, shall be accepted "in proper fire insurance policy or policies on said large saw-mill in place of the within mortgage," but the amount of the insurance to be procured as the substitute for the mortgage security is not specified, and without reference to the instrument which provided for the sale and purchase of the real estate included in the deed of conveyance, it would be difficult, if not impossible, to define that amount; but when the several instruments relating to the transaction are considered together all ambiguity at once disappears. Viewed in the light of those suggestions the intention of the parties appears to be plain, as it is quite evident that the second mortgage constitutes the "security upon other property" for the amount which the purchasers of the real estate agreed to give to the appellant as the seller thereof in addition to the mortgage back of the premises included in the deed of conveyance.

IV. Two conditions precedent are annexed to the supposed right of the mortgagors in the second mortgage to demand that the mortgage should be canceled and discharged, and unless it is shown that they were waived or modified by mutual consent they must both be fulfilled or the appellant must prevail: (1) That the large saw-mill, "fifty by one hundred and fifty feet in size," was *properly* built and completed upon the foundation previously commenced, within two years from the date of the stipulation indorsed on the second mortgage; (2) That proper fire insurance policies on said saw-mill to the amount of \$6,666.66 $\frac{2}{3}$ were procured for the benefit of the appellant, in one or the other of the two modes provided in the instrument of mortgage.

Undoubtedly the obligation to procure the policies rested on the mortgagors, but authority to procure them in case of the default of the mortgagors was vested in the appellant, and if he exercised that authority and actually procured the policies to that amount as security for their indebtedness he cannot set up the non-performance of that condition as an answer to this suit. They might

procure the policies, or if they did not he might procure them, and in that event the premiums paid and the costs and charges incurred were made a lien on the mortgaged lands, and if he exercised the privilege conferred and procured the policies he is bound by his own act.

1. Compliance with the first condition is not shown, as the mill actually built is seventy-eight feet in width by one hundred feet in length, and not one hundred and fifty feet in length as described in the written stipulation, and the decree, therefore, must be reversed unless it satisfactorily appears that the appellant acquiesced in the change made in the plan and dimensions of the mill, or accepted it after it was completed, as contended by the complainants.

Constructed as the mill was of different dimensions from the plan specified in the stipulation, it could not be erected throughout upon the foundation previously commenced, but it appears that it was erected on the same site, and that it is connected with the same water-power, and that no greater alterations were made in the foundation previously commenced than the change in the plan and dimensions of the mill required; and the proofs show to the entire satisfaction of the court that the mill as constructed cost nearly twice as much as it would if the plan indicated in the stipulation had been followed, and that it is of greater value, and that in view of the site and surrounding circumstances, it is much better adapted to the purposes to be accomplished.

Intended for three gangs of saws with other machinery incident to such a saw-mill of modern construction, it seems reasonable to suppose that the increase in the width of the mill, as compared with the dimensions given in the stipulation, would much more than compensate for the diminution in the length of the structure, as the length is still sufficient, and the effect of the alteration is to give more space where it is most needed.

Even the answer alleges that the second mortgage was given as a performance of the agreement to furnish additional security, and the appellant admits that he agreed to accept the policies of insurance on the saw-mill in the place of the mortgage, provided the mill was built of the size specified in the stipulation and on the foundation commenced before the agreement for the sale and purchase of the real estate was executed, but he utterly denies that he acquiesced in the change made in the plan and dimensions of the mill, or that he ever accepted or agreed to accept the mill as built and completed. Three witnesses, however, testify to the contrary, and a fourth testifies that the appellant was two or three times at that place and once in the mill "during the building of the mill," and that he never made any objections to him or in his presence as to the change in the dimensions of the mill. Two of these witnesses are the mortgagors in the first mortgage, who built and completed the saw-mill; the third was a partner with them in the lumber business, and the fourth is the mill-wright who superintended the construction of the saw-mill and put in the machinery, and in the judgment of the court they are entitled to credit. They speak of his presence at the mill during the progress of the work and after the mill was completed, and the first three give the details of the conversation they had with him, showing to a demonstration that, if they are to be believed, the appellant not only acquiesced in the change in the plan as proposed, but that he in terms accepted the saw-mill erected on the premises as built and completed.

Opposed to the statements of those witnesses is the negative averment of the answer and the positive denial of the appellant that any such interviews ever took place, or that he ever gave utterance to any such sentiments; but it is a

sufficient response to those denials of the appellant to say that his testimony is not of a character to discredit the proofs introduced by the complainants. Attempt is also made to contradict the complainants' witnesses as to the time when they say they saw the appellant at the saw-mill or in that vicinity, but the error, if it be one, is not sufficient to discredit the witnesses, as it is quite immaterial whether the interview was at the time stated or a week or two or even a month earlier. Other considerations, such as the necessity for the removal of the shop of the deaf-mute brother, are also invoked as tending to show the improbability that the appellant should have assented to the alteration in the plan of the mill, but it is unnecessary to enter into the details, as the court is of the opinion that the allegations of the bill of complaint in that behalf are fully proved by the direct proofs.

Next objection of the appellant is that the agreement to accept the mill as built and completed, even if made as supposed, was void as within the statute of frauds of that state, because it was not in writing; but it becomes necessary before considering that question to determine whether the second condition specified in the stipulation was fulfilled so that the mortgagors in the second mortgage, or those claiming under them, have the right, if the agreement to accept the saw-mill as built and completed is operative, to demand that the second mortgage shall be canceled and discharged.

2. Whether the mortgagors in the principal mortgage kept the insurable property included in that mortgage insured or not is not a question in this case, nor is it a question at this time whether they kept the saw-mill insured as agreed in that instrument; but the question to be decided is whether the mortgagors, within two years from the date of the stipulation, procured for the benefit of the mortgagee proper fire insurance policies thereon to the requisite amount, or whether the mortgagee within that period procured the same for his own benefit, as required or permitted in the second condition of that stipulation, when construed in connection with the provision upon the subject contained in the principal mortgage. Proper fire insurance policies might be procured for the purpose, as before explained, by the mortgagors or by the mortgagee, and inasmuch as the premiums paid and the costs and charges incurred were, in the latter event, to be added to and considered a part of the debt secured by mortgage, it cannot make any difference whether they were actually obtained by the one or the other of those parties. Such being the rule to be applied, the question presented for decision is purely one of fact depending upon the proofs in the case, the results of which, as they appear to the court, will be briefly stated.

Three policies of insurance on the saw-mill were procured in the year 1856 by the mortgagors for the benefit of the mortgagee, to wit: \$2,000 in the *Ætna Insurance Company*, \$2,000 in the *Washington Union Insurance Company*, and \$2,000 in the *Jackson Mutual Insurance Company*; and the proofs show that the policies were delivered to the appellant, and that he accepted them without objection. Added together, the sum is a fraction less than the required amount, but the policies were accepted without objection, and none is now made on that account. Policies on the saw-mill were obtained the succeeding year by the appellant for the same amount, to wit: \$1,500 in the *Phoenix Insurance Company*, \$3,000 in the *Washington Union Insurance Company*, and \$1,500 in the *Ætna Insurance Company*; and the proofs show that the premiums which he paid for the same were added to the mortgage debt, and were ultimately adjusted by the mortgagors.

Insurance on the saw-mill for the year 1858 was also obtained by the appellant for the same amount, and the exhibits in the record show that the money he paid for the premiums was repaid to him by the mortgagors. They also paid him at the same time \$14,673.43, which was indorsed on the bond given for the balance of the purchase money, and which was secured by the mortgage of the same real estate.

V. All these policies, however, were for the term of one year, and the next objection is that they cannot be regarded as fulfilling the second condition of the stipulation on that account, as they would expire before some of the instalments of the bond fell due; but the objection is not entitled to weight for several reasons: (1) Fire policies are usually issued for one year, and there is nothing in the stipulation to justify the conclusion that the policies were to be in any other than the usual form. (2) When the first three were obtained they were accepted by the appellant without objection. (3) He asked and obtained leave of the mortgagors to procure the future policies, and when he came to exercise that privilege he obtained them in the same form. (4) Because, having been intrusted, at his own request, with the business of procuring the requisite insurance, it was his own fault if the business was neglected or was not properly transacted. (5) He cannot impute fault to the mortgagors, as they paid on the mortgage a sum nearly equal to the anticipated cost of the saw-mill, especially as they had consented to leave the business of insurance to him, and as he was expressly authorized to add the premiums to the mortgage debt, and as all sums paid for that purpose were declared to be a lien on the mortgaged lands. (6) If he desired that the insurance should be continued, and did not wish to transact the business, he should have given notice to the mortgagors; but the probability is that he felt less interest in the subject on account of the large payment which had been made on the mortgage debt.

§ 1744. *A written contract falling within the statute of frauds cannot be varied by any subsequent agreement, unless the latter be in writing.*

VI. 1. Although the fee of the mortgaged premises remains in the mortgagor, under the laws of that state, till after foreclosure and sale, still no doubt is entertained that the stipulation to accept proper fire insurance policies on the saw-mill in the place of the mortgage was an agreement providing for the surrender of an "estate or interest in lands," and, therefore, was an agreement within the statute of frauds of that state. R. S., ch. 108, § 6, p. 615; Wood v. Trask, 7 Wis., 572; Russell v. Ely, 2 Black, 578. Nothing is left for construction, as the subsequent act provides that the term "lands" shall be construed as co-extensive in meaning with lands, tenements and hereditaments, and that the terms "estate and interest in lands" shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent. R. S., ch. 108, § 6, p. 615; Stevens v. Cooper, 1 Johns. Ch., 425; Hunt v. Maynard, 6 Pick., 489; Browne on Frauds (2d ed.), § 430.

But the stipulation in this case to accept the policies of insurance on the saw-mill as security in the place of the second mortgage, and thereupon to cancel and discharge that instrument, is in writing, and having been executed as a part of the bargain of purchase and sale of the real estate, it rests upon a sufficient consideration, and is valid and binding. Argument upon that topic is unnecessary, as it is too plain for contention; but the suggestion which the appellant intends to make is that the agreement subsequently made to modify the stipulation as to the dimensions of the mill is within the statute of frauds

of that state, and null and void. Views of the complainants are that an agreement, though in writing and under seal, may in all cases be varied as to time or manner of its performance, or may be waived altogether by a subsequent oral agreement; but the court is of a different opinion, if the agreement to be modified is within the statute of frauds.

2. Numerous authorities sanction the principle advanced by the complainants in cases not within the statute of frauds, and which fall within the general rules of the common law, and in such cases it is held that the parties to an agreement, though it is in writing, may, at any time before the breach of it, by a new contract not in writing, modify, waive, dissolve or annul the former agreement, if no part of it was within the statute of frauds. *Goss v. Nugent*, 5 Barn. & Ad., 64; *Harvey v. Grabham*, 5 Ad. & Ell., 73; *Emerson v. Slater*, 22 How., 42 (§§ 1785-90, *infra*); *Browne on Frauds* (2d ed.). § 409. Reported cases may also be found where that rule is promulgated without any qualification; but the better opinion is, that a written contract falling within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Express decision in the case of *Marshall v. Lynn*, 6 Mees. & W., 109, is that the terms of a contract for the sale of goods falling within the operation of the statute of frauds cannot be varied or altered by parol; that where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing. *Clarke v. Russell*, 3 Dal., 415; *Emerson v. Slater*, 22 How., 42 (§§ 1785-90, *infra*); *Goss v. Nugent*, 5 Barn. & Ad., 58; *Harvey v. Grabham*, 5 Ad. & Ell., 73; *Stowell v. Robinson*, 3 Bing. N. C., 928; *Stead v. Dawber*, 10 Ad. & Ell., 57; *Falmouth v. Thomas*, 1 Crompt. & M., 109; *Hasbrouck v. Tappen*, 15 Johns., 200; *Blood v. Goodrich*, 9 Wend., 68. Suggestion may be made that all the cases were cases at law; but the same rule prevails in equity, as appears by the highest authority. *Emmet v. Dewhirst*, 8 Eng. L. & Eq., 83; S. C., 3 Macn. & G., 587; *Stevens v. Cooper*, 1 Johns. Ch., 429; *Browne on Frauds* (2d ed.), § 422.

§ 1745. — *but where the contract has been fully performed by both parties, except as to a formal act by one, the latter cannot set up the statute of frauds as a defense against the performance of such formal act.*

Regarded, therefore, as a mere executory agreement to accept the mill when built and completed, it is clear that the statute of frauds would be a good defense to a suit for the breach of it; but it cannot be viewed in that light, as it was fully executed on the part of the mortgagors, and was in fact fully executed on the part of the appellant.

3. He is not sued for a breach of the agreement to accept the mill as built and completed; but the suit is to compel him to cancel and discharge the mortgage as agreed in the written stipulation. Called upon to plead to the bill of complaint, he sets up the defense that the dimensions of the mill vary from those specified in the stipulation, to which the complainants reply that he acquiesced in the change at the time the work was done, and that he accepted the mill as built and completed, and they prove the allegations to the entire satisfaction of the court. They built and completed the mill, seventy-eight feet in width by one hundred feet in length, at an expense exceeding \$30,000, and the appellant not only accepted it when completed as a compliance with the stipulation, but he also accepted the policies of insurance procured on it as security in the place of the second mortgage, and he cannot now be permitted

to avoid the true issue, nor to divest the transaction of its real character, in order that he may set up the statute of frauds.

§ 1746. *Where a person tacitly encourages an act to be done he is estopped from afterwards exercising his legal right in opposition to such consent, if the other party was thereby induced to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim.*

VII. 1. Even part performance is often admitted in equity as an answer to the statute; but it is not necessary to invoke that principle in this case, as it is clear that the appellant acquiesced in the changes made in the plan, and that the mill, as built and completed, was accepted by him as a compliance with the stipulation. '1 Story, Eq. Jur. (9th ed.), §§ 759, 761; Browne on Frauds (2d ed.), § 463.

2. Estoppel is also set up by the complainants as an answer to the defense of the statute of frauds, and, in view of the facts, the court is of the opinion that it is a complete answer to that defense. He sold the real estate for \$52,400, received in cash \$10,000, and the purchasers gave a mortgage on the same real estate for the balance of the purchase price. They paid towards the mortgage \$17,673, exclusive of \$576.73 for insurance premiums and for taxes, and erected the saw-mill at the cost of \$32,000, and the record shows that the appellant foreclosed the mortgage, and, with two other persons, became the purchaser of the entire property and improvements, subject to the mortgage, for the sum of \$19,600, and has a decree for the deficiency of \$2,864.11, for which he proposes to foreclose the second mortgage now under consideration.

3. Beyond doubt the mortgagors in the first mortgage, one of whom was the principal mortgagor in the second mortgage, built and completed the saw-mill in the full belief, induced by the conduct and declarations of the appellant, that it would be accepted as a compliance with the stipulation indorsed on the second mortgage. Taken as a whole, the proofs satisfy the court that his conduct and declarations led them to believe that he was content with the change made, and that he would readily acquiesce in their doings when the mill was completed, and, if so, he cannot be heard to allege or prove the contrary to the prejudice of their rights. *Pickard v. Sears*, 6 Ad. & Ell., 474; *Freeman v. Cooke*, 2 Exch., 654; *Foster v. Dawber*, 6 id., 854; *Edwards v. Chapman*, 1 Mees. & W., 231; *Morris Canal Co. v. Lewis*, 1 Beasley, 323; *Cary v. Wheeler*, 14 Wis., 285.

Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim.

Decree affirmed.

BOYD v. GRAVES.

(4 Wheaton, 513-518. 1819.)

Opinion by MR. JUSTICE DUVAL.

STATEMENT OF FACTS.—An action of ejectment was brought by Andrew Boyd against the defendants in the circuit court for the district of Kentucky, on the 25th of November, 1814, for two thousand acres of land in Fayette county, on the waters of Elkhorn creek. The patent bears date on the 3d of December, 1789, and was granted to Andrew Boyd, pursuant to a survey made the 14th of July, 1774, on a warrant issued under the royal proclamation of

1763. This tract of land is contained within the courses and distances following: Beginning at a buckeye and ash corner to John Carter's land, and in a line of William Phillips' land, and with the same southeast three hundred and seventy-four poles, crossing a small branch to a hoopwood and sugar-tree, and leaving said line southeast eight hundred and sixty poles, crossing a branch to an elm and buckeye northeast three hundred and seventy-four poles, crossing a branch to a sugar-tree and buckeye, thence northwest eight hundred and sixty poles to the beginning.

The defendants claimed title under a patent granting to Elijah Craig, on the 7th of November, 1779, for two thousand acres, on a warrant to John Carter, heir at law of Thomas Carter, in consideration of military services. The warrant was assigned to Craig. The courses and distances are the following: Beginning at three large hoopwoods growing from one root, corner to William Phillips' land, and with a line thereof southwest three hundred and seventy-four poles, crossing two branches to a buckeye and ash on the bank, southeast eight hundred and sixty poles, crossing a small creek to a sugar-tree and buckeye, northeast three hundred and seventy-four poles, crossing three branches to an ash, hickory, mulberry and hoopwood, northwest eight hundred and sixty poles to the first station. These two tracts are adjacent to and bind on each other. It is obvious that they were intended to present rectangular figures, and to contain equal quantities; but by satisfying the calls, the figures are irregular, and do not contain equal quantities.

The plaintiff in the court below locates his pretensions on the plat returned in the cause, beginning at A, then to K, to L, to D, and to the beginning. And he locates Craig's patent, beginning at A, then to B, to C, to D, and to the beginning. The defendants locate it, beginning at A, then to B, to C, to E, and to the beginning. The land contained in the triangle A E D is the land in dispute.

The defendants, to support their location, offered evidence to prove that the dividing line between Boyd and Craig being unascertained, the parties, by agreement, had it surveyed, for the purpose of establishing and settling the line between them; that, in the year 1793, it was run, in their presence, from A to E, as distinguished on the plat, and that it was mutually agreed to establish the corner at E, where a boundary was marked, by consent, E C and A B, and that the line from A to E should be the dividing line between them, and that possession had been since held accordingly. They also offer in evidence a deed from Boyd and wife to William Hanback, bearing date the 14th of December, 1793, for one hundred acres, part of the land granted to Boyd, beginning at the corner at E before mentioned, and binding on the line A E, regarding it as the dividing line between Boyd and Craig; also a deed from Elijah Craig to John Whitesides, dated the 12th of May, 1794, for seventy-two acres, part of Craig's patent, bounding also on the line A E as the dividing line between Boyd and Craig, and that all the other defendants as purchasers under Craig held to the said line A E.

The defendants' counsel then moved the court to instruct the jury, that if they found from the evidence that, owing to the uncertainty of the line of said Boyd and Carter's military surveys, the said Boyd and Elijah Craig, by mutual consent, surveyed and located their respective patents by making the line from A to E, and marking the corner at E, with the intent (at the time), positively expressed, to settle and ascertain the true boundary and dividing line between the tracts respectively claimed by them under their patents and that the said

line has been acquiesced in by the said parties, and possession held and taken accordingly, for more than twenty years before the commencement of this action, they ought to find for the defendants; which instruction the court gave, and to this opinion of the court the plaintiff, by his counsel, excepted; and the record of the proceedings was removed, by writ of error, to this court for their decision.

At the trial in the court below, several other questions were propounded and decided by the court, and to which exceptions were taken, which is not material to notice here, because the decision of this court on the question stated will decide the controversy between the parties.

It appears that in the year 1793, more than twenty years before the commencement of this action of ejectment, Boyd and Craig employed a surveyor to run the dividing line between them, and they mutually agreed that it should be thus ascertained and settled. It was, accordingly, run as described on the plat from A to E, and the corner at E was marked in their presence as the boundary between them. That possession has been held by each, and those claiming under them respectively, from that time to the present; and that each has sold parcels of land, bounding them on the line A E thus agreed on, regarding it as the established line between them. Hence, the question arises, whether the agreement made in 1793, although by parol, accompanied by correspondent possession for more than twenty years, is or is not conclusive against the plaintiff's right of recovery in this action?

§ 1747. *A parol agreement to settle a disputed boundary of lands by a surveyor, mutually employed, is not within the statute of frauds.*

This court cannot consider the agreement of the parties, although by parol, to settle the dividing line between them by a surveyor, mutually employed, as affected by the statute of frauds, as is contended by the counsel for the plaintiff. It is not a contract for the sale or conveyance of lands. It has no ingredient of such a contract. There is no *quid pro quo*; and the court do not consider it as a conveyance of title from one person to another. It was merely a submission of a matter of fact, to ascertain where the line would run on actual survey, beginning at a place admitted and acknowledged by the parties to be a boundary where the line must begin.

§ 1748. *A parol agreement, under which a disputed boundary was surveyed and settled, is, after twenty years' possession, in an ejectment suit, binding and conclusive upon the parties.*

The possession subsequently held, and the acts of the parties evidenced by their respective sales of parcels of the land held by each, under his patent, bounding on the agreed line, amount to a full and complete recognition of it; and, in the opinion of this court, precludes the plaintiff, after such a lapse of time, from denying it to be the dividing line between him and the defendants; and neither ought now to be permitted to disturb the possession of the other under a pretense that the line was not correctly run.

Judgment affirmed.

GARFIELD v. PARIS.

(6 Otto, 557-567. 1877.)

ERROR to U. S. Circuit Court, Eastern District of Michigan.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Neither the manufacture nor the sale of spirituous or intoxicating liquors is allowed by the law of the state where the present

controversy arose. Instead of that the state law provides that all payments made for such liquors so sold may be recovered back, and that all contracts and agreements in relation to such sales shall be utterly null and void against all persons and in all cases, with an exception in favor of the *bona fide* holders of negotiable securities and the purchasers of property without notice. 1 Comp. Laws Mich., p. 690.

Two bills of goods, consisting of spirituous liquors, were purchased of the plaintiffs by the defendants, which, including exchange, amounted to \$4,143.69. Payment being refused, the plaintiffs brought suit in the court below to recover the amount, and the verdict and judgment were for the plaintiffs. Exceptions were taken by the defendants, and they sued out the present writ of error. Sufficient appears to show that the plaintiffs are citizens of New York, and that the defendants are citizens of Michigan; that the liquors were purchased of the plaintiffs, as alleged; and that the same were received and sold by the defendants; but they set up the prohibitory liquor law of the latter state, providing that all such contracts are utterly null and void.

Evidence was introduced by the plaintiffs, showing that the liquors were ordered by one of the defendants at a time when he was temporarily in the city of New York; and that the plaintiffs, by his request, sent certain labels to be attached to the same to the defendant, at the hotel in that city where he was stopping. By the agreement at the time the sale was made, the plaintiffs were to furnish these labels to the purchasers, and the evidence showed that the value of the labels entered into the price charged for the liquors, and that the labels, by the terms of the contract, were to be furnished to the buyers by the sellers, without any other charge than the price to be paid for the liquors. Labels of the kind were something more than ordinary labels affixed to bottles, as they indicated not only the kind of liquor which the bottle contained, but also embraced an affidavit that the distillation was genuine, and of the particular brand manufactured and distilled by the plaintiffs; support to which is derived from the fact that the label was copyrighted, so that no other person than the plaintiffs had any right to make, use or vend it.

Certain questions were submitted to the jury, among which were the following: Were there any receipt and acceptance in New York of part of the goods sold; and, if so, what was so received? To which the jury answered, There was, to wit, certain labels. Was anything added to the price of the liquors on account of the labels, and, if so, what amount or price? Answer: There was nothing added; but the labels added to the value of the liquors, and formed part or parcel of the price. Testimony was offered by the plaintiffs in respect to the delivery of the labels to the defendant while he was at the hotel in New York, to which the defendants objected; but the court overruled the objection, and the testimony was admitted, subject to the defendants' objection.

Errors assigned are in substance and effect as follows: 1. That the court erred in refusing to charge the jury that the delivery of the labels, as proved, was not a receipt and acceptance of part of the goods sold within the meaning of the state statute of frauds. 2. That the court erred in refusing to charge the jury that the evidence was not sufficient to take the case out of the statute of frauds. 3. That the court erred in refusing to charge the jury that the sale was not consummated until the defendants received and accepted the goods in the state where they resided. 4. That the court erred in instructing the jury that the defense set up is one not to be favored, and that the proof to support

it must be clear and satisfactory, before the jury can consistently enforce it.

5. That the statute is a penal statute, in derogation of the rights of property; and that for that reason, if for no other, it must receive a strict construction.

6. That the court erred in instructing the jury that if the labels were included in the contract, and the liquors were worth more to the defendants on account of the labels, then the receipt and acceptance of the same by the acting defendant took the case out of the New York statute of frauds, and their verdict should be for the plaintiffs.

§ 1749. *Evidence need not be stated in a bill of particulars.*

Due exception was also made to the ruling of the court in admitting the evidence reported in respect to the delivery and acceptance of the labels furnished to the purchasers at the time the order for the liquors was filled, the objection being that the labels are not mentioned in the plaintiffs' bill of particulars filed in the case. Matters of evidence are never required to be stated in such a paper. Courts usually require such a notice where the declaration is general, in order that the defendant may know what the cause of action is to which he is required to respond. Nothing is wanted in this case to meet that requirement, as all the items of the demand are distinctly and specifically stated in the bill filed in compliance with the order of the court.

Merchants selling spirituous liquors in bottles usually label the bottles, to indicate the kind, character, age, quality or proof of the liquor, or to specify the name of the manufacturer, or the place where it was manufactured or distilled. Such are somewhat in the nature of trade-marks, and are useful to the seller of the liquors, to enable him to distinguish one kind of liquor from another without opening the bottle, and to commend the article to his customers without oral explanation.

Coming to the errors formally assigned, it is manifest that the first and second may be considered together, as they depend entirely upon the same considerations. Both parties concede that the bargain for the sale of the liquors in this case was made in New York; and, by the laws of that state, contracts for the sale of any goods, chattels, or things in action, for the price of \$50 or more, shall be void, unless, 1, a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or, 2, unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, 3, unless the buyer shall at the time pay some part of the purchase money. 3 R. S. New York (6th ed.), 142, sec. 3.

Four answers are made by the plaintiffs to that proposition, each of which will receive a brief consideration: 1. That the defendants received and accepted the labels which the plaintiffs contracted to furnish at the time they filled the order for the liquors. 2. That the case is not within the statute of frauds, inasmuch as the defendants received the liquors, and sold the same for their own benefit. 3. That the statute of Michigan, prohibiting the sale of such liquors, and declaring such contracts null and void, has been repealed. 4. That the subsequent letter written by the defendants to the plaintiffs takes the case out of the operation of the statute requiring such a contract to be in writing.

§ 1750. *Acceptance of part, however small, of goods sold, takes the case out of the statute of frauds.*

Authorities almost numberless hold that there is a broad distinction between the principles applicable to the formation of the contract and those applicable to its performance, which appears with sufficient clearness from the language of the statute,—such a contract must be in writing, or there must be some note

or memorandum of the same to be subscribed by the party to be charged; but the same statute concedes that the party becomes liable for the whole amount of the goods, if he accepts and receives part of the same, or the evidences, or some of them, of such things in action; and the authorities agree, that, where the question is whether the contract has been fulfilled, it is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold, in order that the contract may be held to be good, even though it does not preclude the purchaser from refusing to accept the residue of the goods, if it clearly appears that they do not conform to the contract. *Benjamin on Sales* (2d ed.), 117; *Hinde v. Whitehouse*, 7 East, 558; *Morton v. Tibbett*, 15 Ad. & Ell. (N. S.), 427. Hence, said Lord Campbell, in the case last cited, the payment of any sum in earnest to bind the bargain, or in part payment, is sufficient; the rule being, that such an act on the part of the buyer, if acceded to on the part of the vendee, is an answer to the defense.

§ 1751. — *the "acceptance" required by the statute of frauds may be constructive.*

"Accept and receive" are the words of the statute in question; but the law is well settled, that an acceptance sufficient to satisfy the statute may be constructive, the rule being that the question is for the jury whether the circumstances proved, of acting or forbearing to act, do or do not amount to an acceptance within the statute. *Bushel v. Wheeler*, 15 Ad. & Ell. (N. S.), 445; *Chitty, Contr.* (10th ed.), 367; *Parker v. Wallis*, 5 Ell. & Bl., 21; *Lillywhite v. Devereux*, 15 Mees. & W., 285; *Simmonds v. Humble*, 13 C. B. (N. S.), 261; *Addison, Contr.* (6th ed.), 169. Questions of the kind are undoubtedly for the jury; and it is well settled that any acts of the parties indicative of ownership by the vendee may be given in evidence to show the receipt and acceptance of the goods to take the case out of the statute of frauds. Conduct, acts and declarations of the purchaser may be given in evidence for that purpose; and it was held, in the case of *Currie v. Anderson*, 2 Ell. & Ell., 591, that the vendee of goods may so deal with a bill of lading as to afford evidence of the receipt and acceptance of the goods therein described. *Gray v. Davis*, 10 N. Y., 285.

Throughout, it should be borne in mind that one of the defendants in person visited the plaintiff's place of business, and while there ordered the liquors, and that the liquors were all received by the defendants at their place of business, and were sold by them for their own benefit; that the contract between the sellers and purchasers was that the former should furnish the labels as part of the contract; and the evidence shows that they fulfilled that part of the contract, and that they delivered the same to the contracting party at his hotel, before he left the state where the purchase was made.

Satisfactory evidence was also introduced by the plaintiffs, showing that they drew a draft on the defendants for the payment of the price, and that the defendants answered the letter of the plaintiffs declining to accept the same, as more fully set forth in the record, in which they state that the purchase was on four months, with the further privilege of extending the time two months longer by allowing seven per cent. interest, adding, that if the plaintiffs doubted their word, they had "a written contract to that effect." What they claim in the letter is that the arrangement was made with the salesman; and they state that they would not have given him the order, if he had not given them "those conditions." They make no complaint that the liquors were not of the agreed quantity and quality, and certainly leave it to be implied that they had been duly received, and that they were satisfactory. It was contended by the plaintiffs that the case was

taken out of the statute of frauds: 1. Because the labels were a part of what was purchased, and that the defendants accepted and received the same at the time and place of the purchase. 2. That the subsequent letter, as exhibited in the record, is sufficient for that purpose.

Enough appeared at the trial to show that the labels were copyrighted, and that the plaintiffs agreed to furnish the same without any additional charge; and the bill of exceptions also shows that it was conceded that the defendants accepted and received the labels at the hotel, as claimed by the plaintiffs. Still, the defendants denied that the labels were of any value, or that they entered into or constituted any part of the things purchased; both of which questions the circuit judge submitted to the jury, remarking, at the same time, that by the furnishing the labels with the liquors the defendants acquired the right to use the copyright to that extent, without which, or some equivalent permission or license, they would have had no such lawful authority.

Pursuant to these suggestions, the jury were directed to ascertain whether the liquors were worth more to the defendants on account of the labels, and whether the labels were included in the contract; and they were instructed that, if they found affirmatively in respect to both of these inquiries, then the receipt and acceptance of the labels as alleged took the case out of the statute of frauds, because then there was a receipt and acceptance by the defendants of a portion of the things purchased.

Appropriate instruction was also given to the jury in respect to the subsequent letter sent by the defendants to the plaintiffs; and the jury were told by the presiding judge that if they found, under the instructions given, that the defendants received and accepted a part of the things purchased, then the contract was made valid as a New York contract, and that their verdict should be in favor of the plaintiffs. *Currie v. Anderson, supra*. That if the contract was not made valid by the acceptance and receipt of the labels, nor by the letter exhibited in the record, then it was a Michigan contract, and their verdict should be for the defendants. *Meredith v. Meigh*, 2 Ell. & Bl., 364; *Castle v. Swooner*, 6 H. & N., 828; Law Rep., 1 C. P., 5.

Controlling authorities already referred to show that the question whether the goods or any part of the same were received and accepted by the purchaser is one for the jury, to which list of citations many more may be given of equal weight and directness. Just exception cannot be taken to the form in which the question was submitted to the jury; and the record shows that the verdict was for the plaintiffs, and that the jury found, in response to the fifth question, that the labels added to the value of the liquors, and that they formed part or parcel of the price. *Jackson v. Lowe*, 7 Moore, 219. Where goods are purchased in several parcels, to be paid for at a future day, the whole, within the meaning of the statute of frauds, constitutes but one contract, and the delivery of part to the purchaser is sufficient to take the case out of the operation of the statute of frauds. *Mills v. Hunt*, 20 Wend. (N. Y.), 431.

Apply the finding of the jury in this case to the conceded facts, and it shows that the defendants were in the situation of a purchaser who goes to a store and buys different articles, at separate prices for each article, under an agreement for a credit, as in this case, accepting a part, but leaving the bulk to be forwarded by public conveyance. Frequent cases of the kind occur; and it is well settled law that the delivery of a part of the articles so purchased, without any objection at the time as to the delivery, is sufficient to take the case

out of the statute of frauds as to the whole amount of the goods. *Mills v. Hunt*, 20 id., 431.

The delivery in such a case, in order that it may have that effect, must be made in pursuance of the contract, the question whether it was so made or not being one for the jury; but if they find that question in the affirmative, then it follows that the case is taken out of the statute of frauds. *Van Woert v. Albany & Susquehanna R. Co.*, 67 N. Y., 539. Parol evidence is admissible to show what the circumstances were attending the contract, and to show the receipt and acceptance, in whole or in part, of the goods purchased. *Tomkinson v. Straight*, 17 C. B., 695; *Kershaw v. Ogden*, 3 H. & C., 715. Due acceptance and receipt of a substantial part of the goods will be as operative as an acceptance and receipt of the whole; and the acceptance may either precede the reception of the article, or may accompany their reception. 2 Whart. Evid., sec. 875.

Differences of opinion have existed upon some of these matters; but all the authorities, or nearly all, concur that the question is for the jury, to be determined by the circumstances of the particular case. *Id.* Viewed in the light of these suggestions, it is clear that the question whether the evidence showed that the case was taken out of the statute of frauds by the acceptance and receipt by the defendants of a part of what was purchased by them, in connection with the letter of the defendants exhibited in the record, was fairly submitted to the jury, and that their finding in the premises is final and conclusive.

Attempt was also made by the plaintiffs to support the judgment, upon the ground that the defendants were estopped to set up the statute of frauds as a defense, in view of the fact that they had received the liquors and sold the same for their own benefit; but it is not necessary to examine that proposition in view of the conclusion that the case is taken out of the operation of the statute by the other evidence and the finding of the jury. Nor is it necessary to give any consideration to the proposition that the act of the state of Michigan to prevent the manufacture and sale of spirituous and intoxicating liquors as a beverage is repealed, for the same reason, and also for the additional reason, that the repealing clause saves "all actions pending, and all causes of action which had accrued at the time" the repealing act took effect. Sess. Acts 1875, p. 279.

Having come to the conclusion that the case is taken out of the statute of frauds, it is not deemed necessary to give the other assignments of error a separate examination. Suffice it to say, that the court is of the opinion that there is no error in the record.

Judgment affirmed.

EX PARTE SAFFORD—IN RE DOWNING.

(District Court for Massachusetts: 2 Lowell, 563-567. 1877.)

STATEMENT OF FACTS.—Safford offered for proof against Downing's estate the price of certain lots of leather bought by him of S. under oral contracts. Some of the leather had not been taken from S.'s warehouse on November 9 and 10, 1872, and with the warehouse was destroyed by fire at that time. Further facts appear in the opinion.

§ 1752. *Goods may be delivered and received, though left in possession of the vendor as warehouseman.*

Opinion by LOWELL, J.

The single question in this case is whether the goods had been accepted and received by Downing, within the meaning of the statute of frauds. They had been weighed in his presence, and the precise hides agreed on, and the shrinkage ascertained. At his request, though whether in his presence or not is not quite clear, they had been set apart from all other goods, and marked with his name; and he was to take them when he pleased to send his carrier for them. No delivery could be more complete, unless they had come into his personal possession; and I do not understand it to be denied that, at common law, the property would have passed. Undoubtedly the decisions upon the statute have introduced some refinements not easily reconciled with common sense, by which the property in goods is held to have passed and not to have passed at the same time; and they are said to have been delivered by the buyer before they are received by the seller. I have no intention of departing from those decisions; but this case steers wide of them.

§ 1753. — *distinction between accepting and receiving goods.*

The latest authorities make the distinction between accepting goods and receiving them to be this: Goods may be constructively delivered, as to a carrier or warehouseman, and yet not accepted, if, for instance, they were ordered by word of mouth, or bought by sample; and the carrier or warehouseman is not, as such, without special appointment, the agent of the buyer to ascertain that the goods conform to the order or to the sample; and, therefore, in such a case, the goods may be received and yet not accepted. It was formerly said that the goods must be received, and an opportunity be given to examine them, before they could be accepted; but, in a very elaborate opinion of the queen's bench, this doctrine was denied to be sound, and a defendant was held bound who had exercised acts of ownership over the goods, though he had not precluded himself from objecting that they did not conform to the contract; or, in other words, there might be an acceptance to satisfy the statute, and let in proof of the contract, which yet would not be an acceptance under the contract itself, when proved. *Morton v. Tibbett*, 15 Q. B., 423. In *Cusack v. Robinson*, 1 Best & S., 299, Blackburn, J., says: "Acceptance may be before receipt;" and it was there decided that specific goods, agreed on, and afterwards sent to a warehouse named by the vendee, had been both accepted and received by him. Whether the courts of Massachusetts would assent to the full extent of the law laid down in *Morton v. Tibbett*, *ubi supra*, I do not know; but I take it to be clear that, by the law of this state, and of the United States generally, as well as of England, if specific goods are fully agreed on and bought, and afterwards sent to a warehouseman or carrier, designated by the vendee, the statute is satisfied. *Ullman v. Barnard*, 7 Gray, 554; *Cross v. O'Donnell*, 44 N. Y., 661; *Howes v. Ball*, 7 B. & C., 481; *Dodsley v. Varley*, 12 A. & E., 632.

There is no doubt that the vendor may himself be the warehouseman or bailee. This was decided in the leading case of *Elmore v. Stone*, 1 Taunt., 458. I have seen it stated that this case has been overruled; but that is a mistake. It was fully approved by Shaw, C. J., who states the exact case, though he does not cite it by name, in *Arnold v. Delano*, 4 Cush., 40. It was cited and followed in *Beaumont v. Brengeri*, 5 C. B., 301, and *Marvin v. Wallis*, 6 Ell. & Bl., 726; and its doctrine reaffirmed in *Cusack v. Robinson*, *ubi supra*. See

Benj. Sales (2d Am. ed.), 136. It has often been decided that there can be no sufficient receipt by the vendee so long as the vendor holds as vendor, and insists on his lien for the price. The reason is given by Abbott, C. J., in an early case, that, if the vendee had actually received the goods, it would necessarily follow that he could maintain trover for them, and the vendor would be left to his action for the price. *Baldey v. Parker*, 2 B. & C., 37. In this case there is no doubt that the vendor's lien was gone; for the vendee usually removed the goods within the sixty days for which credit was given, and had an undoubted right so to do.

If the decision were to turn merely on the conditional contract of insurance made by the vendee, that would be sufficient evidence to warrant a jury in finding a receipt of the goods. The cases are many where a sale, or a mere offer to sell, or a request by the vendee to the vendor to sell on his account, and various other acts of ownership, have been held sufficient for that purpose, though the goods remained in the actual possession of the vendor, or of a middleman. *Chaplin v. Rogers*, 1 East, 192; *Blenkinsop v. Clayton*, 7 Taunt., 597; *Marvin v. Wallis*, 6 Ell. & Bl., 726; *Castle v. Swarder*, 6 H. & N., 828. It may be said that a resale would be a fraud on the vendor, if the goods are not the property of the vendee, and that for this reason the latter is estopped; but the true reason is that such an act is of itself evidence of acceptance and receipt; and a contract of insurance is fully as significant in this respect.

It was argued that, in a certain sense, the lien of the vendor was not gone, because, if the vendee had become insolvent, it might have revived under the decision in *Arnold v. Delano*, 4 Cush., 33, and similar cases; and it was added that, so long as the right of stoppage *in transitu* was not lost, there could be no receipt by the vendee. The law is so given in *Story, Sales*, § 276; but there are many decisions to the contrary of that statement, and none in its favor that I have seen. In *Bushell v. Wheeler*, 15 Q. B., 442, note, Coleridge, J., said of the right to stop *in transitu*: "That is a bad test; there might be stoppage *in transitu*, though there had been a note in writing." Lord Denman, C. J., made a similar remark in delivering the opinion of the court; and the decision covers the point. So are *Cross v. O'Donnell*, 44 N. Y., 661; *Castle v. Swarder*, 6 H. & N., 828; and, in point of principle, the following cases, as well as those above cited, in which delivery of accepted goods to a carrier was held to have been received by the vendee within the statute, though in most of them the right of stoppage might have been exercised if the vendee had become insolvent: *Dodsley v. Varley*, 12 A. & E., 632; *Howes v. Ball*, 7 B. & C., 484; *Pinkham v. Mattox*, 53 N. H., 600. The revival of the vendor's lien in case of insolvency is an equitable doctrine very difficult to explain at common law; but it arises only upon bankruptcy or insolvency, and does not then revert the property.

Lastly, it is said that certain late cases in Massachusetts are opposed to the plaintiff's argument (*Knight v. Mann*, 118 Mass., 143; *S. C.*, 120 Mass., 219; *Safford v. McDonough*, *id.*, 290); but they are not like this case. In the former, the goods were not taken out and weighed in the presence of the buyer; and he had done no act of acceptance except to authorize them to be set apart, and to say that he would send for them. The court said that he had still the right of examination and rejection, which it is clear that the bankrupt in this case had not. In the latter case the plaintiffs were holding the goods as unpaid vendors, and had refused to deliver them excepting for cash or a satisfactory note. This case is more like *Ross v. Welch*, 11 Gray, 235, where the defendant

bought growing cabbages and received constructive delivery of them on the ground. It is true a few were actually delivered; but that fact is not noticed in the judgment of the court, who say, "an agreement to sell an article ready to be delivered and taken away, though still standing in the soil, unrevoked, is sufficient delivery to give effect to the sale between the parties."

It is not necessary to go so far in this case; because the hides were delivered in an unequivocal manner, and put by themselves, and insured for the buyer, though it happened through most unforeseen circumstances that the insurance was inadequate. With all the refinements to which I have before alluded, I know of no case, either in England or the United States, in which such circumstances have not been considered evidence for the jury to find both acceptance and receipt to satisfy the statute; and, as a jurymen, I have no hesitation in saying that they were so accepted and received, because this was the undoubted intent and understanding of both parties.

Debt admitted to proof.

BUTLER v. THOMSON.

(2 Otto, 412-417. 1875.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The plaintiff alleged that on the 11th day of July, 1867, he bargained and sold to the defendants a quantity of iron, thereafter to arrive, at prices named, and that the defendants agreed to accept the same and pay the purchase money therefor; that the iron arrived in due time and was tendered to the defendants, who refused to receive and pay for the same; and that the plaintiff afterwards sold the same at a loss of \$6,581, which sum he requires the defendants to make good to him. The defendants interposed a general denial.

Upon the trial the case came down to this: The plaintiff employed certain brokers of the city of New York to make sale for him of the expected iron. The brokers made sale of the same to the defendants at twelve and three-quarters cents per pound in gold, cash. The following memorandum of sale was made by the brokers, viz.:

"NEW YORK, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first-quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters (12 $\frac{3}{4}$) cents per pound, gold, cash, actual tare.

"Iron due about Sept. 1, '67.

WHITE & HAZZARD, Brokers."

The defendants contend that, under the statute of frauds of the state of New York, this contract is not obligatory upon them. The judge before whom the cause was tried at the circuit concurred in this view, and ordered judgment for the defendants. It is from this judgment that the present review is taken. The provision of the statute of New York upon which the question arises (2 R. S., 136, sec. 3) is in these words:

"Every contract for the sale of any goods, chattels, or things in action, for the price of \$50 or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase money."

The eighth section of the same title provides that "every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party."

§ 1754. *A memorandum of sale made by the broker of both parties, reciting the sale and its terms, is sufficient to charge the purchaser.*

There is no pretense that any of the goods were accepted and received, or that any part of the purchase money was paid. The question arises upon the first branch of the statute, that a memorandum of the contract shall be made in writing and be subscribed by the parties to be charged thereby. The defendants do not contend that there is not a sufficient subscription to the contract. White & Hazzard, who signed the instrument, are proved to have been the authorized agents of the plaintiff to sell, and of the defendants to buy; and their signature, it is conceded, is the signature both of the defendants and of the plaintiff.

The objection is to the sufficiency of the contract itself. The written memorandum recites that Butler & Co. had sold the iron to the defendants at a price named; but it is said there is no recital that the defendants had bought the iron. There is a contract of sale, it is argued, but not a contract of purchase. As we understand the argument, it is an attack upon the contract, not only that it is not in compliance with the statute of frauds, but that it is void upon common law principles. The evidence required by the statute to avoid frauds and perjuries — to wit, a written agreement — is present. Such as it is, the contract is sufficiently established, and possesses the evidence of its existence required by the statute of frauds.

The contention would be the same if the articles sold had not been of the price named in the statute, to wit, the sum of \$50. Let us examine the argument. Blackstone's definition of a sale is "a transmutation of property from one man to another in consideration of some price." 2 Bl., 446. Kent's is, "a contract for the transfer of property from one person to another." 2 Kent, 615. Bigelow, C. J., defines it in these words: "Competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject-matter of the sale, and the price to be paid therefor." *Gardner v. Lane*, 12 Allen, 39, 43. A learned author says: "If any one of the ingredients be wanting, there is no sale." *Atkinson on Sales*, 5. *Benjamin on Sales*, p. 1, note, and p. 2, says, "To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money, paid or promised."

How, then, can there be a sale of seven hundred and five packs of iron, unless there be a purchase of it? How can there be a seller, unless there be likewise a purchaser? These authorities require the existence of both. The essential idea of a sale is that of an agreement or meeting of minds by which a title passes from one, and vests in another. A man cannot sell his chattel by a perfected sale, and still remain its owner. There may be an offer to sell, subject to acceptance, which would bind the party offering, and not the other party until acceptance. The same may be said of an optional purchase upon a sufficient consideration. There is also a class of cases under the statute of frauds where it is held that the party who has signed the contract may be held chargeable upon it, and the other party, who has not furnished that evidence against himself, will not be thus chargeable. Unilateral contracts have been the subject of much discussion, which we do not propose here to repeat. In

Thornton v. Kempster, 5 Taunt., 788, it is said, "Contracts may exist which, by reason of the statute of frauds, could be enforced by one party, although they could not be enforced by the other party. The statute of frauds in that respect throws a difficulty in the way of the *evidence*. The objection does not interfere with the substance of the contract, and it is the negligence of the other party that he did not take care to obtain and preserve admissible evidence to enable himself also to enforce it."

The statute of 29 Car. II., ch. 3, on which this decision is based, that "no contract for the sale of goods, wares and merchandise, for the price of £10 or upwards, shall be allowed to be good except the buyer," etc., is in legal effect the same as that of the statute of New York already cited. See *Justice v. Lang*, 42 N. Y., 203, that such is the effect of the statute of New York.

The case before us does not fall within this class. There the contract is signed by one party only; here both have signed the paper; and, if a contract is created, it is a mutual one. Both are liable, or neither. Under these authorities, it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale. When, therefore, the parties mutually certify and declare in writing that *Butler & Co.* have sold a certain amount of iron to *Thomson & Co.* at a price named, there is included therein a certificate and declaration that *Thomson & Co.* have bought the iron at that price.

In *Radford v. Newell*, L. R., 3 C. P., 52, the memorandum was in these words: "Mr. H., thirty-two sacks culasses at 39s., two hundred and eighty pounds, to wait orders;" signed, "John Williams." It was objected that it was impossible to tell from this memorandum which party was the buyer and which was the seller. Parol proof of the situation of the parties was received, and that Williams was the defendant's agent, and made the entry in the plaintiff's books. In answer to the objection the court say, "The plaintiff was a baker, who would require the flour, and the defendant a person who was in the habit of selling it;" and the plaintiff recovered. It may be noticed, also, that the memorandum in that case was so formal as to contain no words either of purchase or sale ("Mr. H., thirty-two sacks culasses at 39s., two hundred and eighty pounds, to wait orders"); but it was held to create a good contract upon the parol evidence mentioned.

The subject of bought and sold notes was elaborately discussed in the case of *Sievenright v. Archibald*, 6 Eng. L. & Eq., 286; S. C., 17 Q. B., 103; *Benj. on Sales*, p. 224, sec. 290. There was a discrepancy in that case between the bought and sold notes. The sold note was for a sale to the defendant of "five hundred tons Messrs. Dunlop, Wilson & Co.'s pig-iron." The bought note was for "five hundred tons of Scotch pig-iron." The diversity between the bought and sold notes was held to avoid the contract. It was held that the subject of the contract was not agreed upon between the parties. It appeared there, and the circumstance is commented on by Mr. Justice Patteson, that the practice is to deliver the bought note to the buyer and the sold note to the seller. He says: "Each of them, in the language used, purports to be a representation by the broker to the person to whom it is delivered, of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be a memorandum of the contract signed by the buyer's agent, in order that he might be bound thereby; for then it would have been delivered to the seller, not to the buyer, and *vice versa* as to the sold note."

The argument on which the decision below of the case we are considering

was based is that the contract of sale is distinct from the contract of purchase; that to charge the purchaser, the suit should be brought upon the bought note; and that the purchaser can only be held where his agent has signed and delivered to the other party a bought note—that is, an instrument expressing that he has bought and will pay for the articles specified. Mr. Justice Patteson answers this by the statement that the bought note is always delivered to the buyer, and the sold note to the seller. The plaintiff here has the signature of both parties, and the counterpart delivered to him and on which he brings his suit, is, according to Mr. Justice Patteson, the proper one for that purpose—that is, the sold note.

We do not discover in *Justice v. Lang*, reported in 42 N. Y., 493, and again in 52 N. Y., 323, anything that conflicts with the views we have expressed, or that gives material aid in deciding the points we have discussed. The memorandum in question, expressing that the iron had been sold, imported necessarily that it had been bought. The contract was signed by the agent of both parties, the buyer and the seller, and in our opinion was a perfect contract, obligatory upon both the parties thereto. Judgment reversed and cause remanded for a new trial.

WILLIAMS v. MORRIS.

(5 Otto, 444-458. 1877.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Sufficient appears to show that the complainants are the heirs-at-law of James Williams, who died intestate August 16, 1862, seized in fee of an undivided moiety of lot 1 in square 160 on the plan of the city of Washington, bounded as described in the bill of complaint; and they allege that their intestate, six years before his decease, acting for himself and for the heirs of his brother previously deceased, who in his life-time owned the other moiety of the premises, rented the whole lot to the first-named respondent for the yearly sum of \$600; that the rent was subsequently increased, and that the lessee has ever since remained in the possession of the undivided moiety which belonged to the intestate, and that a large amount of the rent is in arrear, the respondent having paid only an inconsiderable amount of the same to the lessor during his life-time, and nothing to the complainants since his decease.

Superadded to that, the charge of the complainants is that the respondent, while so in possession of the premises as tenant, did by his own default suffer the taxes assessed on the lot to remain unpaid; that the premises were sold at a tax sale; and that he claims to hold the same by virtue of that sale; but they allege that the title, if any, acquired to the moiety in question inured to their benefit; and they further show that the respondent has recently, in violation of his duty as tenant, repudiated his tenancy, and claims title to the premises under some pretended contract with the lessor in his life-time for the purchase of the same, all of which claim the complainants aver is unfounded. Based upon these allegations, the complainants allege that the respondent has terminated his tenancy; and they charge that he has ever since held the property, and received from the United States large rents for the same, for which he is justly accountable; and they pray for an account of all moneys due for such rent to them and to the widow of the deceased lessor, and that he be decreed to convey to the complainants all title to the moiety of the premises he acquired by the tax sale, and for general relief.

Service was made, and the first-named respondent appeared and filed an answer, setting up several defenses. Proofs were taken on both sides, and the court at special term entered a decree in favor of the complainants. Due appeal was taken by the respondent to the general term; when both parties were again heard, and the appellate court reversed the decree entered at the special term, and dismissed the bill of complaint. From that decree the complainants appealed to this court, and now assign the following errors: 1. That the court erred in finding, as matter of fact, that there was any contract made by the intestate in his life-time for the sale of his moiety of the premises. 2. That the court erred in giving effect to the alleged contract, as it was within the statute of frauds. 3. That the court erred in refusing to allow the complainants to contribute to the payment of the tax debt to relieve their title from the cloud of the tax sale. 4. That the court erred in not requiring the respondent to account for the rents and profits.

Prior to the origin of the present controversy, the premises, with the building thereon, had been the partnership property of the two brothers named in the bill of complaint. Possession of the premises was taken by the respondent, and he proceeded to repair the building, and expended several hundred dollars in fitting up the lower story of the same as an office for the insurance company of which he was president. Six months later or more, the respondent entered into a formal written contract with the heirs of the other deceased owner, whereby they agreed to sell and convey to him the other moiety of the premises, and he agreed to purchase the same for the sum of \$3,000, to be paid \$1,000 in cash and the rest in notes.

Corporation taxes for two years — to wit, for the years 1853 and 1854 — not having been paid, the proper authorities sold the premises for the payment of the same; and the record shows that one John P. Ingle became the purchaser at each of the sales, and that the right of redeeming the property had expired before the respondent went into possession. Deeds of the premises were subsequently executed, and delivered to the respondent; but he did not at the time put them on record, probably for the reason that the sales were irregular and that the deeds conveyed no valid title. Negotiations subsequently ensued between the respondent and the purchaser of the premises at the tax sales, which resulted, with the approval of the lessor, in an arrangement that the respondent should pay the amount of the taxes and expenses and take up the tax deeds; and the evidence shows that the arrangement was carried into effect.

Nothing remained in that regard for substantial controversy; but the respondent six months thereafter induced the purchaser at the tax sales to give him a quitclaim deed of the whole lot, and at a still later period put all three deeds on record, showing the title to the entire premises in himself. Throughout the whole period, the respondent continued to occupy the premises, until June, 1861, when he rented the same to the United States at \$175 per month; which rental he has since received. Viewed in the light of these suggestions, much discussion of the title of the complainants, irrespective of the defenses set up in the answer, is unnecessary; as it is obvious that they are entitled to a decree in their favor, unless the defenses or some one of them can be sustained.

Three of the defenses set up in the answer will be separately considered: 1. That the respondent was lawfully in possession of the lot with the tenement thereon, under a parol contract with the complainants' intestate for the purchase and conveyance of his moiety of the premises. 2. That the pretended claim set up by the complainants is stale, and ought not to receive the coun-

tenance of the court of equity as the ground for the relief prayed. 3. That the cause of action set up in respect to the matters alleged, if any, occurred more than three years before the filing of the bill of complaint or the service of process; and that the respondent did not, at any time within three years next before the filing of the bill or the service of process, agree to come to any account or pay any sum of money to the complainants by reason of the matters therein charged.

Briefly stated, the matters alleged in the answer in support of the first defense are that the respondent, in the month of February, 1856, entered into a contract with James Williams, under which he rented the premises at the rate of \$650 a year, with the right thereafter to purchase the same for the sum of \$6,000, the lessor representing at the time that he was the sole owner of the same; and that he, the respondent, entered into possession of the lot and tenement, and proceeded to make extensive improvements and alterations in the tenement; that six months later he learned, to his great surprise, that the heirs of John Williams, deceased, were entitled to a moiety of the estate; and that he, the respondent, in order to confirm his title, and at the instance and with the approval of his lessor, entered into a contract with the heirs of the deceased owner, whereby one-half of the purchase money was agreed to be paid to them as such owners of the moiety which belonged to their intestate in his life-time; and he also alleges that, on the 22d of October, 1856, he delivered to their attorney two checks (each for \$500) and four promissory notes (each for the sum of \$500), in payment for the moiety of the property to which those parties were entitled.

Apart from that the respondent alleges in his answer that the premises were heavily incumbered by mortgages; and that at the time or before the date of the contract for the purchase of the other moiety it was further agreed, between him and the owner of the moiety now in question, that he, the respondent, should purchase the same, in pursuance of the original contract, for the sum of \$6,000, and that the grantor should be entitled to a moiety only of the purchase money.

§ 1755. *Under the law in force in the District of Columbia, an interest in land by livery of seizin or parol, except leases under three years, constitutes only an estate at will.*

Two contracts are therefore alleged for the sale and purchase of the premises; and it is obvious that they are widely different in form and substance. As alleged, the first is for the purchase of the entire lot and tenement, and the second is for the purchase of the moiety only which belonged to the complainants' intestate. Under the first contract, the entire consideration was to be paid to the party contracting to make the conveyance; but by the terms of the second, one-half only of the consideration was to be paid to that party for his benefit, the clear inference being that the purchaser had previously purchased or contracted to purchase the other moiety of the heirs of the deceased owner. Evidence to show that the first contract, if made, was ever fulfilled, is entirely wanting; nor is there a particle of evidence that any such contract as the one secondly alleged was ever made or proposed between the parties. Suppose it were otherwise, and that the parol evidence introduced was sufficient to show that one or both of the alleged contracts were actually made in adequate terms and free of ambiguity, still the evidence would not constitute a defense to the suit, for the reason that the alleged contracts would be within the statute of frauds.

Interests in lands, except leases not exceeding the term of three years, made or created by livery and seizin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only; and shall not, either at law or in equity, be deemed or taken to have any other or greater force or effect. 1 Kilty's Laws, Md., 242. No action shall be brought . . . upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized. Browne, Frauds, 503.

§ 1756. *A tenant buying a tax title holds in trust for his landlord.*

Argument to show that the respondent did not derive any valid title to the premises under the tax deeds is unnecessary, as the amended answer admits that the tax deeds did not convey any title whatever, and the respondent testified to the same effect. Even if the deeds had been regular, they would not benefit the respondent; as in that event the legal conclusion would be that the respondent, as the tenant of the lessor, held the title in trust for his landlord. *Rothwell v. Dewees*, 2 Black, 613; *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.), 388; 2 Story, Eq. Jur., sec. 1211 a. Tenants are never allowed to deny the title of their landlord, nor set up a title against him, acquired by the tenant during the tenancy, which is hostile in its character to that which he acknowledged in accepting the demise; the rule being that whenever the possession is acquired under any species of tenancy, whether the action be *assumpsit*, debt, covenant or ejectment, the tenant is estopped from denying the title of the landlord. *Taylor, Land. and Ten.*, secs. 629, 705; *Jackson v. Harper*, 5 Wend. (N. Y.), 246; *Sharp v. Kelley*, 5 Den. (N. Y.), 431; *Doe v. Smythe*, 4 M. & S., 347.

§ 1757. *A writing, to take a case out of the statute of frauds, must state the essential terms of the contract.*

Attempt is made to take the case out of the protection of the statute of frauds by the receipts given in evidence; but it is clear that they fall far short of what is required to accomplish that object. 3 Phil. Ev. (4th Am. ed.), 351; *Tallman v. Franklin*, 14 N. Y., 584; *Elmore v. Kingscote*, 5 B. & C., 583. Decided cases everywhere require that the memorandum should mention the price. Nothing is contained in either receipt to fulfil that requirement, nor do the receipts contain anything of an unambiguous character to enable the court to determine what real estate is the subject of the purchase. Part of the property lying west of the tenement, the evidence shows, was never occupied by the respondent; and the second receipt, in terms, limits the purchase to the tenement which the respondent occupied and repaired. None of the terms, says Mr. Phillips, can be left to be supplied by parol; and, if not, it is clear that the receipts are not sufficient to support the theory of the defense. *Baptist Church v. Bigelow*, 16 Wend. (N. Y.), 28; *Morton v. Dean*, 13 Metc. (Mass.), 385.

Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. 2 Kent, Com. (12th ed.), 511; *Norris v. Lain*, 16 Johns. (N. Y.), 151; *Dung v. Perkins*, 52 N. Y., 494; *Baltzen v. Nicolay*,

53 id., 467; *Wright v. Weeks*, 25 id., 153; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.), 273; S. C., 14 id., 15. Any note or memorandum in writing which furnishes evidence of a complete and practicable agreement is sufficient under the statute, and parol evidence is admissible to explain latent ambiguities, and apply the instrument to the subject-matter. *Barry v. Coombe*, 1 Pet., 640; *Clark v. Burnham*, 2 Story, 1; Story, Sales, sec. 257.

Diversity of decision undoubtedly exists; but this court decided in the case of *Purcell v. Miner*, 4 Wall., 513, that the proof as to the terms of the contract must be clear, definite and conclusive, and must show a contract, leaving no *jus deliberandi* or *locus penitentiæ*; that it cannot be made out by mere hearsay or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witnesses have no reason to recollect from interest in the subject-matter, and which may have been imperfectly heard or inaccurately remembered, perverted or altogether fabricated; that the proof must also show that the consideration has been paid or tendered, or that there has been such part performance of the contract that its rescission would be a fraud on the other party, which could not be compensated by the recovery of damages; or that the delivery of possession has been made in pursuance of the contract, and has been acquiesced in by the other party. Tested by these considerations, it is clear that the attempt to prove a written contract utterly fails, and that there is no satisfactory evidence to prove any such part performance of the supposed contract as will take the case out of the operation of the statute.

§ 1758. *Part performance must be of the agreement, not of an agreement, to take a case out of the statute of frauds.*

Where the attempt is to take the case out of the statute upon the ground of part performance, the party making the attempt must show by clear and satisfactory proof the existence of the contract as laid in his pleading, and the act of part performance must be of the identical contract which he has in that manner set up and alleged. It is not enough that the act of part performance is evidence of some agreement; but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill or answer. *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.), 131; *Browne*, Frauds, sec. 452. Specific performance in such a case will not be decreed, unless the terms of the contract are clearly proved or admitted; and a sufficient part performance is made out to show that fraud and injustice would be done if the contract was held to be inoperative; and all the authorities agree that the acts of part performance must be such as are referable to the contract as alleged, and consistent with it. *Woodfall*, Land. & Ten. (9th ed.), 942; *Price v. Salusbury*, 32 Beav., 446; *Tompkinson v. Straight*, 17 C. B., 697.

§ 1759. *Part performance must be substantial, not ancillary or preparatory.*

Nothing is part performance for this purpose which is only ancillary or preparatory; it must be a direct act which is intended to be a substantial part performance of an obligation created by the contract as proved; and it must be an act which would not have been done but for the contract; and it must be directly in prejudice of the party doing the act, who must himself be the party calling for the completion of the contract. *Jones v. Peterman*, 3 Serg. & R. (Pa.), 543; *Morphett v. Jones*, 1 Swans., 172; *Ex parte Hooper*, 19 Ves. Jr., 477; *Frame v. Dawson*, 14 id., 385; *Buckmaster v. Harrop*, 7 id., 341; 3 Pars. Contr. (6th ed.), 60. Where one of the two contracting parties has been induced or allowed to alter his position on the faith of such contract, to such

an extent that it would be fraud on the part of the other party to set up its invalidity, courts of equity hold that the clear proof of the contract and of the acts of part performance will take the case out of the operation of the statute, if the acts of part performance were clearly such as to show that they are properly referable to the parol agreement. *Chitty, Contr.* (10th ed.), 66, 278; 2 Story, Eq. Jur., sec. 761.

Courts of equity sometimes, in cases of concurrent jurisdiction, follow by analogy the statute of limitations which governs courts of law in like cases; but there is nothing in the facts of the case before the court to bring it within the operation of that rule. Beyond all question, the fee-simple title of the property was in the original lessor; and it is equally clear that the respondent entered into the possession of the premises as the tenant of the lessor, under an agreement to pay a stipulated rent, and the record shows that he continued to hold possession of the same until the time of his decease, or until he rented the same to the United States; nor does the fact that he, subsequently to the entry, denied the title of his landlord, have any just influence to support the defense of limitation or laches, inasmuch as the case shows that he did so without any just cause or legal excuse. Authorities to support that proposition are quite unnecessary, as to hold otherwise would be to sanction injustice and encourage fraud.

From these suggestions it follows that the decree in the court of original jurisdiction was correct; but inasmuch as the account was not taken (*Nellis v. Lathrop*, 22 Wend. (N. Y.), 121), the decree rendered at the general term will be reversed and the cause remanded, with directions to enter a decree for the complainants for further proceedings in conformity to the opinion of this court; and it is so ordered.

JUSTICES FIELD and BRADLEY dissented.

GRAFTON v. CUMMINGS.

(9 Otto, 100-112. 1878.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—At an auction sale of the Glen House, in the White Mountains, New Hampshire, on May 16, 1871, Grafton bid off the property for \$90,000. Ten days later deeds of the property were tendered him, which deeds he refused to accept, and the property was sold again for \$61,000. This suit was brought to recover the difference between the two amounts as damages for Grafton's failure to perform his contract. The only question presented was whether there was a sufficient written memorandum of the contract to satisfy the statute of frauds of New Hampshire. That statute enacts that "no action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized by writing." The writing offered to satisfy the statute was as follows:

"I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the Glen House, with furniture belonging to it, in Green's grant, New Hampshire, and sold at auction, Tuesday, May 16, 1871, at 11 o'clock, A. M., and for the sum of \$90,000, the said property being more particularly described in the advertisement hereunto affixed; and I hereby bind

myself, my heirs and assigns, to comply with the terms and conditions of the sale, as declared by the auctioneer at the time and place of sale.

"JOSEPH GRAFTON."

The terms of sale were printed and written on the margin of the above. The advertisement above referred to simply described the property, gave the date of the sale, stated that the property would be sold to close the estate of "the late J. M. Thompson," and directed those wishing to make inquiries to J. W. Weeks or S. H. Cummings. The above described paper was indorsed "A. R. Walker, auctioneer and agent of both parties."

A letter to the following effect, signed by Woodbury Davis and addressed to S. H. Cummings, was read in evidence: "DEAR SIR—I came up to-day hoping to confer with you in regard to the purchase of the Glen House. I don't know but what Lindsay and Barron intend to take it. Some things they said indicated as much, and Grafton offered to let them take it at his bid, and let them have their own time to pay him his claim. But I find Mrs. Thompson is strongly attached to the place. The judge of the probate court will make her an allowance. It occurred to me that the purchase might be made in this way. One-tenth would be \$9,000; S. H. Cummings, three-tenths, \$27,000; Lindsay, three-tenths, \$27,000; Barron, three-tenths, \$27,000; Mrs. Thompson, one-tenth, \$9,000. This would relieve you from most of the care. It would give Mrs. Thompson an interest in it. The \$9,000 due Grafton is as much as her share, and I will agree to let it be until she has time to pay it from the profits. I go home to-morrow, but I wanted to propose this to you, as Grafton really don't want anything to do with the property, though he thinks Stearns, or some one of their leading hotel men, may have some young man that they would like to put into the house. He will try to dispose of it in that way, but hopes that before doing it I shall be able to write to him that it will be taken up here."

Judgment for plaintiff.

Opinion by MR. JUSTICE MILLER.

The bill of exceptions in this case is voluminous, containing, apparently, everything said and done on the trial. Sixty-one errors are assigned to this court. We shall confine ourselves to the examination of one of them. That one presents the question, as it occurs in various forms in the record, whether there was a sufficient memorandum of the contract in writing, under the statute of frauds of New Hampshire, to sustain the action.

§ 1760. *A memorandum which fails to indicate the vendor is not sufficient to satisfy the statute of frauds of New Hampshire.*

It is proper to observe that the objection to the papers is not that they were not signed by Grafton, the party charged, for he signed himself the principal instrument. The reference to the others, and their annexation to that, are sufficient to make them a part of the paper which he did sign. We shall, also, for the purpose of this inquiry, take it that Walker was the auctioneer, and that his name indorsed on the instrument gives it all the value which it could have if signed at any time necessary for that purpose. The distinct objection to the instrument, as so presented, is that the other party to the contract of sale is not named in it, and can only be supplied by parol testimony.

The statute not only requires that the agreement on which the action is brought, or some memorandum thereof, shall be signed by the party to be charged, but that the agreement or memorandum shall be in writing. In an agreement of sale there can be no contract without both a vendor and a

vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold by which it can be known or identified, of the price to be paid for it, of the party who sells it and the party who buys it. There is a defect in this memorandum in giving no indication of the party who sells. If Grafton was bound to purchase, it was because somebody was bound to sell. If he was bound to pay, somebody was bound to receive the money and deliver the consideration for the price so paid.

There can be no bargain without two parties. There can be no valid agreement in writing without these parties are named in such manner that some one whom he can reach is known to the other to be bound also. No one is bound in this paper to sell the Glen House or to convey it. No one is mentioned as the owner or the other party to this contract. Let it be understood that we are not discussing the question of mutuality in the obligation, for it may be true that, if a vendor was named in this paper, the offer to perform on his part would bind the party who did sign. But Grafton did not agree to buy this property of anybody who might be found able and willing to furnish him a title. He was making a contract which required a vendor and a vendee at the time it was made, and he is liable only to that vendor. The name of that vendor, or some designation of him which could be recognized without parol proof extraneous to the instrument, was an essential part of that instrument to its validity.

It is alleged that Stephen H. Cummings, the plaintiff in this action, was the vendor, and that this sufficiently appears in the papers annexed to the memorandum and incorporated into the statement of this case. The first ground on which it is sought to maintain this proposition is that Walker's indorsement is sufficient for that purpose. It is very clear that Walker did not intend to hold himself out as the vendor in this case, because he describes himself as auctioneer and agent for both parties. If he had been sued on this contract by Grafton for failing to tender sufficient deeds of conveyance, it would have been a good answer to the action that he describes himself in the paper on which he was sued as merely an auctioneer in the matter, and in that sense as agent, and not principal. He could not in the act of signing that paper be the agent of Grafton, for Grafton signed it for himself. The statement, therefore, did not mean that he signed for both parties, because he did not and could not sign as agent for Grafton.

What did he mean by putting his name there? It can have no other fair meaning than simply to say, as he does, I was the auctioneer who struck off this property. But concede that he meant to represent the other party in that contract, a contract in which he takes care not to bind himself, who is that other party? What light does the writing of his name as auctioneer and agent throw on that question? Literally none. An anxious reader of the whole paper and its attachments would know as little who sold, or for whom Walker was selling, after his signature as he did before. To say agent for both parties may show he was agent for the one party whose name is not there, but it does not show who was that party. The paper without Walker's indorsement shows who was the purchaser, but neither with nor without it does it show who was the seller.

It is next argued that the reference to Cummings' name in the advertisement annexed to the paper signed by defendant is sufficient for this. The statement

is that the sale is made to close out the estate of the late Mr. Thompson, and "any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Me." Three persons are here mentioned. One, Mr. Thompson, was dead, and could not be the vendor. Another, Mr. Weeks, though not mentioned as a party selling, it may be inferred had some interest in the sale as administrator of Thompson. But Weeks does not sue, and if his name had been inserted in the contract as vendor, it would not have sustained the present action. But the true intent of that advertisement was not to describe the vendors, or even the owners of the land, but to designate persons who might give any information about the property which one thinking of purchasing would need. This did not require that the person referred to should be the owner of the land or the party selling it. Such inquiries could as well be answered by a lawyer, a real estate agent, the latest keeper of the hotel, or one who had been his clerk, as by the owner. There did not arise, therefore, any implication from the reference to Cummings that he was owner, or even part owner, or that he was holding himself out as the party selling.

The next effort to sustain the instrument sued on as valid may be said to be a vague effort to show, by the verbal history of the transaction, that defendant recognized Cummings as vendor by subsequent interviews and negotiations with him on the subject of the sale. And special importance in this part of the case is attached to a letter written by Davis, a lawyer, to Cummings. The letter is liable to three objections as a recognition by defendant of Cummings as the party of whom he had purchased.

1. No such recognition is to be found in the letter. It consists of suggestions on the part of Davis of what had better be done with the property; that Cummings, Mrs. Thompson and Grafton ought to take it; and that Grafton really don't wish to have anything to do with it. It is not even a recognition of the validity of the purchase, and nowhere speaks of Cummings as the vendor, but he might rather be supposed to be a purchaser with Grafton.

2. Davis does not profess to be speaking or acting for Grafton. He writes in his own name. It is shown by other evidence that, either as attorney or for himself, he controlled the larger part of the debts against Thompson's estate, which made the sale necessary, and it may be fairly inferred that it was in this character he spoke.

3. There is no satisfactory evidence that he was authorized to act for Grafton in that transaction, and none whatever that he was authorized by him to write that letter. The New Hampshire statute requires that the authority of an agent to charge a party shall be in writing, and there is no pretense that Davis had any such authority from Grafton.

§ 1761. — *authorities examined.*

These views of the proper construction of the statute are amply sustained by authority. In the leading case of *Wain v. Warlters*, 5 East, 10, decided by Lord Ellenborough under the English statute, the same as that of New Hampshire on the point in question, that eminent judge said: "The question is whether that word (agreement) is to be understood in a loose, incorrect sense in which it may be sometimes used as synonymous to promise or understanding, or in its more correct sense of signifying a mutual contract on consideration between two or more parties." He held the latter to be the true construction, and that all its essential elements must appear in the memorandum, including the consid-

eration, which in that case was absent. This has been held to be the law in England ever since.

In *Williams v. Byrnes*, before the privy council, reported in 9 Jur. (N. S.), 363, decided in 1863, the defendant had in a letter to one Hardy told him that he would furnish the funds to pay for a steam-engine if the latter would find and purchase a suitable one. Hardy made a verbal contract for the engine, and the vendor sued defendant on this memorandum. Coleridge, J., in delivering the judgment of the privy council, said: "This language" (the language of the statute) "cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing; and a bargain cannot so appear unless the parties to it are specified, either nominally or by description or reference;" and the ruling of the chief justice that this could be done by extrinsic proof as to who was the vendor was reversed. The case is precisely in point with the one before us.

Sale v. Lambert, Law Rep., 18 Eq., 1, was a sale of real estate in which the party charged was the vendor. The memorandum was signed by Sale, the purchaser, for himself, and by George Jackson, the auctioneer, for the vendor. This memorandum was indorsed on a bill of particulars of the conditions of the sale, in which it was said that the property was sold by the proprietor. The master of the rolls held that the word "proprietor" sufficiently described the vendor, and ascertained who was the party for whom the auctioneer signed. But in *Potter v. Duffield*, id., 4, he held that the words "confirmed on the part of the vendor," and signed "Beadels," who were the auctioneers, did not sufficiently designate who the vendor was, and that a suit against the owner could not be sustained on the memorandum. He said: "If you could go into the evidence as to the person who is described as vendor by Mr. Beadel, the answer would be that Polley was that person. But that is exactly what the act says shall not be decided by parol evidence."

In the case before us, Walker, the auctioneer, does not even say that he signed for the vendor, as Beadel did in the last case cited. But the case which should have most weight in informing our judgment is *Sherburne v. Shaw*, 1 N. H., 157, because it is an authoritative construction of the statute of the state where this contract was made and the land is situated to which the contract relates, made by the highest court of that state sixty years ago and never overruled. The case is so perfectly parallel to the one under consideration that its circumstances need not be repeated. It is sufficient to say that the want of the vendor's name in the memorandum was held fatal to any right of action, though the auctioneer's name was signed to a memorandum otherwise sufficient. The concluding language of the court is that "the written evidence which hath been offered to prove the contract declared on, as it fails to give any intimation that plaintiffs were one of the parties to that contract, must itself be considered fatally defective and inadmissible."

The same doctrine is laid down in the excellent work of Mr. Browne on the Statute of Frauds, sections 372 to 375, and the authorities fully cited. He also speaks of the case of *Salmon Falls Manuf. Co. v. Goddard*, 14 How., 446 (§§ 1762-67, *infra*), as one which might be saved from conflict with the general rule, on the ground that a bill of parcels detailing the purchase was made out and sent to the purchaser, and accepted by him as such. In that case Mr. Justice Curtis delivered an able dissenting opinion, in which Mr. Justice Catron and Mr. Justice Daniel concurred. It may be doubted whether the opinion of the majority in all it says in reference to the use of parol proof in aid of even

mercantile sales of goods by brokers is sound law. It certainly furnishes no rule to govern us in the exposition of the statutes of New Hampshire concerning contracts of sale of real estate within its own borders, where it conflicts with the decisions of the courts of that state on the subject.

Defendant in error relies mainly on that case and the later one of *Beckwith v. Talbot*, 95 U. S., 289 (§§ 1797-98, *infra*). The latter case, however, affords no support to the argument of counsel. The defendant in that action was charged, it is true, on a memorandum in which his name was not found. But he produced that memorandum from his own possession on the trial, and letters of his written to the plaintiff while the agreement was so in his possession were given in evidence, which referred to the agreement and acknowledged its obligatory force on himself in terms that required no parol proof to identify it as the agreement to which he referred. This was, within all the cases, a sufficient signing of the memorandum, though found in another paper written by the party to be charged, to comply with the statute of frauds, and so this court held.

We are of opinion that there was no sufficient memorandum in writing of the agreement on which this suit was brought to sustain the verdict of the jury. The judgment of the circuit court will, therefore, be reversed, and the case remanded to that court with instructions to set aside the verdict; and it is so ordered.

MR. JUSTICE BRADLEY did not sit in the case.

SALMON FALLS MANUFACTURING COMPANY v. GODDARD.

(14 Howard, 446-468. 1852.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the district of Massachusetts. The suit was brought by the plaintiffs in the court below, to recover the price of three hundred bales of brown, and of one hundred cases of blue drills, which they had previously sold to the defendant.

The contract for the purchase was made with the house of Mason and Lawrence, agents of the plaintiffs, in Boston, on the 19th September, 1850, and a memorandum of the same signed by the parties. A bill of parcels was made out under date of 30th September, stating the purchase of the goods by the defendant, carrying out prices and footing up the amount at \$18,565.08; also the terms of payment — note at twelve months, payable to the treasurer of the plaintiffs. This was forwarded to the defendant on the 11th October, and in pursuance of an order from him, the three hundred bales were sent from their establishment at Salmon Falls by the railroad and arrived at the depot in Boston on the 30th October, of which notice was given to the defendant on the same day, and a delivery tendered. He requested that the goods should not be sent to his warehouse, or place of delivery, for the reason, as subsequently stated by his clerk, there was no room for storage. The agents of the plaintiffs the next day renewed the tender of delivery by letter, adding that the goods remained at the depot at his risk, and subject to storage, to which no answer was returned. On the night of the 4th November, the railroad depot was consumed by fire, and with it the three hundred bales of the goods in

question. The price was to be paid by a note at twelve months, which the defendant refused to give, upon which refusal this action was brought.

The court below, at the trial, held that the written memorandum, made at the time of entering into the contract between the agents of the plaintiffs and the defendant, was not sufficient to take the case out of the statute of frauds, and as there was no acceptance of the goods, the plaintiffs could not recover. As we differ with the learned judge who tried the cause, as to the sufficiency of the written memorandum, the question upon the statute is the only one that it will be material to notice. The memorandum is as follows:

"Sept. 19,— W. W. Goddard, 12 mos.

Three hundred bales S. F. drills.....	7½
One hundred cases blue do	8½

"Credit to commence when ship sails: not after Dec. 1—delivered free of charge for truckage.

"The blues, if color satisfactory to purchasers.

"R. M. M.

"W. W. G."

The statute of Massachusetts on this subject is substantially the same as that of 29 Car. II, ch. 3, sec. 17, and declares that no contract for the sale of goods, etc., shall be valid, etc., "unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

§ 1762. *Memorandum to satisfy statute of frauds, what is sufficient. Authorities cited.*

The word "bargain," in the statute, means the terms upon which the respective parties contract; and in the sale of goods, the terms of the bargain must be specified in the note or memorandum, and stated with reasonable certainty, so that they can be understood from the writing itself, without having recourse to parol proof; for, unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the memorandum is not a compliance with the statute. This brief note of the contract, however, like all other mercantile contracts, is subject to explanation by reference to the usage and custom of the trade, with a view to get at the true meaning of the parties, as each is presumed to have contracted in reference to them. And although specific and express provisions will control the usage, and exclude any such explanation, yet, if the terms are technical, or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade is admissible to explain the meaning. 2 Kent, Com., 556, and n. 3; id., 260, and n.; Long on Sales, 197, ed. 1839; 1 Gale & Davis, 52.

Extraneous evidence is also admissible to show that a person whose name is affixed to the contract acted only as an agent, thereby enabling the principal either to sue or be sued in his own name; and this, though it purported on its face to have been made by the agent himself, and the principal not named. Higgins v. Senior, 8 Mees. & W., 834; Trueman v. Loder, 11 Ad. & Ell., 589. Lord Denham observed, in the latter case: "That parol evidence is always necessary to show that the party sued is the party making the contract, and bound by it; whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or that of an agent, are inquiries not different in their nature from the question, Who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity made out, the contract is not varied by appearing to

have been made by him in a name not his own." So the signature of one of the parties is a sufficient signing to charge the firm. *Soames v. Spencer*, 1 D. & R., 32; *Long on Sales*, 58.

It has also been held, in the case of a sold note which expressed "eighteen pockets of hops, at 100s.," that parol evidence was admissible to show that the 100s. meant the price per hundred weight. *Spicer v. Cooper*, 1 Gale & D., 52; 5 Jurist, 1036. The memorandum in that case was as follows: "Sold to Waite Spicer, of S. Walden, 18 pos. Kent hops, as under July 23, 1840; 10 pos. Barlow East Kent, 1839; 8 pos. Springall Goodhurst Kent, 1839, 100s. Delivered,"

JOHN COOPER."

Evidence was admitted on the trial to prove that the 100s. was understood in the trade to refer to the price per hundred weight, and the ruling approved by the king's bench. Lord Denman put a case to the counsel in the argument to illustrate his view, that bears upon the case before us. Suppose, he said, the contract had been for ten butts of beer, at one shilling, the ordinary price of a gallon—and intimated that the meaning could hardly be mistaken.

§ 1763. *The memorandum in the case at bar was sufficient.*

Now, within the principles above stated, we are of opinion that the memorandum in question was a sufficient compliance with the statute. It was competent to show, by parol proof, that Mason signed for the firm of Mason and Lawrence, and that the house was acting as agents for the plaintiffs, a company engaged in manufacturing the goods which were the subject of the sale; and also to show that the figures $7\frac{1}{4}$ and $8\frac{1}{4}$, set opposite the three hundred bales and one hundred cases of goods, meant seven and a quarter cents, and eight and three quarter cents per yard. The memorandum, therefore, contains the names of the sellers, and of the buyer—the commodity and the price—also the time of credit and conditions of the delivery; and, in the absence of any specified time or place of delivery, the law will supply the omission, namely, a reasonable time after the goods are called for, and usual place of business of the purchaser or his customary place for the delivery of goods of this description. In respect to the giving of the note, which was to run during the period of the credit, it appears to be the uniform custom of the house of Mason and Lawrence to take notes for goods sold of this description. The defendant was one of their customers, and knew this usage; and it is a presumption of law, therefore, that the purchase was made with reference to it, there being no stipulation to the contrary in the contract of the parties.

§ 1764. *It is competent to give in evidence, in explanation of a memorandum of sale, a bill of parcels of the same transaction subsequently furnished by vendor.*

We are also of opinion, even admitting that there might be some obscurity in the terms of the memorandum, and intrinsic difficulty in a proper understanding of them, that it would be competent, under the circumstances of the case, to refer to the bill of parcels delivered, for the purpose of explanation. We do not say that it would be a note in writing, of itself sufficient to bind the defendant within the statute; though it might be to bind the plaintiff.

It was a bill of sale made out by the seller, and contained his understanding of the terms and meaning of the contract; and having been received by the buyer, and acquiesced in (for the order to have the goods forwarded was given after it was received), the natural inference would seem to be, that the interpretation given was according to the understanding of both parties. It is not necessary to say that this would be the conclusion if the bill differed materially from the written contract; that might present a different question; but we

think it is so connected with and naturally resulting from the transaction, that it may be properly referred to for the purpose of explaining any ambiguity or abbreviation, so common in these brief notes of mercantile contracts. A printed bill of parcels, delivered by the seller, may be a sufficient memorandum within the statute to bind him, especially if subsequently recognized by a letter to the buyer. 2 B. & P., 238 D.; 3 Esp., 180. And, generally, the contract may be collected from several distinct papers taken together, as forming parts of an entire transaction, if they are connected by express reference from the one to the others. 3 Ad. & Ell., 355; 9 B. & Cr., 561; 2 id., 945; 3 Taunt., 169; 6 Cow., 445; 2 Mees. & W., 660; Long on Sales, 55, and cases.

In the case before us, the bill of parcels is not only connected with the contract of sale, which has been signed by both parties, but was made out and delivered in the course of the fulfillment of it; has been acquiesced in by the buyer, and the goods ordered to be delivered after it was received. It is not a memorandum sufficient to bind him, because his name is not affixed to it by his authority; but if he had subsequently recognized it by letter to the sellers, it might have been sufficient. 2 B. & P., 238; 2 Mees. & W., 653; 3 Taunt., 169. But although we admit, if it was necessary for the plaintiffs to rely upon the bill, as the note or memorandum within the statute, they must have failed, we think it competent, within the principle of the cases on the subject, from its connection with and relation to the contract, to refer to it as explanatory of any obscurity or indefiniteness of its terms, for the purpose of removing the ambiguity.

Take, for example, as an instance, the objection that the price is uncertain, the figures $7\frac{1}{2}$ and $8\frac{1}{2}$, opposite the three hundred bales and one hundred cases of drills, given without any mark to denote what is intended by them. The bill of parcels carries out these figures as so many cents per yard, and the aggregate amount footed up; and after it is received by the defendant, and with a knowledge of this explanation, he orders the goods to be forwarded.

We cannot doubt but that the bill, under such circumstances, affords competent evidence of the meaning to be given to this part of the written memorandum. And so, in respect to any other indefinite or abbreviated item to be found in this brief note of a mercantile contract. For these reasons, we are of opinion that the judgment of the court below must be reversed, and the proceedings remitted, with directions to award a *venire de novo*.

MR. JUSTICE DANIEL dissented, on the ground that the court had no jurisdiction, referring for his reasons to his opinion in the case of *Rundle v. Delaware & Raritan Canal Co.*, 14 How., 80.

Dissenting opinion by MR. JUSTICE CURTIS, CATRON, J., concurring.

I have the misfortune to differ from the majority of my brethren in this case, and, as the question is one which enters into the daily business of merchants, and at the same time involves the construction of a statute of the commonwealth of Massachusetts, I think it proper to state briefly the grounds on which I rest my opinion. The first question is, whether the writing of the 19th of September is a sufficient memorandum within the third section of the seventy-fourth chapter of the Revised Statutes of Massachusetts. The writing is in these words and figures:

"Sept. 19. W. W. Goddard, 12 mos.

Three hundred bales S. F. drills.....	7½
One hundred cases blue do.....	8½

"Cr. to commence when ship sails; not after Dec'r 1st; delivered free of charge for truckage.

"R. M. M.

"W. W. G.

"The blues, if color is satisfactory to purchaser."

§ 1765. *A memorandum of sale must show, in itself, who is vendor and who is vendee, to make it sufficient under the statute of frauds.*

Does this writing show, upon its face, and without resorting to extraneous evidence, that W. W. Goddard was the purchaser of these goods? I think not. Certainly, it does not so state in terms; nor can I perceive how the fact can be collected from the paper, by any certain intendment. If it be assumed that a sale was made, and that Goddard was a party to the transaction, what is there, on the face of the paper, to show whether Goddard sold or bought? Extraneous evidence that he was the seller would be just as consistent with this writing as extraneous evidence that he was the purchaser. Suppose the fact had been that Mason was the purchaser, and that the writing might be explained by evidence of that fact; it would then be read that Goddard sold to Mason, on twelve months' credit; and this evidence would be consistent with everything which the paper contains, because the paper is wholly silent as to the fact whether he was the seller or the purchaser. In *Bailey v. Ogden*, 3 Johns., 399, an action for not accepting sugars, the memorandum was:

"14 December. .

"J. Ogden and Co. Bailey and Bogart.

"Brown, 12½, } 60 and 90 days.

"White, 16½, }

"Debenture part pay."

Mr. Justice Kent, who delivered the opinion of the court, enumerating the objections to the memorandum, says, no person can ascertain from this memorandum which of the parties was seller and which buyer; and I think it would be difficult to show that the memorandum now in question is any more intelligible, in reference to this fact. Indeed, I do not understand it is supposed that, in the absence of all extraneous evidence, it could be determined by the court, as matter of law, upon an inspection of the paper alone, that Goddard was the purchaser of these goods. The real inquiry is, whether extraneous evidence of this fact is admissible. Now, it is true, the statute requires only some note or memorandum, in writing, of the bargain; but I consider it settled, that this writing must show who is vendor and who is purchaser. In *Champion v. Plumer*, 1 Bos. & Pull., N. R., 252, the memorandum contained the name of the vendor, a description of the goods and their price, and was signed by the vendee; yet it was held that the vendee could not maintain an action thereon, because it did not appear, from the writing, that he was vendee, though it was clearly proved by parol.

In *Sherburne v. Shaw*, 1 N. H., 157, the plaintiffs caused certain real estate to be sold at auction, and the defendant being the highest bidder, signed a memorandum agreeing to take the property; this memorandum was written on a paper, headed: "Articles of sale of the estate of Jonathan Warner, deceased," containing the terms of the sale; and this paper was also signed by the auctioneer. Yet the court, through Mr. Justice Woodbury, who delivered the opinion, held that, as the paper failed to show that the plaintiffs were the vendors, it was radically defective. Here, also, there was no doubt that the plaintiffs were the vendors, but extraneous evidence to supply this fact was considered inadmissible. It seems to me that the fact that the defendant was the purchaser

is, to say the least, as necessary to be stated in the writing as any other fact, and that to allow it to be proved by parol is to violate the intent of the statute, and encounter the very mischiefs which it was enacted to prevent. Chancellor Kent, 2 Com., 511, says: "The contract must, however, be stated with reasonable certainty, so that it can be understood from the writing itself, without having recourse to parol proof." And this position rests upon a current of authorities, both in England and America, which it is presumed are not intended to be disturbed. But how can the contract be understood from the writing itself, when that fails to state which party is vendor and which purchaser?

§ 1766. — *how far extraneous evidence is admissible.*

I am aware that a latent ambiguity in a contract may be removed by extraneous evidence according to the rules of the common law; and that such evidence is also admissible to show what, in point of fact, was the subject-matter called for by the terms of a contract. *Bradley v. Washington, etc., Steam Packet Co.*, 13 Pet., 98. So when an act has been done by a person, and it is doubtful whether he acted in a private or official capacity, it is allowable to prove by parol that he was an agent and acted as such. But these cases fall far short of proving that when a statute requires a contract to be in writing, you may prove by parol the fact that the defendant was purchaser, the writing being silent as to that fact; or that a writing which does not state who is vendor and who purchaser does contain in itself the essentials of a contract of sale.

It is one thing to construe what is written; it is a very different thing to supply a substantive fact not stated in the writing. It is one thing to determine the meaning and effect of a complete and valid written contract, and it is another thing to take a writing, which on its face imports no contract, and make it import one by parol evidence. It is one thing to show that a party who appears by a writing to have made a contract, made it as an agent, and quite a different thing to prove by parol that he made a purchase when the writing is silent as to that fact. The duty and power of the court is a duty and power to give a construction to what is written, and not in any case to permit it to be added to by parol. Least of all when a statute has required the essential requisites of a contract of sale to be in writing, is it admissible, in my judgment, to allow the fact that the defendant made a purchase to be proved by parol. If this fact, which lies at the basis of the action, and to which every other is but incidental, can be proved by evidence out of the writing signed by the defendant, the statute seems to me to be disregarded.

It has been argued that the bill of parcels sent to Goddard by Mason and Lawrence, and received by him, may be resorted to for the purpose of showing he was the purchaser. But it is certainly the law of Massachusetts, where this contract was made, and the case tried, as I believe it is of most other states and of England, that unless the memorandum which is signed contains a reference to some other paper, no paper, not signed by the party to be charged, can be connected with the memorandum, or used to supply any defect therein. This was held in *Morton v. Dean*, 13 Metc., 385, a case to which I shall have occasion more fully to refer hereafter. And in conformity therewith, Chancellor Kent lays down the rule in 2 Com., 511, and refers to many authorities in support of it. I am not aware that any court has held otherwise.

That this bill of parcels was of itself a sufficient memorandum under the statute, or that it was a paper signed by the defendant, or by any person by him thereunto lawfully authorized, I do not understand to be held by the majority of

the court. Now the memorandum of the 19th September is either sufficient or insufficient under the statute. If the former, there is no occasion to resort to the bill of parcels to show who was vendor and who purchaser; if the latter, it cannot, consistently with the statute, be made good by another paper not signed, and connected with it only by parol. To charge a party upon an insufficient memorandum, added to by another independent paper, not signed, would be to charge him when there was no sufficient memorandum signed by him, and therefore in direct conflict with the statute. It does not seem to me to be an answer to say that the bill of parcels was made out pursuant to the memorandum. If the signed memorandum itself does not contain the essentials of a contract of sale, and makes no reference to any other paper, in no legal sense is any other paper pursuant to it—nor can any other paper be connected with it, save by parol evidence, which the statute forbids. In point of fact, it would be difficult to imagine any two independent papers more nearly connected than a memorandum made and signed by an auctioneer, and the written conditions read by him at the sale. Yet it is settled that the latter cannot be referred to, unless expressly called for by the very terms of the signed memorandum. Upon what principle does a bill of parcels stand upon any better ground?

The distinction, heretofore, has been between papers called for by the memorandum by express reference, and those not thus called for; this decision, for the first time, I believe, disregards that distinction, and allows an unsigned paper, not referred to, to be used in evidence to charge the purchaser. In my judgment this memorandum was defective in not showing who was vendor and who purchaser, and oral evidence to supply this defect was not admissible. But if this difficulty could be overcome, or if it had appeared on the face of the paper that Goddard was the purchaser, still, in my judgment, there is no sufficient memorandum. I take it to be clearly settled, that if the court cannot ascertain from the paper itself, or from some other paper therein referred to, the essential terms of the sale, the writing does not take the case out of the statute. This has been so often decided that it is sufficient to refer to 2 Kent's Com., 511, where many of the cases are collected.

§ 1767. *The essential terms of the sale must appear in the memorandum itself or another paper referred to in it.*

The rule stated by the chancellor, as a just deduction from the authorities, is: "Unless the essential terms of the sale can be ascertained from the writing itself or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent." The statute, then, requires the essential terms of the sale to be in writing; the credit to be allowed to the purchaser is one of the terms of the sale. And if the memorandum shows that a credit was to be given, but does not fix its termination, it is fatally defective, for the court cannot ascertain, from the paper, when a right of action accrues to the vendee, and the contract shown by the paper is not capable of being described in a declaration. The rights of the parties, in an essential particular, are left undetermined by the paper. This paper shows there was to be a credit of six months and contains this clause: "Cr. to commence when ship sails, not after December 1." According to this paper, when is this credit to commence? The answer is, when ship sails, if before December 1. What ship? The paper is silent.

This is an action against Goddard for not delivering his note on twelve months' credit, and it is an indispensable inquiry, on what day, according to the contract, the note should bear date. The plaintiffs must aver, in their declaration, what note Goddard was bound to deliver, and the memorandum must enable the court to say that the description of the note in the declaration is correct. They attempt this by averring, in the declaration, that the contract was for a note payable in twelve months from the sailing of a ship called the Crusader, and that this ship sailed on the 6th day of November. But the writing does not refer to the Crusader; and if oral evidence were admissible to prove that the parties referred to the Crusader, this essential term of their contract is derived from parol proof, contrary to the requirement of the statute. It was upon this ground the case of *Morton v. Dean*, and many other similar cases, have been decided. In that case, there was a memorandum signed by the auctioneer, as the agent of both parties, containing their names as vendor and vendee, the price to be paid, and a sufficient description of the property. But it appeared that there were written or printed conditions read at the sale, but not referred to in the memorandum, containing the terms of credit, etc., and therefore that the memorandum did not fix all the essential parts of the bargain, and it was held insufficient.

But, further; even if oral evidence were admissible to show that the parties had in view some particular vessel, and so to explain or render certain the memorandum, no such evidence was offered, and no request to leave that question of fact to the jury was made. Mason, who made the contract with Goddard, was a witness, but he does not pretend the parties had any particular vessel in view, still less that they agreed on the Crusader as the vessel, the sailing of which was to be the commencement of the credit. I cannot perceive, therefore, how either of the counts in this declaration is supported by the evidence, or how a different verdict could have lawfully been rendered. The count for goods sold and delivered was clearly not maintained, because, when the action was brought, the credit had not expired, even if it began on the 19th of September. One of the special counts avers that the notes were to be due twelve months from the 30th of September; but this is inconsistent with the written memorandum, and there is no evidence to support it. The other special counts all declare for a note due twelve months after the sailing of the Crusader, but as already stated, there is no evidence whatever to support this allegation, and a verdict of the jury, affirming such a contract, must have been set aside.

It may be added, also, that no one of the prayers for instructions contained in the bill of exceptions makes the fact that the parties had reference to the Crusader any element of the contract, but that each of them asks for an instruction upon the assumption that this necessary term of the contract had not been in any way supplied. I consider the language of Chief Justice Marshall, in *Grant v. Naylor*, 4 Cranch, 234 (§§ 240, 241, *supra*), applicable to this case. That great judge says: "Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion that this relaxing construction of the statute ought not to be extended further than it has already been carried, and this court entirely concurs in that opinion."

I am authorized to state that Mr. Justice Catron concurs in this opinion.

SMITH v. ARNOLD.

(Circuit Court for Rhode Island: 5 Mason, 414-421. 1829.)

STATEMENT OF FACTS.— Action of *assumpsit* for the price of a parcel of land sold to defendant by plaintiff as administrator of one Aldrich.

Plaintiff was duly licensed to sell the land in dispute, as auctioneer, and struck it off to defendant, as being the highest bidder. At the time of sale the administrator entered the following memorandum upon the paper containing the conditions of sale: "Home farm of Aldrich, one hundred and forty acres, more or less, said Aldrich's title in the same struck off to Arnold, as the highest bidder, for \$1,705.50." No signature was attached, but below it was another memorandum, signed by the administrator, verifying it, which appeared to have been made at a different time, with different ink. Some time after, the widow of Aldrich, upon application to the probate court, had her dower set off in the said estate. The defendant, Arnold, appealed to the supreme court against the decree of the probate court, alleging in his petition that he was a creditor of the estate of Arnold, and a purchaser of the said estate at auction. The condition of the bond, given upon the appeal, stated that he was interested in the said estate. In the case at bar the memorandum and a record copy of the petition and bond were offered as a sufficient memorandum to charge the purchaser, within the statute of frauds. This evidence was objected to, and it is upon its admissibility that the opinion of the court is rendered.

Opinion by STORY, J.

The question here is, whether there is a sufficient memorandum, within the statute of frauds of Rhode Island (Digest of 1882, p. 366), to bind the defendant as purchaser of the land. The statute is the same in substance with the English statute of frauds of 29 Car. 2, ch. 3, sec. 4. The words are, "No action shall be brought, whereby to charge, etc., etc., any person upon any contract for the sale of lands, etc., etc., unless the promise or agreement, upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

§ 1768. *Under the statute of frauds, a memorandum of a sale, to charge the purchaser therewith, must be signed by him.*

I will first consider whether the petition and bond in the court of probate contain any sufficient proof of the contract now sued on; or contain any reference to the memorandum made by the administrator, acting as auctioneer at the sale, so as to amount to an adoption or ratification of the memorandum. Now, taking the probate proceedings *per se*, it is very clear that they contain no sufficient statement of the contract to be binding on the party. The language of the petition is that the petitioner is a "creditor and purchaser at auction of the farm." It is not said of whom he purchased, at what sale, or at what time; and the court cannot intend that it must necessarily refer to the sale by the administrator. But what is fatal is, that it contains no statement of any price or consideration of the purchase; and no memorandum is sufficient, within the statute, which does not contain in substance the essential terms of the contract. How can that be said to be a memorandum of a contract which is wholly silent as to the consideration and terms of the contract? which merely states that there was a contract or purchase, but leaves all in darkness as to the nature and extent of it? The probate papers, therefore, as a memorandum, may be entirely laid aside. Then, do they contain any certain reference to the

memorandum of the administrator so as to admit and adopt it? There is not a word of reference to any memorandum whatsoever. It is not even said that the purchase was of the administrator; and unless there were some certain reference so clear as to admit of no doubt, there is no pretense to say that the court is at liberty to incorporate the memorandum into, and make it a part of, the petition, as the written admission of the defendant. We may, then, lay aside any further consideration of these proceedings. They stand alone, and are of themselves no proof of any contract binding on the defendant.

Then is the memorandum of the administrator sufficient? The memorandum is at the bottom of the conditions of sale, and, so far as respects the defendant, it is in the following words: "Struck off to John Arnold, highest bidder, for \$1,705.50." There is now found at the bottom of the paper a signature of the administrator's name; but it is almost certain that it was not made at the time the memorandum was written, for it is in a very different ink, and apparently of more recent date. So that the memorandum is not brought within the terms of the statute. It is not signed by the party to be charged therewith, or by his agent thereunto lawfully authorized.

§ 1769. *An administrator is not considered an agent of the buyer so as to bind him by his memorandum of sale.*

But the important question is, whether, under the circumstances of the present case, the administrator can be considered as the agent of the purchaser, authorized by him to make and sign the memorandum. If he can, then the defendant is bound, for the memorandum sufficiently sets forth the terms of the contract. After much fluctuation and doubt, it has at last been settled in England, that an auctioneer is to be deemed the agent of both parties in respect to the sale, and authorized to make a memorandum for both. Lord Mansfield, in *Simon v. Motivos*, 3 Burr., 1921, began that doctrine; and it has, after very great hesitation, been followed. It appears to me, speaking with all due respect, to have done much to destroy the salutary operation of the statute of frauds. By the common law, if an agent is to execute a deed for his principal, his authority must be of as high a nature. It must be by deed. By analogy it would have seemed convenient, if not indispensable, to have held, that where the statute, to prevent frauds and perjuries, required a contract to be in writing, if executed by an agent, his authority should be in writing also. That the auctioneer is agent of the seller is clear; that he is also agent of the buyer is not so very clear; and is a conclusion founded on somewhat artificial reasoning. But the doctrine is now established; and the best reason in support of it is, that he is deemed a disinterested person, having no motive to misstate the bargain, and enjoying equally the confidence of both parties. The agency is presumed to be given to him on this account by the purchasers, trusting to his integrity and disinterestedness.

§ 1770. *A vendor who is his own auctioneer is not an agent for the buyer to sign a memorandum, under the statute of frauds, which will bind him.*

But the case is very different where the auctioneer is the vendor, and is himself the very party in interest, with whom the contract is made. There can be no reasonable presumption from the mere act of bidding that the purchaser means to trust the other party with settling, by his own memorandum, the whole terms of the contract. It would be a very extraordinary position, at war with the ordinary care and caution of men, to put into the hands of the other party the unlimited power to settle all the terms of an important contract by

his own memorandum. And this would be the result of the doctrine contended for. For if the mere act of bidding, being proved by parol, would be sufficient to create a virtual agency for the bidder, then the party would be bound, though he never saw the memorandum; and when the memorandum was once reduced to writing, no parol evidence could at law be admissible to show that the terms were mistaken or varied; for the memorandum would be the proper evidence of the contract, though made by the very party in interest. It is said that here the administrator is not the party in interest; and that he has a mere power or license to sell. But he is the party who alone is competent to make the contract. The price must be paid to him; and *non constat*, to what extent, as administrator, he may have an interest in the proceeds, either as creditor or for services. He stands in the same situation as a trustee of an estate, selling for the use of his *cestui que trust*. He could not be a witness to prove the contract. And yet, upon the doctrine now asserted, his memorandum is better than any testimony. In a legal point of view he is the real party to the contract, and is alone authorized to sue upon it. And whether he has a beneficial interest in it or not is immaterial. He is the legal party in interest in the price and performance of the contract.

The case, then, is not distinguishable from that of any other vendor who acts as auctioneer. If there were no authority upon the subject, we should say, upon principle, that a vendor was not to be presumed to be the agent of the purchaser for the purpose of signing the contract for him. That it would be a presumption against common sense to suppose that the party could act both as buyer and seller at the same time, and that the purchaser meant to surrender himself into the hands of a party in interest. If there were an *express* authority given for such a purpose, that might be another thing. But it ought not to be presumed from so equivocal an act as bidding at a public sale, and having the property struck off at the bid. There are cases where courts of law have interposed limitations upon the construction of the statute, which are not found in its words. It is, for instance, decided that the memorandum of the auctioneer, to bind the purchaser, must be *contemporaneous* with the sale. It cannot be made afterwards. Now the statute does not say that the memorandum in writing shall be contemporaneous with the sale. But the courts, upon principles of just policy, have bound up the words by this restriction, in order to prevent men from being ensnared by contracts subsequently reduced to writing by agents. See 13 Ves., 456. The same reasoning applies to the present case, and with far greater force.

But there is an authority directly in point, and even stronger, than the case before the court. It is *Wright v. Dannah*, 2 Camp., 203. There the vendor reduced the contract to writing, and showed it to the vendee, who corrected it and approved it. But it was held by Lord Ellenborough that the memorandum was not sufficient within the statute of frauds. On that occasion he said: "The agent must be some third party, and could not be the other contracting party." Now there, the very paper was assented to by the party, after it had been read; but the court thought it dangerous to allow the doctrine that the mere assent of the vendee to the contract, as drawn up by the vendor, should be deemed by implication to make him an agent to bind the vendee by the memorandum. It was quite consistent with the facts, that he should be satisfied that it was truly stated, and yet that he should not adopt it as his own act, or the act of his agent to bind him.

§ 1771. *A sale by an administrator under license of the court is not a judicial sale, but is merely the execution of a ministerial authority.*

But it is said that this is the case of a judicial sale, and such sales have been held not to be within the statute of frauds. The cases alluded to are sales of a very different sort from that before the court. In sales directed by the court of chancery, the whole business is transacted by a public officer under the guidance and superintendence of the court itself. Even after the sale is made, it is not final until a report is made to the court, and it is approved and confirmed. Either party may object to the report, and the purchaser himself, who becomes a party to the sale, may appear before the court, and, if any mistake has occurred, may have it corrected. He therefore becomes a party in interest, and may represent and defend his own interests, and if he acquiesces in the report, he is deemed to adopt it, and is bound by the decree of the court confirming the sale. He may be compelled, by process of the court, to comply with the terms of the contract. So that the whole proceedings, from the beginning to the end, are under the guidance and direction of the court; and the case does not fall within the mischiefs supposed by the statute of frauds. In the case of an administrator, the authority to sell is, indeed, granted by a court of law. But the court, when it has once authorized the administrator to sell is *functus officio*. The proceedings of the administrator never come before the court for examination or confirmation. They are mere matters *in pais*, over which the court has no control. The administrator is merely accountable to the court of probate for the proceeds acquired by the sale, in the same manner as for any other assets. But whether he has acted regularly or irregularly in the sale is not matter into which there is any inquiry by the court granting the license, or by the court of probate having jurisdiction over the administration of the estate. So that the present case is not a judicial sale in any just sense; but it is the execution of a ministerial authority. The sale is not the act of the court, but of the administrator.

For these reasons we are of opinion that the evidence is inadmissible.

D'WOLF v. RABAUD.

(1 Peters, 476-502. 1828.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—Messrs. Rabaud Brothers & Co., of Marseilles, brought a suit in the circuit court of the southern district of New York, against James D'Wolf, Jr., (the plaintiff in error), to recover damages for not shipping them five hundred boxes of sugar, on account of one George D'Wolf, according to an agreement entered into by him with them. The declaration contained four counts, and in each of them the substance of the contract stated is, that the defendant, in consideration that one Belknap (one of the partners in the house of Rabaud Brothers & Co.) would authorize George D'Wolf to draw on the plaintiffs for one hundred thousand francs, undertook and promised that he would ship for the account of George D'Wolf, on board such vessel as he (George D'Wolf) should direct, five hundred boxes of white Havana sugar, consigned to the plaintiffs at Marseilles. The declaration then proceeds with the proper averments and breaches necessary to maintain the action. Upon the trial, under the general issue, the jury found a verdict for the plaintiffs, and judgment was given for them accordingly. The cause now comes before this court upon a writ of error and bill of exceptions taken at the trial.

The bill of exceptions is voluminous, and contains, at large, the evidence admitted at the trial, as well as the charge of the learned judge who presided at the trial. It is unnecessary to refer to that evidence, or to consider its nature, bearing and extent, upon which so ample a comment has been made at the bar, except so far as it applies to some question of law decided by the court, to which an exception has been taken. The whole facts were left open to the jury, and, so far as they were imperfect or inconclusive, the defendant has had the full opportunity of addressing his views to the jury, and they have found their verdict against him. In the progress of the trial, a letter of the 27th December, 1825, written by George D'Wolf to Belknap, was offered by the defendants in evidence, for the purpose of showing an authority from George D'Wolf to Belknap, to direct or name a vessel to the defendant, on board of which the sugars might be shipped. The defendant objected to its admission, and the objection was overruled. This constitutes the first ground of error, now insisted on by the defendant. We are of opinion that the letter was rightly admitted, for both of the reasons stated in the charge. It was evidence of such an authority; and the defendant made no objection to it at the time on account of any insufficiency in this respect, but put his defense by his letter of the 5th of January, 1826, on an entirely distinct ground.

§ 1772. *A non-suit cannot be ordered upon the defendant's application. Plaintiff's consent indispensable.*

After the evidence for the plaintiffs was closed, the defendant moved for a non-suit, which motion was overruled. This refusal certainly constitutes no ground for reversal in this court. A non-suit may not be ordered by the court, upon the application of the defendant, and cannot, as we have had occasion to decide at the present term, be ordered in any case without the consent and acquiescence of the plaintiff. *Elmore v. Grymes*, 1 Pet., 469. In the further progress of the trial, upon the examination of one Frederick G. Bull, a witness for the defendant, the counsel for the defendant offered to prove, by Bull, that it was an express understanding and agreement between the defendant and George D'Wolf, at the time the letter of the 15th November, 1825 (which will be hereafter more particularly noticed), was signed by the defendant, that the latter should furnish the defendant with the funds necessary for the purchase of the sugar, before the defendant would be under any obligation to ship the same. This testimony was rejected by the court, unless it should also appear that Belknap was a party thereto, or that the same was brought home to his knowledge. We can perceive no error in this decision. If the defendant had entered into the contract with the plaintiffs, stated in the declaration, and the private arrangement made between the defendant and George D'Wolf constituted no part of that contract, and was unknown to them, it certainly ought not to prejudice their rights. It was *res inter alios acta*, and had no legal tendency either to disprove the plaintiff's case or to exonerate the defendant from his liability. The other exceptions are exclusively confined to the charge given to the jury upon the summing of the court upon points of law.

§ 1773. *Question as to citizenship of a party must be raised by plea in abatement.*

The first objection was to the sufficiency of the evidence to establish the citizenship of Belknap, as averred in the declaration. This is now waived by the counsel, and, indeed, could not now be maintained, because it has been recently decided by this court, upon full consideration, that the question of such citizenship constitutes no part of the issue upon the merits, and must be

brought forward by a proper plea in abatement, in an earlier stage of the cause. The great question upon the merits arises upon that part of the charge which relates to the agreement contained in the letter of the 15th of November, 1825, from George D'Wolf to the defendant, and the accompanying assent of the latter, with reference to the statute of frauds. That letter is in the following terms:

"NEW YORK, November 15, 1825.

"*Mr. James D'Wolf, Jr.:*

"DEAR SIR— You will please ship for my account, on board such vessel as I shall direct, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud Brothers & Co., Marseilles, and oblige your friend and obedient servant,

(Signed)

"GEORGE D'WOLF.

"Agreed to. (Signed) JAMES D'WOLF, Jr."

Upon this part of the case the charge was as follows: "It is said that this letter, under the statute of frauds, does not purport on its face to contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection, I think, cannot be sustained. The first question to be settled, and which is matter of fact for your determination, is, whether the arrangement between Belknap and George D'Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of five hundred boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction." The judge then proceeded to sum up the evidence on this point, and added: "The consideration for this undertaking was the authority given by Belknap to George D'Wolf, to draw on the plaintiffs for one hundred thousand francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is, whether it can be supplied by parol evidence; and I think it may, if the undertaking of the defendant was entered into at the same time with that between Belknap and George D'Wolf, so as to form one entire transaction. The evidence does not in any manner contradict the written agreement, and is perfectly consistent with it; as between the plaintiffs and George D'Wolf the consideration might be clearly supplied by parol proof; and if the undertaking of the defendant was at the same time, it required no consideration from the plaintiffs to him. The consideration to George D'Wolf was sufficient to uphold and support the contract of the defendant." And he finally stated, if he was mistaken in this view of the evidence, "and the jury should be of opinion that the contract between Belknap and George D'Wolf was completed and unconnected with the engagement of the defendant before he undertook to make the shipment and consignment, then the evidence was not sufficient to maintain the present action. It will then be a collateral undertaking made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract."

The question, then, so far as it was a question of fact, whether the defendant did enter into the asserted agreement with the plaintiffs, and whether it was a part of the original arrangement with George D'Wolf, and upon the original consideration moving from the plaintiffs, was before the jury, and they have found in the affirmative. The question of law remains, whether this was a case within the statute of frauds, so as to prevent parol evidence from being admissible, to charge the defendant.

The statute of frauds of New York is a transcript, on this subject, of the

statute of 29th of Charles II., ch. 3. It declares "that no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party, or by any one by him authorized." The terms "collateral" or "original" promise do not occur in the statute, and have been introduced by courts of law to explain its objects and expound its true interpretation. Whether by the true intent of the statute it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration moving at the same time between the parties; or whether it was confined to cases where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, deserve very great deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination, at least, in those states where the English authorities have been fully recognized and adopted in practice.

§ 1774. *It seems that defendants' undertaking was original.*

If A agree to advance B a sum of money, for which B is to be answerable, but at the same time it is expressed upon the undertaking that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of a mere collateral undertaking, but rather, if one might use the phrase, a trilateral contract. The contract of B to repay the money is not coincident with, nor the same contract with C, to do the act. Each is an original promise, though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A, not solely upon the promise of B or C, but upon the promise of both, *diverso intuitu*, and each becomes liable to A, not upon a joint but a several original undertaking. Each is a direct, original promise, founded upon the same consideration. The credit is not given solely to either, but to both; not as joint contractors, on the same contract, but as separate contractors upon co-existing contracts, forming parts of the same general transaction. Of that very nature is the contract now before the court; and if the intention of all the parties was that the letter of the 15th of November should be delivered to Belknap, as evidence of the original agreement between all the parties, and, indeed, as part execution of it, to bind the defendant not merely to George D'Wolf, but to the plaintiffs (and so it has been established by the verdict), then it is not very easy to distinguish the case from that which was put.

But assuming that the true construction of the statute of frauds is as the authorities seem to support, and that such a promise would be within its purview, it remains to consider whether the arguments at the bar do establish any error in the opinion of the circuit court. In the first place, there is no repugnance between the terms of that letter and the parol evidence introduced. The object of the latter was to establish the fact that there was a sufficient consideration for the agreement and what that consideration was, and also the circumstances under which it was written, as explanatory of its nature and objects. Its terms do not necessarily import that it was an agreement exclusively between George D'Wolf and the defendant. If the paper was so drawn up and executed by the assent of all the parties, for the purpose of being delivered to Belknap, as a voucher and evidence to him of an absolute agreement by the defendant to make the shipment, and so was in fact understood by all the parties at the time, there is nothing in its terms inconsistent with such an

interpretation. The defendant agrees to the shipment. But with whom? It is said with George D'Wolf alone; but that does not necessarily follow, because it is not an instrument in its terms *inter partes*. If the parties intended that it should express the joint assent of George D'Wolf and the defendant to the shipment, and it was deliverable to Belknap accordingly, as evidence of their joint assent that it should be made upon the terms and in the manner stated in it, there is nothing which contradicts its proper purport; and it is then precisely what the parties require it to be. It was for the jury to say whether the evidence disclosed that as the true object of it, and to give it effect accordingly, as proof of an agreement in support of the declaration. The case of *Sargent v. Morris*, 3 Barn. & Ald., 277, furnishes no uninstructional analogy for its admission.

§ 1775. *Parol evidence to show the consideration was admissible. Authorities examined.*

In the next place, was the parol evidence inadmissible to supply the defect of the written instrument as to the consideration and *res gestæ* between the parties? The case of *Wain v. Warlters*, 5 East, 10, was the first case which settled the point that it was necessary, to escape from the statute of frauds, that the agreement should contain the consideration for the promise as well as the promise itself. If it contained it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms or by necessary implication. That case has from its origin encountered many difficulties, and been matter of serious observation both at the bar and on the bench in England and America. After many doubts, it seems at last in England, by the recent decisions of *Saunders v. Wakefield*, 4 Barn. & Ald., 595, and *Jenkins v. Reynolds*, 3 Brod. & B., 14, to have settled down into an approved authority. It has not, however, received a uniform recognition in America, although in several of the states, and particularly in New York, it has to a limited extent been adopted into its jurisprudence as a sound construction of the statute. On the other hand, there is a very elaborate opinion of the supreme court of Massachusetts in *Packard v. Richardson*, 17 Mass., 122, where its authority was directly overruled. What might be our own view of the question, unaffected by any local decision, it is unnecessary to suggest; because the decisions in New York upon the construction of its own statute, and the extent of the rules deduced from it, furnish, in the present case, a clear guide for this court. In the case of *Leonard v. Vredenburg*, 8 Johns., 29, Mr. Chief Justice Kent, in delivering the opinion of the court, adverting to the fact that that case was one of a guaranty or promise collateral to the principal contract, but made at the same time, and becoming an essential ground of the credit given to the principal or direct debtor, added, "and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary, by parol proof; and the decision in *Wain v. Warlters* did not stand in the way."

One of the points in that case was whether the parol proof of the consideration was not improperly rejected at the trial, and the decision of the court was that it ought to have been admitted. It is not, therefore, as was suggested at the argument, a mere *obiter dictum*, uncalled for by the case. It was one, though not the only one, of the points in judgment before the court. The same doctrine has been subsequently recognized by the same court in *Bailey v. Freeman*, 11 Johns., 221, and in *Nelson v. Dubois*, 13 Johns., 175. It does not seem necessary to pursue this subject further, because here is a clear authority,

justifying the admission of the parol evidence upon the principle of the local jurisprudence. It seems to us a reasonable doctrine founded in good sense and convenience, and tending rather to suppress than encourage fraud. But, whether so or not, it sustains the opinion of the circuit court in a manner entirely free from exception.

The next objection to the charge founded on the variance between the declaration and proofs has been abandoned at the argument, and need not be dwelt upon. And the last objection, to wit, to the designation of a vessel for the shipment as ineffectually made, has been already in part answered, and we entirely coincide with the views expressed on this point by the circuit court.

Without, therefore, going more at large into the points of the case, or commenting upon the various authorities and principles so elaborately brought out in the discussions at the bar, it is sufficient to say that we perceive no error in the judgment of the circuit court, and it is therefore to be affirmed with costs.

THOMPSON v. JAMESSON.

(Circuit Court for the District of Columbia: 1 Cranch, C. C., 295-299. 1800.)

STATEMENT OF FACTS.—This suit was brought to charge defendant for goods furnished one Brown, at defendant's request and on his credit. It appeared that Brown had died insolvent, and the defendant or his agent administered on his estate. The plaintiffs had formerly filed a bill in equity to offset their demand against a judgment of Mandeville & Jamesson.

Opinion by CRANCH, J.

This cause came on to be heard on the bill, answer, plea and replication. The only facts on which a decree can be founded are those confessed by the answer to this bill or by the answer to a former bill, which is made an exhibit in the present bill. By the answer of the present defendant to a former bill of the complainants against Mandeville & Jamesson, the defendant "admits that he gave a verbal promise to the complainants to pay them the amount of the goods if Brown should be unable to pay for them," but relies and insists on the statute of frauds in the same manner as if he had pleaded it. To the present bill the defendant pleads the statute, and then, "not waiving his said plea, but wholly relying and insisting thereon, says, he believes it may be true that the complainants sold the goods to Brown, and that the defendant verbally promised to pay for them if Brown should be unable;" and denies that he made any other promise; and denies that the goods were sold to himself, etc. And then says: "And this defendant again relying upon the statute to prevent frauds and perjuries, as aforesaid pleaded, to bar the complainants' demand against him for the supposed undertaking aforesaid, prays to be hence dismissed," etc. To this plea and answer there was a general replication and issue.

§ 1776. *Equity will not decree the execution of a parol agreement to pay the debt of another, although such agreement be confessed in the answer, provided that in it also the statute of frauds be pleaded.*

On the part of the complainants it is contended that if the parol agreement to pay the debt of another be confessed by the answer, although it relies on the statute of frauds, or although the statute be pleaded, yet the court ought to decree a performance of the agreement, because there can be no danger of fraud or perjury, the prevention of which is the sole object and interest of the statute. It is also said that if a man confess in writing that he did make such a parol agreement, although at the time of such confession he insist that the parol

agreement imposed no obligation on him, because the statute makes all such agreements void, yet the court ought to decree its performance, because such confession takes the case out of the evil of the statute. The first case cited in support of these principles is *Cottington v. Fletcher*, 2 Atk., 155, where the plaintiff charged the defendant with holding a term as trustee for the plaintiff. The defendant pleaded the statute of frauds and perjuries, alleging that there was no declaration of the trust in writing, but by his answer admitted the trust. Lord Chancellor Hardwicke was of opinion that the plea ought to be overruled, and said that if the plea stood by itself it might have been a sufficient plea, but coupled with the answer, which is a full admission of the facts, it must overrule the plea. In that case it does not appear that the defendant, in his answer, still insisted on his plea and the benefit of the statute. His answer therefore might be considered as a waiver of his plea. But in the present case the defendant, conceiving himself obliged to answer, still takes the utmost care to guard against the confession being considered as a waiver of his plea or defense. If the defendant is obliged to answer and confess a parol agreement, there is no possible case in which a parol agreement can be vacated by that statute; unless the defendant will commit perjury by denying it. Instead, therefore of preventing frauds and perjuries, the statute would tend to increase them; for by preventing the plaintiff from proving a parol agreement by any other evidence than the defendant's own oath, it holds out to the defendant the strongest temptation to perjury, and at the same time gives him a perfect security against detection. If the defendant is bound to confess the parol agreement it must be because when confessed he could not avail himself of the statute. But it is settled that he may avail himself of the statute. Hence it seems to follow that he is not bound to confess; for this would be to compel him to confess an immaterial fact. The question then occurs whether, if the defendant voluntarily confess the parol agreement, he can insist on the statute?

It is said in *Mitford*, 114, that if a plea is coupled with an answer to any part of the bill covered by the plea, the plea will, upon argument, be overruled; and he cites the case of *Cottington v. Fletcher*, 2 Atk., 155; and in page 124 *Mitford* says an answer will overrule a plea. But cannot the defendant guard his answer so as to prevent it from having that effect? In the present case, if the answer overrules the plea, yet the answer itself sets up and insists on the same defense. And in *Fonblanque*, vol. 1, page 171, note (d), it is said that it seems to be immaterial whether the defendant set up the defense in the shape of a plea or of an answer; the statute not having prescribed any mode in particular by which a defendant must avail himself of such defense. And he refers to the case of *Steward v. Careless*, cited in *Whitchurch v. Bevis*, 2 Bro. Ch., 566. The question then occurs whether the statute is, in equity, to be considered as a bar to the relief, or a bar to the discovery only. The words of the statute are: "that no action shall be brought whereby to charge the defendant," etc., "unless the promise or agreement upon which such action shall be brought shall be in writing," etc. The act refers evidently to the relief, and is at least as strongly expressed as if it had said that no action shall be maintained upon a parol promise, even if proved in any manner whatever. The confession, therefore, of a parol promise is not a confession of any cause of action either at law or in equity. A court of equity cannot, more than a court of law, dispense with the positive and clear prohibition of a statute.

There is no case in which a court of equity has enforced such a parol agree-

ment, when the confession was accompanied with a claim of indemnity under the statute. In *Cottingham v. Fletcher*, the plea was considered as superseded by the answer, which did not insist on the statute. It was therefore the case of an admission of the agreement without claiming the benefit of the statute.

The case of *Lacon v. Mertins*, 3 Atk., 3, has been cited, but the opinion of Lord Ch. Hardwicke, which is relied on, is only a *dictum* in a supposed case. He says, "If the bill had been brought by Mrs. Hayes, in her life-time, and the defendant, Mertins, had admitted the agreement, though he had insisted on not performing it, the court would have decreed it, because the admission takes it out of the statute of fraud and perjuries." He does not say, though he had insisted on the statute; but on not performing it, which is a different thing; and that he did not mean to say on the statute is evident from the case which was then before him, in which the defendant confessed the agreement, and "offered to perform it." The case of *Montacute v. Maxwell*, 1 P. Wms., 618, has also been cited, to prove that a parol promise, acknowledged afterwards in writing, is sufficient to take the case out of the statute. But the point does not appear in the case. The writing relied on was not an acknowledgment of the parol promise simply, but a new promise, in writing, to perform the parol promise, and this is evidently the ground on which the chancellor overruled the plea and ordered it to stand for an answer. The statute was not insisted on. The opinion of Powell (*Contracts*, vol. 1, p. 291) has also been cited. But that opinion is founded only upon authorities, in which the statute was not insisted upon; and in one of the cases which he cites (*Droyston v. Banes*, Finch, Prec. Ch., 208), the distinction is expressly taken between the case where a parol agreement is confessed, without insisting upon the statute, and a confession accompanied by a reliance on the statute.

There being, therefore, no case in which such a parol agreement, confessed, has been carried into execution, when the defendant has insisted on the statute, this court will not say that it is not bound to obey the positive injunction of the statute, which forbids any action to be brought upon such an agreement. The bill must be dismissed with costs.

STEWART v. HINKLE.

(Circuit Court for Ohio: 1 Bond, 506-511. 1801.)

Opinion by the COURT.

STATEMENT OF FACTS.—The question before the court arises on a general demurrer to the special plea of the defendant. The declaration is in *assumpsit* on a special promise by the defendant, and the case made is, in substance, that the plaintiffs had obtained a judgment against one Cyrus M. Williams, in the common pleas of Hamilton county, for \$4,750.28, on which an execution had issued, and a levy had been made on several parcels of real estate in Cincinnati, as the property of Williams. It is there averred that, "in consideration of the premises, and that the plaintiffs agreed to release the levy aforesaid and the lien of the judgment, so far as the same existed on the following described real estate of the said Cyrus W. Williams, being part of the same described and levied upon," to wit, two certain lots in said city (which are fully described), "and that the said plaintiffs would forbear to collect the sum of \$1,235.85, part of their said judgment against the said Williams, and would give time for the payment of the last-mentioned sum for the period of six months, the defendant then and there undertook and promised the plaintiffs to pay them the said last-mentioned sum of money at the expiration of the said period of six months."

The declaration then alleges that, in consideration of said promise, the plaintiffs released their levy on the two lots above referred to, and the lien of their judgment thereon, and forebore for the period of six months to collect the said sum of \$1,235.85, and gave time for the payment thereof. To this declaration the defendant has filed a special plea, setting forth that the promise averred was a promise "to answer for the debt, default or miscarriage of another person," and, not being in writing, no action can be maintained on it under the statute of Ohio for the prevention of frauds and perjuries. The plaintiffs demur to this plea, and thus the first question for the court is whether the promise, as set forth, is within the statute referred to, and is required to be in writing to sustain an action.

§ 1777. *The oral promise by defendant in the case at bar was binding.*

On this point the counsel on both sides have referred to numerous cases to sustain their views of the law. I have not regarded it as necessary to attempt a minute analysis and comparison of the cases in which the provision of the statute of frauds referred to has passed under the consideration of the courts. The question now presented is on a demurrer to the declaration, in which the court is not required to decide what evidence will be necessary to sustain the plaintiffs' action, but simply whether the promise, as set out in the declaration, is valid as a verbal promise. In this aspect the inquiry of the court lies within very narrow limits. It involves, in the first place, the question whether the undertaking of the defendant is original in its character, or whether it falls within the designation of a collateral promise. If it is of the former class, it is not within the statute; if it is collateral, then it is void as not being in writing. In attempting to distinguish between promises or agreements, as original or collateral in their character, there seems to be some obscurity and some conflict in the numerous cases cited.

§ 1778. *Authorities and text-writers cited.*

There are some general rules, however, which will be referred to, and as to which there is no question. One of these rules, as stated by 2 Parsons on Contracts, 300, is, "that only when the promise is distinctly collateral is it within the clause of the statute." The same doctrine is held by the court in 20 Vermont, 205. In that case it is also decided, "that, if the promise is not collateral to the liability of some other person to the same party, it is not within the statute." And in the case of *Nelson v. Boynton*, 3 Metc., 396, the court draws a distinction between cases where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, "yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own." In the former case, the court held "that the promise of the principal is not valid unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object of the promisor." And in *Story on Contracts*, sec. 861, it is laid down that the statute applies "to engagements upon which the guarantor is only conditionally liable upon the default of some other person who is solely liable originally." And again, in the same section, it is said: "The mere fact that a promise is to pay a debt due from a third party, or to pay for goods to be furnished to a third party, does not prove that the promise does not create an original liability, since it is perfectly competent to a man to assume, on sufficient consideration, to pay the debt of another."

In 2 Parsons on Contracts, 308, the learned author puts this case: "If a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person, who also has an interest in the same property, promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien, this promise is not within the statute." And in *Johnson v. Gilbert*, 4 Hill, 178, the court held "that the statute of frauds had nothing to do with the case. That only applies where the person making the promise stands in the relation of a surety for some third person, who is the principal debtor."

From these citations, which could be greatly extended, it would seem clear that an undertaking or promise, to be within the statute, must partake of the nature of a guaranty or suretyship. It embraces only the cases where the promise made is "to answer for the debt, default or miscarriage of another person." Now, it seems clear that the promise in this case as described in the declaration is not within the words or the spirit of this clause. It is not a promise to pay or answer for the debt of another, but a promise founded on a consideration stated to pay a sum of money to the plaintiff, not as a surety or guarantor, but positively and absolutely. There is no such condition or contingency stated, on which he is to be liable, as the neglect or failure of the judgment debtor, Williams, to pay the sum mentioned. If this was the construction of the promise stated, the statute requires that it shall be in writing to sustain an action. The statement of the promise in the declaration is that the plaintiff had a judgment lien and a levy on certain real estate of the judgment debtor, and that the defendant agreed, in consideration that the plaintiffs would release their lien and discharge the levy, and forbear to collect a specified part of the judgment, and give time for the payment of the same, to pay the money in six months.

But the promise, though direct and original, and therefore not required to be in writing, must be based on a valid and legal consideration to sustain it. It is true the plea does not allege a want of consideration as a bar to a recovery on the promise laid in the declaration. The demurrer to the plea, however, puts in issue not only the sufficiency of the plea, but of the declaration also. And if the declaration sets forth no good legal consideration for the promise, it is clear the plaintiff cannot recover. It is, therefore, proper to inquire whether such a consideration is averred. On this subject the authorities are numerous and conclusive. "An agreement to forbear for a time proceedings at law or in equity, to enforce a well-founded claim, is a valid consideration for a promise." 1 Par. on Con., 365, and the authorities there cited. The same writer says, "Nor is it necessary that the forbearance should extend to an entire discharge; any delay which is real, and not merely colorable, is enough." "Nor need the agreement to delay be for a time certain; for it may be for a reasonable time, and yet be a sufficient consideration for a promise." 1 Par. on Con., 367. And, again, "It is not material that the party who makes the promise in consideration of such forbearance should have a direct interest in the suit to be forborne, or be directly benefited by the delay." *Ibid.* And, further, "In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise." *Ibid.*, 369.

§ 1779. *The agreement of a creditor to forbear and give time on a judgment is a sufficient consideration for the promise of a third person to pay that judgment.*

There would seem to be no doubt that the plaintiff's agreement to release his levy and judgment lien against Williams, and to forbear the collection of a

part of the judgment, is a sufficient consideration for the promise of the defendant Hinkle to pay the plaintiffs the sum claimed in this suit. It seems to be supposed by the counsel for the defendant that it must be averred that Hinkle had some interest in the release of the levy and lien, and in forbearing the collection of the sum due on the judgment, to give effect to his promise to pay the money to these plaintiffs. From the authority just cited, it would seem that this is not necessary. It is immaterial whether he is to be benefited by the release and forbearance. But if the law were otherwise, it would not affect the question arising on this demurrer. A good consideration for the promise is averred in the declaration without an averment of the defendant's interest in obtaining a release of the levy and lien on the real estate, and forbearance to proceed on the judgment. As a question of pleading merely, the court will presume that the defendant was induced to make the promise to pay, for the reason that he had an interest in disincumbering the real estate from the lien of the judgment and the levy, and procuring for Williams an extension of the time of payment. Whether it may be expedient or necessary for the plaintiff, on the trial, to prove how his interests were connected with these transactions is not, therefore, on this demurrer, a question for the decision of the court.

Without going more at length into the consideration of this subject, I am led to the conclusion that the promise laid in the declaration is an original and not a collateral promise, and, therefore, not within the statute of frauds, required to be in writing. And, also, that there is a good and valid consideration for the promise set forth in the declaration. The demurrer to the plea of the defendant is therefore sustained.

MORSE v. MASSACHUSETTS NATIONAL BANK.

(Circuit Court for Massachusetts: 1 Holmes, 209-215. 1873.)

Opinion by SNEPLEY, J.

STATEMENT OF FACTS.—The declaration in each of these cases alleges that the plaintiff, on the 29th day of August, 1866, was the owner and possessor of a check drawn and signed by one B. Franklin Beal, whereby Beal directed the Massachusetts National Bank to pay to the order of the plaintiff the sum of \$10,290; that the plaintiff on the same day presented the check for payment; and the defendants, in consideration that the plaintiff would deposit said check for collection in some other bank in the city of Boston, so that the same should be presented for payment through an association called and known as the Clearing-house Association, promised and agreed with the plaintiff, that, upon such presentation, they, the said defendants, would pay the same; and the plaintiff alleges that, in consideration thereof and in pursuance of the said request, he did agree to deposit said check in some other bank in Boston, that the same should be transmitted from said bank through the clearing-house for payment; and accordingly did deposit it in the First National Bank; and the check was, by the First National Bank, through the Clearing-house Association, duly presented to defendants for payment, and defendants refused to pay the same. Defendants demur to the declaration, and plaintiffs join in the demurrer.

There is no averment that, at the time of presentation of the check, the drawer had any funds on deposit in the defendant bank, or that defendant at that time was under any obligation to honor his checks. The suit is brought by the original payee of the check, and not by an indorsee or subsequent as-

signee or *bona fide* holder for value. The question presented is, whether, when a check is drawn upon a bank by a drawer who has no funds on deposit to pay the check, the bank is liable upon its verbal promise to pay, if the holder would deposit the check in another bank and have it presented through the Clearing-house Association; in case the holder agrees to deposit, and does so deposit, the check in another bank, and have it presented.

§ 1780. *Contract of bank with depositor.*

The contract of a bank with a depositor is to pay his checks when presented for payment, if, at the time of presentment of the check, he has funds on deposit sufficient to pay the check.

§ 1781. *Authority and duties of bank cashiers.*

Cashiers of banks are held out to the public as having authority to act according to the general usage, practice and course of business conducted by the bank; and their acts, within the scope of such usage, practice and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. *Minor v. Mechanics' Bank of Alexandria*, 1 Pet., 70 (BANKS, §§ 6-19); *Merchants' Bank v. State Bank*, 10 Wall., 604 (BANKS, §§ 101-118). To this extent the liability of the bank for the acts of its officers is recognized in the opinions of the dissenting justices, as well as in the opinion of the court in the case last cited. And in that case, where a cashier had certified as "good," checks of a drawer having no funds on deposit to pay the checks, it was held that it should have been left to the jury to determine whether from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that the cashier had authority to bind the bank by such certificate. The certificate of the cashier of a bank that a check is "good" is a representation of a present existing fact, within his knowledge as cashier; and if that certificate be made by him in the course of his ordinary business as cashier, it will bind the bank in favor of innocent third persons, upon the principle of *estoppel in pais*, even if the certificate be not true and the drawer of the check has no funds on deposit in the bank. The ordinary duties of a cashier are well known. They are to keep the funds, notes, bills and other choses in action of the bank to be used from time to time for the exigencies of the bank; to receive directly, and through subordinate officers, all moneys and notes of the bank; to surrender notes and securities upon payment; to draw checks; to withdraw funds of the bank on deposit; and, generally, to transact, as the executive officer of the bank, the ordinary routine of business. But the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank. *Bank of United States v. Dunn*, 6 Pet., 59; *United States v. Bank of Columbus*, 21 How., 364 (BANKS, §§ 99, 100).

§ 1782. *It seems that a bank cashier cannot make a valid promise to pay a check not drawn on a deposit, except by express authority from the directors.*

Defendant contends that it was not in the power of any cashier or other officer of a national bank to make a valid promise to pay a check not drawn against funds deposited in the bank, simply in consideration that the holder of the check will present it through some other bank, and have it pass through the clearing-house. If this point in relation to the authority of the cashier or teller, or other officer of the bank as such cashier, teller or other officer merely, were open on the state of pleadings in this case, I should not find much difficulty in

deciding that such a promise was wholly outside of the ordinary duties of a cashier or other officer of the bank, and would not bind the bank in the absence of proof of express delegation from the board of directors of power to make the contract. But the declaration in this case avers that the promise was made by the bank, not by the cashier or any other officer, and the demurrer admits the averment. *Willeys v. Phoenix Bank*, 2 Duer, 129. The case must, therefore, on the pleadings, be considered as presenting the question of the liability of the bank upon the promise declared upon as the promise of the bank.

There was no representation made in this case by any officer of the bank that the drawer had any funds in the bank when the check was presented. If such was the case, the bank was bound to pay the check on presentation. The refusal of the bank to do so, although accompanied with a promise to pay it at a future time, was in fact information to the holder of the check that the bank had no funds of the drawer on deposit at that time wherewith to pay the check. The case does not, therefore, fall within that class of cases like *Pope v. Bank of Albion*, 59 Barb., 226, in which it has been held that any language, whether verbal or written, employed by an officer of a banking institution whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good, and will be paid, estops the bank from thereafter denying, as against a *bona fide* holder of the check, the want of funds to pay the same. Nor do the plaintiffs in these cases represent *bona fide* holders of the checks, who have purchased the same upon the strength of such representations. There does not appear to be anything in this case to take the promise declared on out of the operation of the statute of frauds.

§ 1783. *Facts to determine whether a check operates as payment.*

A check is merely evidence of a debt due from the drawer. Whether it shall operate as payment or not depends on two facts: first, that the drawer has funds to his credit in the bank upon which it is drawn; and, second, that the bank is solvent, or, in other words, pays its bills and the checks duly drawn upon it on demand. *Taylor v. Wilson*, 11 Metc., 51.

There being no funds of the drawers of these checks in the bank, the bank received no benefit or advantage from the promise of the holder to deposit the checks in the other bank, and that the same should be presented through the clearing-house. The promisors lost nothing by such promise. They had seasonably presented the checks; were guilty of no laches; were not even obliged to notify the drawers of the non-payment, the drawee having no funds. They did not disable themselves from enforcing their debt against Beal, or promise to delay enforcing or collecting it. They were as much at liberty to collect their debts of Beal, while the unpaid checks were in the banks, or clearing-house, for collection, as if they were in fact, as they were in law, in their own possession.

§ 1784. *The oral promise of the bank to pay the check was void under the statute of frauds.*

The debt remained the debt of Beal. The promise of the bank to pay it was a promise to pay the debt of another, and void under the statute of frauds. This is not a case where the guaranty or promise which is collateral to the principal contract is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor. In this case the collateral undertaking of the bank was subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability was the ground of the promise. There must, to sustain the promise and take it out of the operation

of the statute, be some other and further consideration shown; for the consideration for the original debt will not attach to this subsequent promise. *Wain v. Warlters*, 5 East, 20; *Leonard v. Vredenburg*, 8 Johns., 31. The promise of the payees of these checks, as set out in the declaration, does not amount to such further and new consideration as to take the case out of the operation of the statute. It is contended that it amounts to a parol acceptance of the checks, and that a parol acceptance of a check is good. Authority may be found in many text-books of writers of high authority upon commercial law, for the proposition stated, without qualification or exception, that a parol acceptance of a bill is good. *Vide* 1 Parsons on Bills and Notes, 285. But it is believed that an examination of the cases cited in support of this proposition will not sustain its application to the case of a parol accommodation acceptance of a bank check. A verbal acceptance of, or a verbal promise to accept, a check when the acceptor has funds of the drawer in his hands, is entirely without the operation of the statute, from the consideration that the drawee's engagement is, in fact, to pay his own debt to the drawer, the owner of the funds. But it is not perceived how any sound reason can be given why a verbal acceptance, or promise to accept, for the mere accommodation of the drawer, without funds or value received, should not be treated as within the statute. *Browne on Stat. of Frauds*, secs. 172, 174; *Quin v. Hanford*, 1 Hill, 82; *Pike v. Irwin*, 1 Sand., 14; *Pillans v. Van Mierope*, 3 Barr., 1663; *Johnson v. Collings*, 1 East, 98; *Curtis v. Brown*, 5 Cush., 488, and cases cited; *Dexter v. Blanchard*, 11 Allen, 365. Courts have frequently expressed their dissatisfaction that the rule with regard to implied as well as parol acceptances of bills has been carried as far as it has, and their regret, as stated in *Boyce v. Edwards*, 4 Pet., 122, "that any other act than a written acceptance of the bill had ever been deemed an acceptance."

In *Townslley v. Sumrall*, 2 Pet., 170, which decides that a verbal accommodation acceptance is taken out of the statute by the circumstance that the party to whom the promise was made paid money on the strength of it, the whole opinion on this point in the case proceeds upon the assumption that, without some new and original consideration moving between the parties to the collateral undertaking, a verbal accommodation acceptance is within the statute. The mischief of the rule holding parol acceptances of bills to be good was so apparent that the subject has been regulated by statute in several of the states, requiring the acceptance to be in writing; and in England, by the statute 1 and 2 George IV., ch. 78, an acceptance of an inland bill must be in writing, and on the bill itself. But the reasons given for holding good a parol accommodation acceptance of a bill of exchange do not apply to the case of a bank check. The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are, that they are always drawn upon a bank or a banker; that they are payable immediately on presentment without the allowance of any days of grace; and that they are never presentable for acceptance, but only for payment. *Story on Promissory Notes*, sec. 489, and cases cited in note. The promise declared on does not amount to an acceptance. If it be treated either as a promise to accept or a promise to pay, it cannot avail the plaintiffs. No consideration to support the promise is stated, or appears. The checks were not taken on the faith of such promise. The holder gave nothing, and relinquished no advantage for the promise. All the cases, including those before cited, which hold that a promise to accept amounts to an acceptance, put the doctrine on the ground that the holder has taken the bill on the faith of the

promise. *Coolidge v. Payson*, 2 Wheat., 66; *Schimmelpennich v. Bayard*, 1 Pet., 284 (BILLS AND NOTES, §§ 135-138); *Adams v. Jones*, 12 Pet., 207 (§ 214, *supra*); *Russell v. Wiggin*, 2 Story, 237.

The promise declared on must be considered as one without consideration, and therefore *nudum pactum*. *Overman v. Hoboken City Bank*, 1 Vroom, 61, 68.

Demurrers sustained.

EMERSON v. SLATER.

(23 Howard, 28-45. 1859.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This case comes before the court upon a writ of error to the circuit court of the United States for the district of Massachusetts. It was an action of *assumpsit*, brought by the plaintiff in error against the present defendant, upon a written agreement, bearing date on the 14th day of November, 1854. By the terms of the instrument, the plaintiff covenanted and agreed with the defendant, in consideration of the agreements of the latter therein contained, and of \$1 to him paid, that he, the plaintiff, would complete all the bridge work to be done by him for the Boston & New York Central Railroad Company, ready for laying down the rails for one track, by the 1st day of December next after the date of the contract. In consideration whereof, the defendant agreed that he would pay the plaintiff, within two days from the date of the agreement, the sum of \$4,400 in cash, and also give to the plaintiff, on the completion of the bridges, and when the rails for one track were laid from Dedham to the foot of Summer street, in Boston, his, the defendant's, five notes, for \$2,000 each, dated when given, as provided, and made payable to the plaintiff, or order, in six months from their date. Another stipulation of the agreement was, that the notes, when paid, were to be applied towards the indebtedness of the railroad company to the plaintiff, and that the agreement was in no way to affect any contract of the plaintiff with the railroad, or any action then pending between them.

When the declaration was filed, it contained three special counts, drawn upon the written agreement, together with the common counts, as in actions of *indebitatus assumpsit*. Performance on the part of the plaintiff, and neglect and refusal on the part of the defendant to give the five notes specified in the agreement, after seasonable demand, constitute the cause of action set forth in the several special counts. They differ in nothing material to be noticed in this investigation, except that, in the first count, performance on the part of the plaintiff is alleged, according to the contract, on the 1st day of December, 1854, while in the second and third counts it is alleged at a period twenty days later.

An additional special count was afterwards filed by consent, which, in one respect, varies essentially from the other counts: After setting out the substance of the contract, it alleges that the defendant waived performance at the day stipulated in the agreement, and extended the time to the 20th day of the same December, and that the plaintiff performed and completed the work within the extended time. Demand of the notes prior to the commencement of the suit, substantially as alleged, was admitted at the trial, as were also the execution of the agreement and the payment by the defendant of the \$4,400. As appears by the transcript, the cause has been twice tried upon the same

pleadings. At the first trial the verdict was for the plaintiff, but the defendant excepted to the rulings and instructions of the circuit court, and, after judgment, removed the cause into this court by writ of error.

Among the questions presented on the writ of error, the principal one was whether, by the true construction of the written agreement, time was of the essence of the contract. That question was directly presented by the fourth exception; and this court held that the refusal of the circuit judge to instruct the jury, as prayed by the defendant, that the plaintiff could not recover on the special counts without showing that the work was completed by the day stipulated in the contract, was error. Accordingly, the judgment was reversed, and the cause remanded, with directions to issue a new venire. In the opinion delivered on the occasion, this court said, in effect, that in cases where time is of the essence of the contract, there can be no recovery on the written agreement, without showing performance within the time limited; but added, that a subsequent performance and acceptance by the defendant will authorize a recovery in a *quantum meruit*. *Slater v. Emerson*, 19 How., 239 (§§ 910-912, *supra*).

Failing to show performance at the day named in the agreement, the plaintiff, at the last trial, offered to prove by parol, to the effect that, after the day of the agreement, and before as well as after the day specified for the completion of the work, the defendant, by his conduct, acts and declarations, waived and dispensed with performance at the day named in the written agreement, and agreed to substitute therefor performance on the 20th day of the same December, and to deem performance on the day last named as equivalent to performance on the day specified in the written agreement, and that the work was fully performed within the extended time. Objection was made by the defendant to this testimony upon the ground that the written agreement declared on was a special promise for the debt, default or misdoings of another; and that the alleged waiver, substitution and extension, not being in writing, were within the statute of frauds; and the court sustained the objection, and excluded the testimony. To which ruling of the court plaintiff excepted.

He then proposed to proceed upon the common counts, and offered evidence accordingly. After reading the agreement set up in the special counts, he introduced three deeds, each dated November 17, 1854, purporting to convey certain parcels of real estate therein described. They were each given by the railroad company to the defendant, to indemnify him for the liability he assumed in the before-mentioned written agreement with the plaintiff. Estimating the value of the real estate so conveyed by the considerations expressed in the respective deeds, it amounted in the aggregate to the sum of \$13,500.

He also introduced a memorandum agreement between the defendant and the railroad company, whereby the former leased to the latter ten hundred and fifty tons of railroad iron, to be laid down by the company and used on their railroad. By the terms of the last-named agreement, the railroad iron was estimated at the value of \$68,400; and the company agreed to pay the defendant, for the use of the iron, \$5,000 per month, the first payment to be made on the 1st day of March then next, and so upon the first day of each succeeding month, until the whole sum was paid, with interest on the same from a given day — the defendant agreeing, if there was no default of the payments, when the whole was paid, to sell and deliver the iron to the company for the estimated value, including the interest. To secure these payments, together with the interest, the railroad company, by the same instrument, assigned and set over

to the defendant the proceeds of the railroad, to an amount equal to the estimated value of the iron, with the interest, and authorized and required the superintendent of the road to retain in his own hands, out of the proceeds, a sum sufficient to pay the amount to the defendant, in the manner and at the time specified in the agreement.

Emerson's contract with the railroad company was also introduced, and makes a part of the record. It bears date on the 17th day of December, 1853, and provides, on the one part, that the plaintiff shall build and complete, sufficient for the passage of an engine over the same by the 1st day of May then next, all the bridging, as then laid out and determined upon by the engineer, from the wharf, near the foot of Summer street, in Boston, to Dorchester shore, and to complete the same as soon thereafter as might be reasonably practicable. On the other part, the agreement prescribes the compensation to be paid by the railroad company to the plaintiff, for building and completing the respective works therein designated and described, stipulating that eighty-five per cent. upon the estimated value of the materials furnished, and seventy-five per cent. upon the estimated value of the labor performed, should be paid monthly, as the work was done, and that the balance should be paid by the company upon the completion and acceptance of the whole work.

Parties to the suit are by law competent witnesses in the courts of Massachusetts; and under that law the plaintiff was examined in this case. He also called and examined five other witnesses. From this parol testimony it appears that securities were put into the hands of the defendant, deemed by him and the company adequate, at the time, to indemnify him against his contract with the plaintiff. Those securities, two of the witnesses say, consisted of real estate and the bonds of the company for \$17,000, secured by a mortgage upon the road. In respect to the real estate, it is to be observed that the deeds of conveyance bear date three days after the date of the contract; but the presumption from the circumstances is a reasonable one; that they were given in pursuance of the arrangement made at the time the contract was executed. It also appeared that the company failed in July, 1854, and that it was actually insolvent at the date of these transactions.

Prior to the date of the agreement of the 14th of November, 1854, the plaintiff had stopped work under his contract with the company, and refused to continue it. As soon as the contract with the defendant was made, he resumed the work on the bridges, and finished them about the middle of December, 1854; but the rails were not all laid by the company until the 21st day of the same month. At the date of the contract between these parties, the defendant was a large stockholder in the corporation, and holder of the bonds of the company, which were secured by a mortgage of the road to trustees. During the progress of the work under the contract between these parties, and before the day therein named for the completion of the work, the officers of the company, or some of them, repeatedly stated to the plaintiff, in the presence of the defendant, and without objection on his part, that all the company wanted was, that the plaintiff should keep out of the way of the track-layers.

Three of the directors, including the defendant, on the 24th day of November, 1854, called on the plaintiff while he was at work on one of the bridges, and inquired of him if he could complete it by the fourth day of the then next month, stating to him the reason why it was desirable that he should do so—and by working nights and Sundays he completed it, according to their request.

Several witnesses state—and among the number the one who laid the rails for the company—that the track-layers were not delayed by the plaintiff; and the plaintiff testified that the defendant never objected because the bridges were not completed by the day specified in the written agreement. On being recalled, he further testified that he paid, for work done and materials furnished after that day, the sum of \$11,157.84, and that he had not received a dollar for it from any source. Thereupon the presiding justice ruled and instructed the jury that, upon this testimony, the plaintiff was not entitled to recover on the common counts, and directed the jury to return their verdict for the defendant. Accordingly, the jury found that the defendant never promised; and the plaintiff excepted to the rulings and instructions of the court.

Several questions were discussed at the bar, which, in the view we have taken of the case, it will not be necessary to decide. Both of the exceptions to the rulings and instructions of the court necessarily involve the construction of the contract between these parties; but the question presented is widely different from the one considered and decided by this court on the former record. On that occasion the single question of any importance was whether, by the true construction of the contract, it was agreed and understood between the parties to the instrument that the completion of the work at the time therein prescribed was a condition on which the obligation of the defendant to give the notes was to depend.

§ 1785. *Former decision adhered to, that time was of the essence of contract for completion of railroad bridge by contractor.*

Contrary to the ruling of the circuit judge, this court held that the covenants of the respective parties were dependent, that time was of the essence of the contract, and remanded the cause for a new trial. That rule of construction, beyond doubt, is the law of the contract, and no attempt has been made to evade or question it on either side in this controversy. But the question now presented is of a very different character. It is insisted by the plaintiff that the promise of the defendant was an original undertaking, on a good and valid consideration, moving between the parties to the instrument. On the part of the defendant it is insisted that his undertaking was a special promise for the debt, default or misdoings of another, and so within the statute of frauds.

§ 1786. *Subsequent oral agreements may sometimes be shown to vary the terms of a previous written contract.*

If the theory of the plaintiff be correct, then it would seem to follow that the rulings and instructions of the circuit court were erroneous. Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to vary its terms or to affect its construction. All such verbal agreements are considered as merged in the written contract. But oral agreements subsequently made on a new and valuable consideration, and before the breach of the contract, in cases falling within the general rules of the common law, and not within the statute of frauds, stand upon a different footing. Such subsequent oral agreements, not falling within the exception mentioned, may have the effect to enlarge the time of performance specified in the contract, or may vary any other of its terms, or may waive and discharge it altogether.

§ 1787. — *authorities examined.*

On this point the authorities are numerous and decisive, of which the following are examples: *Goss v. Nugent*, 5 Barn. & Ad., 65; *Nelson v. Boynton*, 3

Metc., 402. Speaking of the exceptions to the general rule that parol evidence is not admissible to contradict or vary the terms of a written instrument, Mr. Greenleaf says: "Neither is the rule infringed by the admission of oral evidence to prove a new and distinct agreement upon a new consideration, whether it be a substitute for the old one or in addition to and beyond it; and if subsequent, and involving the same subject-matter, it is immaterial whether the new agreement be entirely oral, or whether it refers to and partially or totally adopts the provisions of the former contract in writing, provided the old agreement be rescinded and abandoned." 1 *Greenl. Ev.*, 303. But the rule, so far as it is applicable to this case, is better stated by Lord Denman in *Goss v. Nugent*, 5 *Barn. & Ad.*, 665, wherein he says: "After the agreement has been reduced into writing, it is competent to the parties, in cases falling within the general rules of the common law, at any time before the breach of it, by a new contract, not in writing, either altogether to waive, dissolve or annul the former agreement, or in any manner to add to or to subtract from or vary or qualify the terms of it, and thus to make a new contract." That rule was afterwards qualified by the same learned judge in a particular not essential to the present inquiry; and with that qualification it appears to be the rule constantly applied by the English courts, in cases not within the statute of frauds, to the present time. *Harvey v. Grabham*, 5 *Ad. & Ell.*, 61; 1 *Phil. Ev.* (Cow. & Hill's ed.), p. 563, n. 987; *Munroe v. Perkins*, 9 *Pick.*, 298; *Snow v. Inhabitants of Ware*, 13 *Metc.*, 42; *Vicary v. Moore*, 2 *Watts*, 451; *Cummings v. Arnold*, 3 *Metc.*, 489; *Fleming v. Gilbert*, 3 *Johns.*, 528.

§ 1788. *Can a written contract, within the statute of frauds, be varied by a subsequent oral agreement?*

On the other hand, assuming the theory of the defendant to be correct, that, by the true construction of the contract, his undertaking was a special promise for the debt, default or misdoings of the railroad company, then perhaps the better opinion is, according to the weight of authority, that a written contract within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. *Marshall v. Lynn*, 6 *Mee. & W.*, 109; *Goss v. Nugent*, 5 *Barn. & Ad.*, 58; *Harvey v. Grabham*, 5 *Ad. & Ell.*, 61; *Stowell v. Robinson*, 3 *Bing. N. C.*, 927; *Stead v. Dawber*, 10 *Ad. & Ell.*, 57; *Emmet v. Dewhirst*, 8 *Eng. L. & Eq.*, 88; *Hasbrouck v. Tappen*, 15 *Johns.*, 200; *Blood v. Goodrich*, 9 *Wend.*, 68; *Stevens v. Cooper*, 1 *Johns. Ch.*, 429; *Clarke v. Russell*, 3 *Dal.*, 415. Decided cases, however, are referred to from the Massachusetts reports, which evidently wear a different aspect, and it is contended by the counsel for the plaintiff that the principle adopted in those cases constitutes the rule of decision in this case; but it is unnecessary to determine that point at the present time, as we are of the opinion that the promise of the defendant contained in the written agreement was an original undertaking on a good and valid consideration moving between the parties to the instrument. *Nelson v. Boynton*, 3 *Metc.*, 396; *Stearns v. Hall*, 9 *Cush.*, 31.

§ 1789. *A promise, although collateral in form, if made in pecuniary interest of promisor, is not a collateral undertaking within the statute of frauds, but an original promise.*

Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement.

to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability. *Nelson v. Boynton*, 3 Metc., 400; *Leonard v. Vredenburg*, 8 John., 39; *Farley v. Cleveland*, 4 Cow., 432; *Alger v. Scoville*, 1 Gray, 391; *Williams v. Loper*, 3 Burr., 1886; *Castling v. Aubert*, 2 East, 325; 2 *Parsons on Con.*, 806. Nothing is better settled than the rule, that if there is a benefit to the defendant, and a loss to the plaintiff, consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation. 2 *Addison on Con.*, 1002, and cases cited. Other authorities state the proposition much stronger, authorizing the conclusion that benefit to the party by whom the promise is made, or to a third person at his instance, or damage sustained at the instance of the party promising, by the party in whose favor the promise is made, is sufficient to constitute a good and valid consideration on which to maintain an action. *Violett v. Patton*, 5 Cranch, 150; *Chitt. on Con.*, 28; *Townsley v. Sumrall*, 2 Pet., 182.

Apply these principles to the terms of the written agreement, in view of the attending circumstances and the subject-matter, and it is quite clear that the promise of the defendant was an original undertaking on a good and valid consideration moving from the plaintiff at the time the instrument was executed. On its face it purports to be a contract between the parties, for their own benefit; one agreeing to do certain work and furnish certain materials, and the other agreeing to pay therefor a stipulated compensation. Their promises are mutual, and in one respect dependent. In consideration that the plaintiff engaged to do the work and furnish the materials by a given day, the defendant, on his part, agreed, among other things, when the work was completed, to give the plaintiff the five notes therein described. Reference was made to the contract of the plaintiff with the railroad company in the first instance, as descriptive of the work to be done and of the materials to be furnished; and in the second instance, doubtless for the reason that, as a part of the transaction, the company had placed, or agreed to place, securities in the hands of the defendant, to indemnify him for the liability he thereby assumed to the plaintiff. Part of those securities were delivered over to the defendant at the time, and the residue as soon thereafter as the conveyances could conveniently be made. But when we consider the attending circumstances, the presumption is much stronger that the arrangement was one mainly, if not entirely, for the individual benefit of the defendant.

§ 1790. *A contract, by one having large interests in a railroad as stockholder and otherwise, with a contractor, to discharge indebtedness of company for future work, is not a collateral contract under statute of frauds.*

Prior to that date the railroad company had failed and was utterly insolvent, owning nothing, it seems, except the securities transferred to the defendant for his indemnity in this transaction, and the franchise of the road. Unlike what was exhibited in the former record, it now appears that the defendant had large interests of his own, separate from his relation to the company as a stock-

holder, which were to be promoted by the arrangement. He had leased to the company railroad iron for the use of the road, amounting in value to the sum of \$68,000, and, as a security for payment, held an assignment of the proceeds of the road to that amount with interest, which was to be paid in monthly instalments of five thousand. Now, unless the bridges were completed and the road put in a condition for use, there would be no proceeds; and as he had already taken into his possession all the available means of the company to secure himself for this new liability, should the road not be completed, the company could not pay for the iron.

In this view of the subject, it is manifest that the arrangement was one mainly to promote the individual interest of the defendant. Damage also resulted to the plaintiff, as is obvious from the whole transaction. Under his contract with the company, they had stipulated to pay him monthly eighty-five per cent. upon the estimated value of the materials furnished, and seventy-five per cent. upon the estimated value of the labor performed as the work was done. Failing to receive those monthly payments from the company, the plaintiff, as he had a right to do, stopped the works and refused to proceed, in consequence of the failure of the company to make the monthly payments. To remedy this difficulty and insure the completion of the bridges so as to render the road available for use, this arrangement was made by the defendant. It was not an arrangement to pay a subsisting indebtedness, but only for work to be done and materials to be furnished; monthly payments were discontinued, and the plaintiff was induced, with an advance of \$4,400, to resume and complete the work at his own expense. Without detailing more of the evidence, as exhibited in the statement of the case, it will be sufficient to say that, in view of all the attending circumstances, we think it is clear that the promise of the defendant was an original undertaking upon a good and valid consideration moving between the parties to the written agreement.

For these reasons we think the plaintiff had a right to proceed upon the common counts, and that it was error in the presiding justice to direct a verdict for the defendant. It is also contended by the plaintiff that the effect of the indemnity given by the railroad company to the defendant was to take the contract out of the statute of frauds; but we do not find it necessary to determine that question at the present time.

The judgment of the circuit court is therefore reversed, with costs, and the cause remanded with directions to issue a new venire.

ULLMAN v. MEYER.

(Circuit Court for New York: 10 Federal Reporter, 241-243. 1882.)

Opinion by WALLACE, D. J.

STATEMENT OF FACTS.—I am constrained to hold that the defendant was erroneously precluded from the benefit of his defense under the statute of frauds on the trial of the action, and that the construction of the statute, which, upon a hasty reading seemed correct, cannot be maintained. The case turns upon the construction of the statute of frauds, the phraseology of which differs from that of the statute of Charles II. It is stated in Parsons on Contracts (vol. 3, p. 3), that although provisions substantially similar have been made by the statutes of this country, in no one state is the English statute exactly copied. It was alleged in the present case, and the evidence tended to show, that by the terms of the agreement of marriage between the parties

the marriage was not to take place until some time after the expiration of one year. It was held that, by force of the exception in the third section of our statute, promises to marry were not required to be in writing under any circumstances, the view being taken that it was the intention of the statute to withdraw agreements to marry altogether from its operation.

§ 1791. *The statute of frauds applies to promises to marry. Such promises, if not to be performed within a year, must be in writing or are void.*

As an original proposition it might be debated whether the statute of frauds was ever intended to apply to agreements to marry. They are agreements of a private and confidential nature, which, in countries where the common law prevails, are usually proved by circumstantial evidence, and at the time the English statute was passed were not actionable at law, but were the subjects of proceedings in the ecclesiastical courts to compel performance of them. Nevertheless, at an early day after such actions became cognizable in courts of law the defense of the statute of frauds was interposed, under that clause of the statute which denies a right of action upon any agreement made upon consideration of marriage unless the agreement is in writing; and though it was held that such clause only related to agreement for marriage settlements, there seems to have been no doubt in the minds of the judges that promises to marry were within the general purview of the statute. In our own country, in *Derby v. Phelps*, 2 N. H., 515, the question was directly decided, and it was held that although the defense could not be maintained under the marriage clause of the statute, it was tenable under the clause requiring all agreements not to be performed within a year to be in writing. To the same effect are *Nichols v. Weaver*, 7 Kan., 373, and *Lawrence v. Cooke*, 56 Me., 193.

The question has never been presented in our own state, and the ruling upon the trial was made under the impression that the exception in the third clause of our statute was meaningless, unless intended to relate to all the clauses. It was entirely unnecessary if limited to the particular clause in which it is placed, because by the settled construction of the statute the clause did not apply to the excepted class of promises. 1 *Ld. Raym.*, 387; 1 *Strange*, 34. When English statutes, such as the statute of frauds, have been adopted into our own legislation, the known and settled construction of these statutes has been considered as silently incorporated into the acts. *Pennock v. Dialogue*, 2 *Pet.*, 1.

A more careful examination has, however, satisfied me that the only purpose of inserting the exception was by way of explanation, and to remove any doubt as to the meaning of the clause by incorporating into it expressly what would otherwise have been left to implication. This conclusion is more reasonable than the supposition that so important an innovation upon the statute of frauds would have been engrafted so ambiguously. If it had been intended to exclude promises of marriage altogether from the operation of the statute, it could have been plainly evinced by inserting the exception where it would naturally apply to all the classes of promises required to be in writing; as it is, it more obviously refers to the marriage clause, and the class of promises covered by that clause. It has no necessary relation to the other classes of promises. While the letters of the parties show a marriage engagement, the terms of the engagement and the time of the marriage are not indicated sufficiently to take the case out of the statute. The evidence offered to show that the promise of the defendant was not, by its terms, to be performed within a year, was sufficient to present a question of fact for the jury. As this question was withdrawn from their consideration, there must be a new trial.

WALKER v. JOHNSON.

(6 Otto, 424-429. 1877.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—On July 21, 1869, Sherburne, Walker and Farwell made a written contract with the canal commissioners of Illinois for the construction of a certain lock and dam. Work was to be begun on or before August 1, 1869, and be completed by September 1, 1871. Sherburne shortly afterwards assigned his interest to one Lake, and Lake, Farwell and Walker assigned the whole contract, with the approval of the commissioners, to Johnson, the plaintiff below. While Lake, Farwell and Walker were the contractors they agreed, in writing, that Walker was "to furnish all the stone necessary for the construction of the lock and dam, to be by him delivered on board of canal-boats at Henry, as the same might be required in the progress of the work;" and the prices for such stone were settled. Johnson claimed that after the contract had been assigned to him by Lake, Farwell and Walker, the latter had agreed with him to furnish stone in the same manner and on the same terms as in the contract between Walker and his partners Lake and Farwell. Walker failed to do this, and Johnson brought suit. Judgment was given for him, and defendant sued out a writ of error.

§ 1792. *A contract which does not show by its terms that it is not to be performed within a year is not void by the statute of frauds.*

Opinion by MR. JUSTICE MILLER.

The first error arises upon the proposition of defendant that the contract, being one not to be performed within a year from the time it was made, and resting only in parol, was void, and could not sustain the action. Evidence was given which tended to show that the agreement between plaintiff and defendant was made early in November, 1869, and renewed or modified in April, 1870. As by the terms of the original contract with the canal commissioners the work was to be completed on or before September 1, 1871, defendant insisted that his contract for delivery of stone had the same time to run; and his counsel asked the court to instruct the jury that it was void, if it appeared from the Farwell, Lake and Walker contract that it was not the intention and understanding of the parties that the same should be performed within the space of one year from the making of the verbal agreement between plaintiff and defendant.

The court refused this instruction, and told the jury that if it appeared from the contract itself that it was not to be performed, or was not intended to be performed, within a year, it was void; but that if it was a contract which might have been performed within a year, and which the plaintiff at his option might have required the defendant to perform within a year, it was not within the statute. We think the court ruled correctly, both in what it charged and in what it refused.

§ 1793. *A contract which may be performed within a year is not within the statute of frauds.*

1. In order to bring a parol contract within the statute, it must appear affirmatively that the contract was not to be performed within the year. We have had occasion to examine this question very recently in the case of *McPherson v. Cox*, 96 U. S., 404. We said, in that case, that the statute "applies only to contracts which, by their terms, are not to be performed within the year, and not to contracts which may not be performed within that time."

The court said, in regard to that case, which was a contract by a lawyer to conduct a suit in court, that there was nothing to show that it could not have been fully performed within a year. So, in this case, the lock and dam were to be completed on or before September 1, 1871. Clearly, the contractor had the right to push his work so as to finish it before November, 1870, which would have been within a year from the date of Walker's contract with plaintiff. If plaintiff had a right to do his work within that time, he had a right to require of defendant to deliver the stone necessary to enable him to do it. There is no error in the action of the court on this branch of the subject.

§ 1794. *A subsequent oral alteration by consent in an oral contract becomes a part of the contract.*

2. It will be observed that, by the agreement of Walker with his partners, he was to deliver at Henry in canal-boats. Evidence was given tending to show that, in the spring of 1870, it was agreed between him and plaintiff that he should deliver by railroad; and the court charged the jury that it was competent for the parties to change the contract in that regard, if they chose; and that if the jury found that defendant did so agree, he was bound by such agreement as he made, if any. The original contract between Johnson and Walker was in parol; and if the parties, for their mutual convenience, or for no good reason at all, chose a delivery by rail, both of them consenting thereto, we think that the change in the mode of delivery became a part of the contract.

§ 1795. *Remarks irrelevant to any issue in the case, and which do not prejudice the party bringing writ of error, need not be considered in this court.*

3. There was evidence tending to show that, while defendant was performing part of the contract, he received notice from plaintiff that he would take no more stone from him; and also evidence that, shortly after this, the parties had an interview, in which this notice was waived, and Walker agreed to go on with the contract. On this part of the case the court said: "If the testimony satisfies you that the defendant did, after the notice of the 12th of May, recognize the contract as still in force, and promise the plaintiff that he would go on and complete the same, the defendant cannot now claim as a defense to this action that said notice released him from the performance of the contract. If, on the contrary, you are satisfied that the defendant made no agreement after the notice to stop on the 12th of May, recognizing the contract as still in force, or promising to perform it or continue it in force, then the defense may be considered made out, although the notice to suspend might entitle the defendant to damages; but I do not think it necessary to discuss the question of the defendant's damages."

The court, however, did, in answer to a suggestion of counsel for defendant, that the latter would have a right to damages for the withdrawal of the contract by plaintiff, proceed to make some remarks on that subject to which defendant excepts, and which he now assigns for error. We do not see anything in these remarks to complain of, except that they were irrelevant to any issue in the case. There was no plea or cross demand under which those damages could have been passed upon by the jury. As they in nowise prejudiced defendant in the present action, we are not called on to consider further their soundness as matter of law.

§ 1796. *The court is not bound to charge abstract propositions of law, which do not relate to the questions in issue.*

4. The court was asked to instruct the jury "that verbal admissions, while, if deliberately made and precisely identified, they frequently furnish satis-

factory evidence, are to be received with great caution; and the attention of the jury should be directed, in passing upon alleged verbal admissions, to whether the witnesses testifying thereto distinctly understood the party charged in what he said, and whether they have or have not, intentionally or unintentionally, failed to express what was actually said." But the court refused said instruction. This is the ground of the last assignment of error.

There is nothing in the testimony, as we find it in the bill of exceptions, to which such a charge could apply. There are no admissions, properly so called, of defendant relied on in the case. The testimony in regard to the renewal of the contract after plaintiff's letter to defendant, that he would receive no more stone from him, is not an admission; it is a conversation between plaintiff and defendant, in which the contract is renewed or the abandonment waived. It is explicitly stated by plaintiff that defendant agreed to recommence the delivery of stone and complete the contract. Whatever else this may be, it is *no* admission. This word, in the sense of the quotation from Greenleaf, asked by counsel as a charge, means an admission by a party of some existing fact or circumstance which tells against him in the trial, and does not relate to the terms in which a substantive verbal contract is made by the parties. Besides, it is apparent that the attention of the jury was directed by the court to all the matters essential to their understanding the case; and we do not admit that a court is bound to give to the jury, at the instance of counsel, every philosophical remark found in text-books of the law, however wise or true they may be in the abstract, or however high the reputation of the author.

We find no error in the record, and the judgment of the circuit court is affirmed.

BECKWITH v. TALBOT.

(5 Otto, 259-294. 1877.)

ERROR to the Supreme Court of the Territory of Colorado.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This was an action brought by Talbot against George C. Beckwith in the district court of Colorado for the county of Fremont, to recover damages for the breach of a contract alleged to have been made on the 7th of October, 1870, between the plaintiff and two others on the one part, and the defendant on the other, whereby they were to herd and care for a large herd of cattle for the defendant, from that time until the 5th day of December, 1872, for which he was to give them one-half of what the cattle and their increase should then bring over \$36,681.60; that is, to each one-third of such half. The declaration alleged that the plaintiff and the two persons who entered into the contract together with him (who were the sons of the defendant) performed their part of it, but that the defendant refused to sell the cattle, or to pay the plaintiff his share of their value above the said sum.

On the trial, two defenses were relied on which are made the subject of assignments of error here: First, that the alleged contract was void by the statute of frauds, because, though not to be performed within a year, it was not in writing signed by the defendant; secondly, that it was a joint contract on which the plaintiff could not maintain a separate action.

The territorial statute of frauds declares that "every agreement which by its terms is not to be performed within a year, unless some note or memorandum

thereof be in writing and subscribed by the party chargeable therewith, shall be void." The verbal difference between this statute and that of Charles II. is not material in this case. It appeared on the trial that the agreement made by the parties was committed to writing at the defendant's instance, and was in the following words, to wit:

"WET MOUNTAIN VALLEY, October 7, 1870.

"This is to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at \$36,681.60 on shares from George C. Beckwith; time to expire on the 5th day of December, 1872; then George C. Beckwith to sell the cattle and retain the amount the cattle are valued at above. Of the amount the cattle sell at over and above the said valuation, George C. Beckwith to retain one-half, and the other half to be equally divided between C. W. Talbot and Elton T. Beckwith and Edwin F. Beckwith.

(Signed)

"C. W. TALBOT,

"ELTON T. BECKWITH,

"EDWIN F. BECKWITH."

This agreement was signed by the plaintiff and the two young Beckwiths, but was not signed by the defendant. It was delivered to him, however, and was kept by him until he produced and proved it on the trial. It was conceded by both parties that this was the agreement under which the services of the plaintiff were performed. Two letters written by the defendant to the plaintiff on the subject-matter of the contract, and whilst he had the said agreement in his possession, and whilst it was being executed by the plaintiff, namely, one on the 21st of September, 1872, and the other on the 10th of November, 1872, were also produced in evidence, from which the following are extracts:

"DENVER, September 21, 1872.

"MR. TALBOT, *Sir*:—On my arrival from the mountains, I received your letter. As I have wrote you before, every day I see parties here that is offering their cattle very low. . . . I have used every exertion for the last three months to sell. . . . You suggest giving you a part of the cattle. That is entirely outside of the agreement. Also, where would be the interest on the amount put in the cattle coming from? And also Elton and Edwin would be glad to do the same; but, at that rate, I would not get my money back I put into the cattle. The cattle must be sold and settled up according to the agreement. I will do everything I can to sell at the best advantage, and you shall have every chance to get a purchaser for the cattle so as to make the most out of them. . . . You shall have no chance to complain in my keeping up to the agreement, as I shall strictly, although I have heard you have made complaints to parties, which I think is very unfair, and the parties you told so said so too. . . .

Yours respectfully,

"GEORGE C. BECKWITH."

"DENVER, Nov. 10, 1872.

"MR. TALBOT, *Sir*:—At first I thought it useless to answer your letter, as I am bound by the agreement to sell the cattle in a very short time. . . . I notified you to get a purchaser for the cattle months ago; and what have I received from you in return and for my pay? I must say I have never been treated so meanly by a man in my life. My rights was to sell the cattle. Does the agreement say that I was to say anything to you or any one else? But what next? You quarreled with me because I would not break the agreement

and give you the cattle to sell at figures less than I had kept them in Denver for sale. Now, I have been offered \$31,000 for the cattle. I have written to Edwin, and he will state to you what I wrote him to say to you.

"Yours, in haste,

GEORGE C. BECKWITH."

§ 1797. *Collateral papers supplying the want of a signature to an agreement, under the statute of frauds, may be aided, under proper circumstances, by parol proof.*

We agree with the supreme court of Colorado that, in the face of this evidence produced by the defendant himself, he cannot deny the validity of the agreement. His letters are a clear recognition of it. In them he refers to "the agreement" again and again. He declares his intention to adhere to it, and to hold the plaintiff to it. What agreement could he possibly refer to but the only one which, so far as appears, was ever made — the one which he took into his possession, and then had in his possession; the one under which it was conceded the parties were then acting? The defendant, being examined as a witness on his own behalf, and testifying with regard to the contract between the parties, said: "The matter was all talked over, and, I thought, understood. I said to my son Elton: 'You understand the matter. Will you take a pen and paper and write the contract?' He wrote it. Talbot read it and signed it, and then my sons signed it." On cross-examination, he said: "The contract was delivered to me after it was signed, and has remained in my possession ever since until this trial."

It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the statute of frauds, should, on their face, sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. *Johnson v. Dodgson*, 2 Mees. & W., 653; *Salmon Falls Co. v. Goddard*, 14 How., 446 (§§ 1762-67, *supra*). There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent. On the following day the latter writes to the party who signed it as follows: "My son informs me that you yesterday executed our proposed agreement, as prepared by J. S. I write this to let you know that I recognize and adopt it." Would not this be a sufficient recognition, especially if the parties should act under the agreement? And yet parol proof would be required to show what agreement was meant. The present case is as strong as that would be. In our judgment, the defendant, unless he could show the existence of some other agreement, was estopped from denying that the agreement referred to by him in his letters was that which he induced the plaintiff to sign, and which he put in his pocket and kept, and sought to enforce against the plaintiff for two whole years. On this point, therefore, we are clearly of opinion that no error was committed by the court below.

§ 1798. *If parties who execute an agreement jointly have separate interests, each may have a separate action.*

The allegation that the plaintiff was interested jointly with the defendant's two sons, and, therefore, could not maintain a separate action for his equal share of the profits, is equally untenable. Their interests were separate. They were all employed and hired by the defendant to herd his cattle. The evidence

shows that each supported himself, found his own assistance, and paid his own expenses. Each was to have as his compensation one-third of half the increased value of the cattle at the end of the employment. Neither was interested in the compensation due to the other. Sergeant Williams, in his note to *Eccleston v. Clipsam*, 1 Saund., 154, says: "Though a man covenant with two or more jointly, yet if the interest and cause of action of the covenants be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint." In the present case, the cause of action was the service performed under the contract; and each performed his own distinct service, and was entitled to distinct and separate compensation therefor. The case is precisely within the category stated by the learned annotator. It is very similar also to that of *Servante v. James*, 10 B. & C., 410, where the master of a vessel covenanted with the several part-owners to pay to them severally in certain proportions the moneys which he should receive from the government for carrying the mails; and it was held that the covenant inured to them severally and not jointly, because their interests were several. The case is also quite similar to that of an engagement with seamen for a whaling voyage, where each is to receive for his compensation a certain percentage of the profits of the voyage. Though they work together and in co-operation, they do not become partners, nor does either acquire any interest in the compensation of the others. The interest of each is separate.

In the present case, the material fact is that the plaintiff and his associates were employees, and not proprietors. They were in the service of the defendant, and employed in and about his property and business, and not their own. Hence they were not partners, either with each other or with him. They were not liable for any losses. The entire responsibility for these was on him. They were only interested in the losses as they might affect the amount of their ultimate compensation.

These considerations dispose of another point made by the plaintiff in error, though not distinctly assigned for error, namely, that the contract created a partnership between the defendant and the other parties to it. No such result was intended, nor does it follow from any fair construction of the contract. There was no community of interest in the capital employed, nor in the profits and losses. The cattle remained the entire property of the defendant. If the whole herd had perished by distemper, it would have been his loss alone, and the other parties would only have been interested in the loss of compensation for their services.

Judgment affirmed.

§ 1799. **Promise to pay the debt of another.**—Under the statute of frauds an undertaking or agreement to pay the debt of another must be in writing and must express the consideration. *How v. Kimball*, 2 McL., 106. See §§ 1731, 1734, 1735.

§ 1800. A note payable on demand, and not payable to order, containing an indorsement that it is held by the payee as collateral security for the maker's obligation upon a previous note of a third person, is not void under the statute of frauds as being a promise to pay the debt of another without expressing the consideration. *Union Bank of Georgetown v. Corcoran*,* 5 Cr. C. C., 518.

§ 1801. A promise to pay the debt of another is within the statute of frauds although the promise is conditional. *Barry v. Law*,* 1 Cr. C. C., 77.

§ 1802. A promise of one partner to pay a debt of the partnership on which a judgment had been rendered against the other partner is not a promise to pay the debt of another and is not within the statute of frauds. *Rice v. Barry*, 2 Cr. C. C., 448.

§ 1803. A verbal acceptance of an order to pay an account against the drawer is not within the statute of frauds. *Shields v. Middleton*,* 2 Cr. C. C., 205.

§ 1804. A promise to answer for the debt, default or miscarriage of a third person must be in writing and wholly so. Therefore letters which, as it is claimed, constitute such a promise, cannot be added to or varied by parol evidence, nor can they be so explained as to affect their import with regard to the supposed undertaking. *Clarke v. Russell*, 3 Dal., 424.

§ 1805. A party wrote at the foot of a note, on the day of its date, "I will pay the above at maturity," and affixed his signature. *Held*, an original undertaking, and that it was not necessary to express the consideration. *Fowler v. McDonald*,* 4 Cr. C. C., 297.

§ 1806. Where a third person receives property from a debtor to pay creditors, and acknowledges that he has received such property, and that there is sufficient to pay creditors, he is liable in a suit by a creditor, though there was no memorandum in writing. *Goddard v. Mockbee*,* 5 Cr. C. C., 636.

§ 1807. A promise upon a new consideration, made to one who owes a third party, to pay the debt, is not within the statute of frauds. *Phelps v. Clasen*, 1 Woolw., 210.

§ 1808. Contracts relating to real estate.—It seems that if two or more persons go into the public domain together, and explore and search for mines, and agree that their discoveries shall be for the joint benefit of all, or if one person furnishes supplies for another who agrees to prospect for and locate mines on the same terms, such agreement is not within the statute of frauds, and need not be in writing. *Murley v. Ennis*,* 2 Colo. T'y, 304. See §§ 1720, 1722.

§ 1809. In such cases neither of the parties, at the time of making such contract, have any interest or estate which is the subject of sale; neither does the contract contemplate that any such interest or estate shall be parted with by either party. *Ibid*.

§ 1810. A parol agreement to become partners in the business of buying and selling lands and lumber is a parol contract respecting an interest in lands and is void under the statute of frauds. A contract for the sale of an equitable estate in lands is a contract respecting an interest in lands, whether it be under a contract for the conveyance by a third person or otherwise, and is within the statute of frauds. *Smith v. Burnham*, 3 Sumn., 454.

§ 1811. Though in Maryland it is the sale under *fiat facias* that passes the title to land, yet the sheriff's sale is within the statute of frauds, and some memorandum in writing must be made. The return of the officer is such a memorandum, and as it is not the memorandum that passes the title it may be made at any time before the trial of the action and after suit is begun. *Remington v. Linthicum*, 14 Pet., 92.

§ 1812. A verbal agreement among the purchasers at an auction sale of lands is within the statute of frauds and void. *Arden v. Brown*, 4 Cr. C. C., 123.

§ 1813. M. being the owner of a plat and certificate of survey, H. used M.'s name without any authority and obtained title to the land in his own name. The fraud being discovered, H. agreed to pay M. a certain sum, which M. agreed to receive in full of all claims and demands against the land and for the injury. *Held*, that as M. had the equitable title to the land, the contract was a contract for the sale of land, and was consequently within the statute of frauds, and must be in writing. *Hughes v. Moore*, 7 Cr., 191.

§ 1814. A mortgage is only a lien on land as security for a debt, and consequently an agreement to extend the time of payment of the debt is not an agreement which must be in writing. *In re Betts*, 4 Dill., 96.

§ 1815. Trusts.—If a parol agreement between parties for the purchase of land upon their joint account has been fully executed and the title taken in the name of one, a trust is fully established and the agreement is taken out of the statute of frauds. *Flagg v. Mann*, 2 Sumn., 546.

§ 1816. The seventh section of the original statute of frauds, 29 Car. II., ch. 3, which declares an express trust to be void if not manifested and proved by some writing signed by the party, is not in force in North Carolina, and such trusts stand, as to their proof, on the same footing as at common law. *Olcott v. Bynum*, 17 Wall., 60.

§ 1817. The creation of a trust in real estate, or a contract made in relation to the title to land, is within the statute of frauds. The prohibition of the statute reaches only to the proofs of such trust, requiring it to be in writing and signed, and does not require the creation of it to be in writing. *Tufts v. Tufts*, 3 Woodb. & M., 477.

§ 1818. If an agent or trustee agrees to reduce a declaration of trust to writing, but does not do so, equity will enforce the agreement, even though required to be in writing, under the statute of frauds. *Jenkins v. Eldredge*, 3 Story, 292.

§ 1819. A parol trust relating to lands is not within the statute of frauds when, 1st. It is a resulting trust; 2d. It is a case of agency; 3d. It is a case of constructive fraud. 4th. It is a case of part performance. *Ibid*.

§ 1820. Contracts not to be performed within a year are within the statute of frauds and are void if not in writing. *Fallon v. Chronicle Publishing Co.*,* 1 MacArth., 488. See §§ 1786-38.

§ 1821. The owners of a steamboat, to the engine of which a certain cut-off was attached, agreed verbally to pay the owner of the cut-off a certain sum per year for twelve years if the cut-off should last so long. *Held*, that this contract was within the statute of frauds and void, as a contract not wholly to be performed within a year, notwithstanding the contract might be terminated within a year by the destruction of the boat. The possibility of defeasance does not make it less a contract not to be performed within a year. *Packet Company v. Sickles*, 5 Wall., 594.

§ 1822. To make an executory parol contract void under the statute of frauds, it must appear that it was the understanding of the parties that it was not to be performed within a year from the time it was made. A contract to pay an attorney a certain sum out of the proceeds of property recovered in an action, where there is nothing to show that it might not be performed within a year, is not within the statute of frauds. *McPherson v. Cox*, 6 Otto, 416.

§ 1823. A promise in consideration of future marriage is within both the English statute of frauds and the statute of frauds of Georgia, and is void if not in writing. *Lloyd v. Fulton*, 1 Otto, 484. See § 1736.

§ 1824. The writing or memorandum.—Where a contract is made and signed by one party and is retained by the other, letters subsequently written by the other, in which he acknowledged the contract, are sufficient in connection with the contract to show a memorandum of the agreement within the statute of frauds. *Beckwith v. Talbot*,* 2 Colo. Ty, 646. See §§ 1726-30.

§ 1825. An entry in his books by one promising to pay the debt of another, not signed by him, is not a sufficient writing to satisfy the statute of frauds. *Barry v. Law*,* 1 Cr. C. C., 77.

§ 1826. An instrument in the following terms:

" ELLSWORTH, December 15, 1834.

" Received of Daniel Burnham and Cyrus S. Clark, \$1,000, to be accounted for if they shall furnish me satisfactory security for certain lands on the Naraguagus river, say one hundred and nineteen thousand acres, for \$113,000, on or before Friday morning next; otherwise to be forfeited.

JOHN BLACK."

is a sufficient memorandum of a contract for the purchase of lands, but a subsequent substituted parol agreement, by which the lands are to be purchased on the joint account of Burnham and Clark and another, is within the statute of frauds. *Clark v. Burnham*,* 2 Story, 1.

§ 1827. A deed written by plaintiff's agent and executed by plaintiff is not a sufficient note in writing under the statute of frauds to bind defendant. *Reeves v. Pye*,* 1 Cr. C. C., 219.

§ 1828. A memorandum in the form of a stated account, made by appellant, Barry, and a copy of another made by him and signed by appellee, Coombe, was in this form:

" By my purchase of your half E. B. wharf and premises, this day, as agreed on between us; " the credit was carried out in figures and deducted from the amount charged to Barry. This memorandum followed: " Balance due G. Coombe, \$1,500, payable in one, two and three years, with interest.

G. COOMBE."

A bill in equity was brought for the specific performance of the contract, and it was held that the memorandum was sufficient to satisfy the statute of frauds. *Barry v. Coombe*,* 1 Pet., 640.

§ 1829. Where it was agreed that an oral contract should be reduced to writing and signed the next day, and it was not so written and signed, it was held to be void under the statute of frauds. *Riggs v. Magruder*,* 2 Cr. C. C., 143.

§ 1830. When plaintiff, in presence of defendant, reduces to writing the terms of a contract between them, which writing is then assented to by defendant, who afterwards writes letters, signed by himself, to plaintiff, in which he refers to the said contract, the letters may be connected with the writing, and the jury are authorized to find that the requirements of the statute of frauds are satisfied. *Dodge v. Van Lear*,* 5 Cr. C. C., 278.

§ 1831. A memorandum of a sale of goods which is simply signed by the broker of the vendor is not, in an action by the vendor against the vendee, for damages for his refusal to accept the goods, a sufficient note or memorandum within the New York statute of frauds, which provides that "every contract for the sale of goods, . . . for the price of \$50 or more, shall be void, unless a note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby." *Butler v. Thomson*,* 11 Blatch., 533.

§ 1832. Under the law of Louisiana declaring "that all sales of immovable property or slaves shall be made by authentic act at private signature," an ordinary mark of a party to such a contract is a sufficient signature. *Zacharie v. Franklin*,* 13 Pet., 151.

§ 1833. The statute of frauds of Virginia provides that in the cases specified no action

shall be brought "unless the promise or agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc.; and it seems that under this statute the consideration need not be expressed in writing, and that in this respect the rule is different from the rule under the English statute of frauds in which the word "promise" is omitted. *Violett v. Patton*, 5 Cr., 151.

§ 1834. A memorandum of a sale of goods set forth the goods sold, and the price and terms of payment; the name of the vendor was printed at the head of the paper, but appearing nowhere else. *Held*, that the memorandum was not good under a statute of frauds which required that it be "subscribed" by the party to be charged. *In re Clifford*, * 2 Saw., 428.

§ 1835. Where it is obvious that a written memorandum does not contain all the terms of a contract, the circumstances of the case, and especially the previous course of dealing between the parties, may be resorted to in order to supply those parts of the contract not within the scope of the memorandum. The owner of a steamer which made daily trips and received a daily supply of coal delivered to the dealer a memorandum signed by himself, which recited that he had that day purchased of the dealer a certain quantity of coal at a certain price, but which was silent as to the time of delivery and payment. *Held*, that the previous course of dealing between the parties might be shown to supply this deficiency in the memorandum, and that, in conformity to their previous course of dealing, the coal was to be delivered in quantities as needed and to be paid for as delivered. *The Alida*, Abb. Adm., 176.

§ 1836. An auctioneer in making a sale acts as the agent of the purchaser, and his memorandum in his sales books is a sufficient memorandum of the sale within the statute of frauds. *Arden v. Brown*, 4 Cr. C. C., 123.

§ 1837. An auctioneer's memorandum of a sale of land is not sufficient, under the statute of frauds, unless it includes the terms of sale and a description of the land, or unless it contains a reference to some document from which they could be ascertained. *Quære*, whether in any case an auctioneer's memorandum of such sale is sufficient under the statute of frauds. *Williams v. Threlkeld*, 3 Cr. C. C., 808.

§ 1838. Part performance.—No memorandum is necessary to make a sale valid where possession passes to the party to be charged at the time of the sale. *Porter v. Graves*, 14 Otto, 175. See § 1719.

§ 1839. A sale of goods in a bonded warehouse, on which the duties are not paid, and an order by the vendor to the warehouseman for their delivery, which is presented and entered on the books of the warehouseman, is not a sufficient acceptance and receipt of the goods under the statute of frauds. Ordinarily, such an order on a mere bailee of the vendor, and acceptance by him, would be sufficient. *In re Clifford*, * 2 Saw., 428.

§ 1840. It seems that part performance of a contract relating to land may take it out of the statute of frauds. *Tufts v. Tufts*, 3 Woodb. & M., 481.

§ 1841. The execution and tender of a deed, together with an offer to deliver possession of the real estate, do not constitute a part performance such as will take the case out of the statute. *Reeves v. Pye*, * 1 Cr. C. C., 219.

§ 1842. In Virginia a parol agreement for the sale of lands was valid under the statute of frauds if, at the time of making the contract, it was fully executed on the part of the vendee by full payment of the consideration. *Caldwell v. Carrington*, 9 Pet., 108.

§ 1843. A part performance will take a parol agreement for the creation of a trust out of the statute of frauds where it clearly appears that such acts of performance were done on the faith of the existence of the trust sought to be set up. *Jenkins v. Eldredge*, 3 Story, 293.

§ 1844. A parol contract made in 1787, for the sale of lands in Kentucky, is valid under the statute of frauds of Virginia when the whole consideration was paid. *Carrington v. Brents*, 1 McL., 176.

§ 1845. Where the vendee of land sold at auction enters into possession thereof, and cultivates it, there is such a part performance on his part as takes the contract out of the statute of frauds. *Conway v. Sherron*, 2 Cr. C. C., 80.

§ 1846. A parol contract relating to lands, which is speedily and deliberately executed in part, is by such part performance taken out of the statute of frauds. *Hunter v. Town of Marlboro'*, 2 Woodb. & M., 187.

§ 1847. Contract not in conformity with the statute passes no title.—Article 4, chapter 44, of the Revised Code of Mississippi enacts that "no contract for the sale of any slaves, personal property, goods, wares and merchandise for the price of \$50, or upwards, shall be allowed to be good and valid, except the buyer shall receive the slaves, or part of the personal property, goods, wares and merchandise, or shall actually pay or secure the purchase money, or part thereof, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged by such contract or his agent thereunto lawfully authorized." An agreement not in conformity with the statute can pass no title. It was so held in regard to a sale of cotton in payment of a mortgage debt, not in writing, the price per pound

being fixed, but the number of pounds not being definitely ascertained; no payment being indorsed upon the mortgage, nor receipt given, nor memorandum in writing made, nor any consideration paid, nor any delivery made, actual or symbolic. *Mahan v. United States*,* 16 Wall., 143.

§ 1848. Made in foreign country, and for the delivery of goods not in existence.—A contract was made in France by which A. was to manufacture for B. certain goods, which were to be shipped to him in America through C. at Havre. Held, that the contract was not within the statute of frauds, both because made in France and because it was not a sale but a contract to deliver the goods which were not then in existence. *Low v. Andrews*, 1 Story, 42.

§ 1849. An insurance policy is not required by the statute of frauds or by the law merchant to be in writing. *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How., 321.

§ 1850. Contract between persons not parties to the suit.—Though in some classes of cases a contract between persons not parties to the suit may, when introduced, be contradicted or varied by parol testimony, yet this principle has no application to contracts which the statute of frauds requires to be in writing to make them valid. *Stitt v. Huidekoper*,* 17 Wall., 384.

§ 1851. Contract for the delivery of notes of a private bank.—An oral contract for the delivery of notes of a private bank is within the statute of frauds. *Riggs v. Magruder*,* 2 Cr. C. C., 143.

§ 1852. Parol evidence to show the capacity in which one indorses a note.—The admission of parol evidence to show in what capacity a party writes his name on the back of a promissory note is no infringement of the statute of frauds, though such evidence may vary the *prima facie* meaning of the instrument. *Pierse v. Irvine*,* 1 Minn., 374.

§ 1853. New agreement must be in writing.—It seems that a written contract within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. *Emerson v. Slater*, 23 How., 28 (§§ 1783-90).

§ 1854. Parol evidence of lost deed.—Though, by the act of Virginia of 1738, a gift of a slave was invalid unless reduced to writing and recorded, yet it was held that parol evidence of a lost deed was admissible to show the nature of possession which accompanied the deed. *Spiers v. Willison*,* 4 Cr., 898; *Ramsay v. Lee*,* 4 Cr., 401.

IX. RIGHT OF ACTION; ACCRUES, WHEN.

SUMMARY — *Right of action accrues at time of breach*, §§ 1855, 1856.—*Notice of intention not to perform*, § 1857.

§ 1855. On January 13, 1874, G. sued M. for a sum of money; the latter claimed the right to set up in defense damages for breach of a contract of lease between himself and plaintiff, in which the lease was to begin February 9, 1874, but by which plaintiff had declared his intention not to be bound. It was held that notice by G. of his intention not to perform gave M. an immediate right of action, and that the damages by reason of such breach could be set up in defense in the principal action. *Grau v. McVicker*, §§ 1858-60.

§ 1856. In 1879 defendants took a quantity of ice from plaintiffs which they agreed to return in kind during the following season, i. e., while the Kennebec river was open. In July, 1880, defendants positively refused to return the ice in kind, owing to a great rise in its value, and in an action against them for breach of contract it was held that plaintiffs had a right of action immediately upon the refusal of defendants to perform, viz., in July. *Dingley v. Oler*, §§ 1861-62.

§ 1857. No action can be brought on a contract until there has been a breach, and notice by defendant of his intention not to perform is not such a breach as gives a right of action. *Greenway v. Gaither*, §§ 1863-65.

[NOTES.—See §§ 1866-85.]

GRAU v. McVICKER.

(Circuit Court for Illinois: 8 Bissell, 18-20. 1874.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—The questions involved in this case are of much interest and rather peculiar. The facts seem to be substantially these: That the defendant, having in his possession some funds belonging to the plaintiff, was sued by him in an action of *assumpsit* to recover the amount, and to the declaration filed in the case the defendant alleged as a defense a contract made

between him and the plaintiff on the 27th day of June, 1873, by which the plaintiff "representing" (as is interpolated in the original contract) "Messrs. C. A. Chizzola and Company," agreed to rent defendant's theater for two weeks from the 9th of February, 1874, for the Aimée Opera Bouffe Company. By the terms of the lease the theater was rented to "the said Grau," and "the said Maurice Grau" agreed to pay \$2,500 a week and the further sum of twenty per cent. of the gross receipts after deducting this \$2,500 per week. The \$2,500 was to be paid in daily instalments of \$500 until \$5,000 was paid. The twenty per cent. of the gross receipts was to be paid at the end of the engagement. The defendant relies upon the violation of this contract on the part of the plaintiff as a defense to the action. The peculiarity of the case arises out of the fact that the lease was not to commence until the 9th of February, and this action was instituted by Grau against McVicker on the 18th of January. If, then, the defendant is entitled to the set-off he claims, it is upon the ground that there was a right of action on his part against Grau in consequence of the refusal of Grau to comply with his contract by giving notice to McVicker to that effect before the time when the lease was to operate had arrived.

§ 1858. *A contract made with a person "representing" other persons binds the first named person as principal, the words "representing," etc., being words of description.*

These being the facts in the case, there are two points made on the demurrer filed to the plea of the defendant. The first is, that Grau was not personally bound by the contract of the 27th of June, 1873, but that he was the agent of other parties, who are themselves liable. I think this position is untenable under the terms of the contract. The only circumstances which show that Grau was an agent are that it is stated he represents C. A. Chizzola & Company, and when he signs his name, he signs it: "Maurice Grau, representing C. A. Chizzola & Company." But it will be observed that the contract is made with Grau personally. He is the "manager," so named in the contract, for the Aimée Opera Troupe. The language of the contract is, "Maurice Grau, representing Messrs. C. A. Chizzola & Company, manager of the Aimée Opera Bouffe Company;" and the contract states that he, Grau, is to have the privilege of giving a certain number of performances each week, and the contract shows that Grau was himself personally bound by its terms. "The said Maurice Grau, in consideration of the above, agrees to pay to the said McVicker, or his representatives, the sum of \$2,500," etc. So that, while he represents certain persons, and is a manager of a particular company, the theater is rented to *him*, and he, personally, is to have the privilege of giving performances, and is to pay the various sums of money. Then the words added to the name of Grau in the contract, and also to his signature, indicate nothing more than a description of the person himself, and do not show that these were principals in the agreement, but that Grau himself was the principal with whom McVicker made the contract, and to whom, if it was violated on Grau's part, McVicker could look for the damages growing out of its non-fulfillment.

§ 1859. *Notice of intention not to perform a contract gives the other party a right of action immediately.*

The second objection as already suggested, that inasmuch as this suit was commenced on the 13th of January, 1874, there was no complete liability on the part of Grau at that time by which McVicker could hold him responsible

under the lease, conceding that he had given notice to McVicker before, that he would not comply with its terms, as it was not to begin until the 9th of February, and there was an opportunity for him to retract, or as it is called in the books, a *locus penitentiae*. Some authorities declare that in law there is this *locus penitentiae*, and that a party shall have a chance to recant and say, "I was wrong, but when the time comes I will perform my contract." Undoubtedly there are authorities which declare that there cannot be a breach of contract, strictly so-called, until the time has arrived when its performance was to commence; and so in this case, there could be no breach of this contract until after the 9th of February, 1874, because that was the date of the commencement of the contract. There are other authorities, however, which hold the contrary; and in the conflict of authority upon the subject, the question is, what is the true rule in cases of this kind? And the chief importance, perhaps, of this case is that it becomes necessary to determine in the midst of the conflict of authority upon this subject, whether, in point of fact, there could be a breach of this contract, properly so-called, so as to entitle McVicker to commence an action against Grau prior to the 9th of February, 1874; and I have come to the conclusion that there may be such breach.

I think that the principles decided in the case of *Hochster v. DeLatour*, reported in 20 Eng. L. & Eq., 157, are sound. That was a case where two parties made an agreement with each other by which one was to enter the employment of the other and to perform a contract which was to commence on a day named. The plaintiff in the action agreed to be a courier of the defendant, on the continent of Europe, for a time, commencing on the 1st of June. Before that time arrived the defendant had notified the plaintiff that he would not perform the contract; in other words, that he did not want him as a courier. Thereupon, before the 1st of June, the plaintiff commenced an action against the defendant, and recovered, and the question came up before the court of queen's bench, whether the action, under such circumstances, could be maintained. And the unanimous opinion of the court was, that the action was maintainable, and on the ground that, although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the 1st of June or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete, and recover against the defendant on the ground that there was a legal liability on the part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there would be just as much reason to say that the action could not be maintained until the 1st of September as that the action could not be maintained for a breach, prior to the 1st of June, because there were three months during which the service was to be performed, and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case and in this, the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do — as to other contracts he may make — whether or not that contract is binding on him. There are frequent cases where contracts run for years, and it would be unreasonable in such a case to require a party to wait all the time before he could institute an action against the delinquent person for damages.

§ 1860. *Measure of damages where a contract is broken by notice in advance of the time of performance.*

It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages. For instance, if, in consequence of the discharge of a servant, or of the refusal of a person to require or receive any of the service which would take time, the servant has the opportunity of engaging in other employment, that can be shown in mitigation of damages, and one of the objections that occurred to me at the argument, I think, may not have the weight that I then supposed, namely, that the *status* of the parties in relation to the extent of their liability must be considered as fixed when the suit was commenced. That is not so. On the contrary, it is competent to show any facts which have occurred subsequent to the commencement of the suit for the purpose of determining the amount of damages which the party can recover; or, to apply it to this case, the amount of damages which the defendant could set off or recoup. For example, this was the case of a theater leased by the defendant to Grau for a particular time. It may be that in case Grau failed to comply with his contract, the defendant could lease the theater to someone else. Now, if that could have been done, and the violation of the contract on the part of Grau did not prevent the defendant from making the lease, then that may be taken into consideration to determine the amount of damages which McVicker has sustained for the violation of the contract. If, on the other hand, the fact that McVicker entered into this contract in June, 1873, and consequently made all his arrangements upon the hypothesis that the theater was to be used by Grau during the time named in the contract, prevented him from leasing the theater to other parties during that time, and so he lost the rent, there is no reason why Grau should not be responsible for the use of the theater during the whole time, and I have come to the conclusion that the fair result of the authorities upon this subject is that *prima facie* upon the showing of the plea Grau is responsible to McVicker for the amount which he agreed to pay, because the inference would be, that the defendant was prevented from leasing the theater to other parties. It may be, also, that the defendant could, himself, have used the theater during that time. If so, that would be taken into consideration; but I am only considering the question now in its apparent aspect, and I think the plea *prima facie* is good. The language of the plea is, after setting out the contract, that he, the defendant, was ready to comply with all the conditions on his part to be performed, which were in relation to lighting the theater and printing and posting advertisements, and furnishing the orchestra, etc.; "that Grau, after the contract was entered into and before the 9th day of February, 1874, and before commencing this suit, to wit, the 9th day of January, 1874, wholly refused to take, receive, occupy and rent the said theater of the said defendant for the purpose aforesaid on or from the said 9th day of February, 1874, for the term or time aforesaid or for any other term or time, and wholly refused to perform and fulfil the said agreement on his part, and then and there wholly discharged the said defendant from said agreement and from the performance of the same, and wholly and absolutely broke and put an end to his said agreement and engagement, without the consent and against the will of him, the said defendant."

Now, I think that is a complete breach of the contract, and if McVicker, instead of being the defendant, were the plaintiff, he would be entitled to institute a suit at once against Grau for a breach of the contract, although the time of its performance had not commenced. For these reasons the demurrer to the plea must be overruled.

DINGLEY v. OLER.

(Circuit Court for Maine: 11 Federal Reporter, 372-375. 1881.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—This case was heard by Judge Fox and me, upon evidence taken at the jury trial, the decision of the court being substituted for that of the jury by stipulation. We had consulted upon the case before Judge Fox's lamented death, and the result which I shall state was arrived at by both of us. I find the facts to be: That late in the season of 1879, the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of, and which threatened to be a total loss, pressed the defendants to buy some or all of it. Both parties were dealers in ice, cutting it upon the Kennebec river, and shipping it thence during the season; that is, while the river is open. The offers of the plaintiffs were rejected, but the defendants, by their letter of 6th September, 1879, made a counter offer to take a cargo and "return the same to you next year from our houses." The plaintiffs, by their letter of September, 1879, accepted this offer, and several cargoes were delivered upon the same terms. The total delivery was three thousand two hundred and forty-five and twenty-five one-hundredths tons. In July, 1880, one of the plaintiffs spoke to one of the defendants about delivering the ice, and he replied that he did not know about that — delivering ice when it was worth \$5 a ton, which they had taken when it was worth fifty cents a ton; but he promised to write an answer. July 7, 1880, the defendants wrote, repeating their objections, and saying, among other things: "We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash, at the price you offered other parties here (that is, fifty cents), or give you ice when the market reaches that point." The plaintiffs, July 10, 1880, wrote that they had a right to the ice, and had sold it in expectation of its delivery; to which the defendants answered, July 15, 1880, reciting the circumstances of the case and the hardship of such a demand, and again denying the obligation. The letter contains this sentence: "We cannot, therefore, comply with your request to deliver you the ice claimed, and respectfully submit that you ought not to ask this of us," etc., asking for a reply or a personal interview. Neither appears to have been given, and this action was brought July 21, 1880. The letters above mentioned and the evidence concerning the oral demand or request are made part of this statement. I further find that ice was worth \$5 a ton in July, 1880, and fell, later in the season, to \$2 a ton. Upon these facts I hold that there was a contract executed by the plaintiffs and to be executed by the defendants, who were bound to deliver three thousand two hundred and forty-five and twenty-five one-hundredths tons of ice from their houses on the Kennebec river during the year 1880; that the year means the shipping season,— as, indeed, I understand the correspondence to admit,— and that the defendants had the whole season, if they chose to demand it, in which to make delivery.

§ 1861. *Action lies for breach of contract immediately upon defendant's explicit refusal to perform.*

The questions are, whether the plaintiffs had a cause of action in July, and, if so, what is the measure of damages? It seems to me that the letters of the 7th and 15th of July contained an unequivocal refusal to deliver any ice during the season. The former letter, to be sure, speaks of shipping if ice should fall to the very low price of fifty cents, but this was under a claim of right not to ship unless it did fall to that point. The second letter says nothing of this qualification, if such it can be called. That letter does speak of further interviews or correspondence, but I regard this rather as looking to a conference and compromise, or possible understanding to be arrived at, than a qualification of the explicit refusal to ship ice that season. The defendants having unqualifiedly refused to ship the ice, this action may be maintained, though brought before the close of the season, if the doctrine of *Hochster v. De La-tour*, 2 Ell. & Bl., 678, is to be followed. That doctrine is that, in contracts for services, for marriage, for deliveries of merchandise, if the principal, before the time for performance arrives, renounces the contract, an immediate action will lie. *Frost v. Knight*, L. R., 7 Ex., 111; *Roper v. Johnson*, L. R., 8 C. P., 167; *Crabtree v. Messersmith*, 19 Ia., 179; *Holloway v. Griffith*, 32 Ia., 409; *Fox v. Kitton*, 19 Ill., 519; *Burtis v. Thompson*, 42 N. Y., 246; *Howard v. Daley*, 61 N. Y., 362. These cases seem to me to be founded in good sense, and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.

An able argument has been made against this doctrine by a jurist whose comparatively early death was a great loss to the cause of jurisprudence. *Daniels v. Newton*, 114 Mass., 530. I appreciate Judge Wells' argument, but he makes an admission which very much impairs its force. He says, on page 533: "A renunciation of the agreement, by declarations or inconsistent conduct, before the time of performance, may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. It may destroy all right of the party so disavowing its obligations to assert rights under it afterwards, if the other party has acted upon such disavowal."

In other words, the promisee may treat the contract as rescinded and act accordingly, in every particular, except bringing an action. If the contract is rescinded wrongly by one party, I do not see why the other may not have an immediate action for the wrongful rescission, whether it be called a breach of the contract or something else. The learned judge certainly makes a strong point when he says (page 532) that this rule has never been applied to commercial paper, and that it may be fairly tested by so applying it. I think it highly probable that a notice by a promisor to the holder of his negotiable note, payable on a day certain, that he shall not pay it, would be treated as a mere friendly warning to be prepared for the emergency. It would be difficult to apply the rule, or to find any damages, in a case of the extreme simplicity and singleness of that supposed. But if the promisor had an election to pay at any time before a certain day, and notified his renunciation before that day, would not his election be gone? This case somewhat resembles that. The defendants might deliver the ice at any reasonable time and on reasonable notice within the season. When asked about it they might have delivered at once, or have fixed a future day, or have declined to appoint a day at present.

They did neither of these things; but said that they should fix no day, and should deliver no ice at any time. It seems to me that they ought not to be permitted to say that the renunciation was mere talk, and that the time had not come when they could do what they undertook to do; that is, reject and renounce the contract.

§ 1862. *Measure of damages.*

It does not follow that the damages are to be reckoned by the price of ice in July. What the plaintiffs lost was three thousand tons at some time during the season. We should infer, in favor of the defendants, that they would have been shrewd enough and well informed enough to deliver when the price had fallen. It went down, after July, to \$2 a ton, and the damages must be reckoned at this rate. *Ex parte Llansamlet Tin Plate Co.*, L. R., 16 Eq., 155; *Brown v. Muller*, L. R., 7 Ex., 319; *Roper v. Johnson*, L. R., 8 C. P., 167. Judge Fox called my attention to these cases, and they seemed to us to be well decided.

After the parties have had opportunity to except to this decision, if they should be so advised, judgment is to be entered at the rate of \$2 a ton for three thousand two hundred and forty-five and twenty-five one-hundredths tons, with interest from the date of the writ.

GREENWAY v. GAITHER.

(Circuit Court for Maryland: Taney, 227-282. 1853.)

STATEMENT OF FACTS.—In 1848 plaintiff agreed to sell and the defendant agreed to buy a certain house and lot. Before the first payment fell due defendant repudiated the bargain and notified plaintiff of the fact. Plaintiff re-sold the property to others for a less sum than defendant had agreed to pay, and before any instalment was due under his contract with defendant brought this suit.

§ 1863. *No action can be brought on a contract until there is a breach.*

Charge by TANAY, J.

1. This action is brought for a breach of the contract set forth in the plaintiff's declaration, and the plaintiff is not entitled to recover, because, at the time the suit was brought, no one of the stipulations on the part of the defendant, contained in the contract, had been broken; and no action can be maintained on the contract unless there was a breach of some one of its stipulations by the defendant before this suit was instituted.

§ 1864. *A suit is not authorized by a notice that the party will not perform his agreement.*

2. The letters of the defendant and those written by his authority, notifying the other party that he would not fulfil his contract, did not authorize an immediate suit upon it, because none of the payments to be made by the defendant were then due, and the plaintiff, at the time of bringing the suit, had no legal demand under the contract, for which an action at law could be immediately brought. (Verdict for the defendant.)

OPINION ON MOTION TO SEAL A BILL OF EXCEPTIONS.

Opinion by TANAY, J.

An application has been made to me, on the part of the plaintiff in this action, to seal a bill of exceptions, in order to carry before the supreme court, by writ of error, the instructions given to the jury by the circuit court. The cause was tried in November, 1851, more than two years ago.

§ 1865. *The court will not seal a bill of exceptions presented two years after trial, unless satisfied that there was error in the instructions given to the jury.*

At the trial, an exception was reserved by the plaintiff, and among the papers now laid before me, I find one which purports to have been drawn as an exception, and upon which I see some notes of my own, which show that this paper was before me. From the lapse of time, I have forgotten the circumstances connected with the preparation of this paper, and its presentation to me; it is now found among the papers in the cause, in the clerk's office, without the signatures or seals of the judges. I cannot now say whether the refusal of the court to sign it arose from any imperfection in the statement, or from the blotched and interlined condition in which it was presented, which made it difficult to understand it; the face of the paper, as it now stands, shows that the last reason would, of itself, have been sufficient. It was, I presume, handed by me to the clerk, with directions to inform the counsel why the paper was not signed and sealed, and what was necessary to be done by them; it is my usual custom in such cases. I have heard nothing of this exception since the term at which the case was tried.

The exception, it appears, was reserved on the 12th November, 1851, and on the 29th of the December following, the counsel for the plaintiff filed a written order to the clerk, to "dismiss the appeal or writ of error." And as no exception was presented to me after the paper I have spoken of was returned, I presume from that circumstance, and this entry on the docket, that the design to bring the question before the supreme court was abandoned. Judge Heath, who sat with me on the trial, died more than twelve months ago. Under such circumstances, it is very clear that, under the rule and practice of the circuit court, the plaintiff has no right to call on me to sign and seal the paper above referred to, as an exception taken at the trial. The rule of the circuit court, in relation to this subject, was before the supreme court at the last term, and fully sanctioned by it. If, however, I had any doubt as to the correctness of the instruction which was given to the jury, I should deem it my duty to seal the exception, provided it could be done without injustice to the defendant, because it is too late now to correct an error here; and if I thought one had been committed, I should send the case to the tribunal which has the power to correct it. This is the ground upon which the plaintiff bases his application; and I have been referred to an opinion, delivered in the queen's bench, in the case of *Hochster v. De Latour*, reported in 20 Eng. L. & Eq., 157.

The decision of the queen's bench is, of course, entitled to no more weight than what it derives from the force of its reasoning and the learning which it displays in support of its opinion; and in that view of the subject, I see nothing to shake my confidence in the instructions given to the jury by the circuit court. The principle upon which that case was decided is loosely stated by Lord Campbell in the opinion delivered. In the first portion of it, the decision would seem to be placed upon the character of the contract, and the necessity the plaintiff was under of preparing himself for the service, before the day when he was to enter upon its actual performance. In another part of the opinion, it would seem to be placed on the ground that, for aught that appeared on the motion in arrest of judgment, it might have been proved at the trial, that the defendant had put himself in a condition to make it impossible for him to perform his part of the engagement.

Neither of these grounds has any application to the case before me. But in the latter part of the opinion, Lord Campbell says that a man who wrong-

fully renounces a contract, when he is to do an act at a future day, may be sued immediately for a breach of it, without waiting for the time stipulated for its performance. His language, in this part of his opinion, is general enough to apply to all cases where an act is to be done by the party on a future day, whether that act be to render service or deliver goods or pay money; and it is upon this part of the opinion that the plaintiff in this case relies to support his present application.

The language of Lord Campbell, in this part of his opinion, is perhaps broad enough to bear the construction which the plaintiff has put upon it. It is, however, but justice to him to restrict it to contracts of the character of which he was speaking; and so, I suppose, he intended it. For if he meant to say that a contract like this, by which the defendant engaged to pay a certain sum of money on certain days, would be broken, and might be sued on immediately, if the party gave notice that he would not comply with it, and intended to dispute it; if such was the doctrine he meant to announce in that opinion, it cannot be maintained either upon principle or the authority of adjudged cases. It has never been supposed that notice to the holder of a bond or a promissory note or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action, upon which he might sue before the time of payment arrived. If, therefore, the case in the queen's bench had been decided previously to the trial in the circuit court, it would not have influenced the decision, and furnishes no sufficient ground for this application.

Indeed, if I entertained upon reconsideration some doubt as to the correctness of the decision of the circuit court, I should feel much difficulty in altering the record, by making an exception a part of it, after such a lapse of time, and when the defendant had every reason to suppose the controversy was finally closed. The counsel who tried the case for him, I understand, do not now consider themselves as authorized to appear in his behalf, and, therefore, decline interfering; and in a case where it appears that a good deal of testimony was offered, parol, as well as written, I should hardly be justified in certifying to the supreme court a statement of the evidence, of which I have no distinct recollection, and in which I might do injustice to the defendant. The application is, therefore, refused.

§ 1866. Where goods are sold under a special contract, which has not been fully complied with by the plaintiff, in other words, if it remains executory, he must sue upon the contract. But where it has been executed on his part, and nothing remains but payment, he may sue for goods sold and delivered, declaring upon the common counts. If the sale, according to the terms of the special contract, be upon credit, he cannot maintain an action upon the common counts until the term of credit has expired. If the contract has been partly performed, and has been abandoned by mutual consent, or rescinded and become extinct by the act of the defendant, the plaintiff may sue upon the common counts for what he has done under the special contract; or, if that which has been done by the plaintiff has not been done in the stipulated time or manner, but has been beneficial to the defendant, and accepted and enjoyed by him, the plaintiff may declare upon the common counts and recover the reasonable value of the benefit the defendant has derived from what he has done. *Dawes v. Peebles*,* 6 Fed. R., 856.

§ 1867. Where vendor refuses to deliver.—Where the seller of goods receives the purchase money at the agreed price, and subsequently refuses to deliver the goods, but converts them to his own use, an action for money had and received will lie to recover back the money. Counts for money had and received may, in such a case, be joined with special counts for damages for the non-delivery of the goods, and evidence may be introduced under both. And the plaintiff may, at his election, have a judgment for damages or for the price with interest. *Nash v. Towne*, 5 Wall., 689 (§§ 1039-42).

§ 1868. Repudiation before time of performance.— If one party to an executory contract repudiates it before the time of performance, the other party has a right of action immediately. (English authorities examined by LOWELL, J.) *In re Wheeler*, 2 Low., 252 (§§ 1845-47).

§ 1869. Suit brought before time for performance has expired.— In a suit brought on the 20th of September the declaration alleged that defendant was liable for breach of a contract to deliver a boat, entered into on the 19th of September, and "to be performed within forty days thereafter." Upon a motion to arrest judgment for plaintiff it was held that, in this form of action for the breach of a parol contract, time is not material, and that it was to be presumed that plaintiff proved the contract to have been made at a date prior to the day laid, and that a sufficient breach had been proved at the trial. *Scull v. Higgins*,* *Hemp*, 90.

§ 1870. General count where contract is special.— Where plaintiff has performed his part of the contract, and defendant is bound to pay a certain sum of money, plaintiff may recover on a general count although there was a special contract. *Ames v. Le Rue*,* 2 McL., 216.

§ 1871. Where a special contract is executed, the party performing may sue for the amount due him in *indebitatus assumpsit*. *Brockett v. Hammond*, 2 Cr. C. C., 56.

§ 1872. Action accruing upon the acceptance of the article built— Failure to test— Delay and non-conformity.— An owner of a steamboat and an engine builder made a contract by which the latter was to build an engine of a certain capacity and description and place it in the steamboat by a certain date. The engine was to be tested in a certain way before it should be accepted, and payments were to be made from time to time as the work progressed. The work was not finished at the time agreed, but the steamboat owner continued to superintend the work and make payments. Before the work had been tested, the boat was taken possession of by the owner and was run by him regularly. Held, that an action by the builder was proper immediately upon the taking of the boat from him by the owner, though no test was ever made; that by superintending the building and making payments the owner had estopped himself from asking damages for the delay, and that having taken possession of the boat was liable to the builder for the benefit actually derived by him, though the work was not in all its parts in perfect conformity to the specifications. *The Isaac Newton*,* *Abb. Adm.*, 19.

§ 1873. Proof of performance of condition precedent.— Where the defendant contracted to do certain work for the plaintiff, and the plaintiff was to perform certain acts before the work should be done, the plaintiff cannot recover for a breach of the contract unless he shows the performance of the precedent acts. *United States v. Beard*, 5 McL., 448.

§ 1874. Where a contract contains mutual conditions, a party cannot recover for a breach without showing performance or a readiness to perform on his part. *Darland v. Greenwood*, 1 McC., 338.

§ 1875. Term of credit ceases on failure to give note as agreed.— A steamboat owner contracted with a boiler maker to have him build a boiler for the boat, and promised to pay him certain sums of money, and, on completion of the boiler, to give him his note due in three months. Not having given his note as agreed, it was held that the term of credit then ceased, and that the amount became immediately due. *The Highlander*, 4 Blatch., 57.

§ 1876. Demand.— Where a contract is for the payment of a specific sum in certain property on a certain date, no demand is necessary to enable the payee to bring suit. *Campbell v. Clark*, *Hemp*, 68.

§ 1877. For work not done in a workmanlike manner.— Under an agreement to do certain work in a workmanlike manner, the plaintiff may recover though the defendant shows that a part of the work was not done in a workmanlike manner. *Voss v. Varden*, 1 Cr. C. C., 410.

§ 1878. Sale conditional upon certain payments— Failure to pay.— If an article sold is to be paid for in instalments in a prescribed manner, the property to belong to the purchaser when paid for, an action will lie for a breach of the contract if the payments are not made in the time and manner prescribed, although the sale is conditional. *Ames v. Le Rue*,* 2 McL., 216.

§ 1879. Where acceptance of draft given in payment for a horse is refused.— Plaintiff sold a horse to defendant, who gave in payment his draft on X. payable at a future day. On the day following the sale, defendant ordered X. not to pay the draft, and acceptance was refused. Held, that plaintiff had no cause of action until after the time fixed for payment of the draft. *Magner v. Johnston*,* 8 Cr. C. C., 249.

§ 1880. Action for balance formed by unpaid acceptances.— No action lies in favor of an acceptor to recover a balance formed by acceptances which have not been paid. So where plaintiff brought suit for an alleged balance, which was made up in part of drafts of defendant, which had been accepted by plaintiff "to be paid when in funds," and which had not been paid at the time of suit, it was held that there must be judgment for defendant. *Parker v. United States*,* *Pet. C. C.*, 262.

§ 1881. *Action by father for services of his minor son as a sailor — Desertion.*— A father entered into a contract by which his minor son was shipped as a sailor for a certain voyage. During the whole period of minority the son did his duty faithfully, but afterwards deserted. *Held*, that the father had a right to the son's wages up to the time of his majority. *Coffin v. Shaw*, 8 Ware, 84.

§ 1882. *Contract for work and materials — Defense.*— In an action on a contract for work and materials, any breach of the contract, or any penalty for non-performance, may be set up as a defense, even though such damages are unliquidated. *Winder v. Caldwell*, 14 How., 448.

§ 1883. *Hiring by the job and not by the season or monthly.*— A steamboat engineer promised, at the solicitation of a blacksmith, to employ him to perform such labor in his line as was necessary, and did so employ him on several jobs, the blacksmith rendering his bill monthly. *Held*, that this was not a hiring for the season, and that the blacksmith had a right to demand his pay at the conclusion of each job, and could sue thereon immediately, and such right was not affected by his custom of rendering bills monthly. *The Alida*, Abb. Adm., 167.

§ 1884. *Covenant to pay certain notes, when in a legal capacity to obtain certain lands.*— A. covenanted to pay certain notes as soon as he should obtain, or be in a legal capacity to obtain, lawful possession of certain specified lands. *Held*, that so long as A.'s capacity was opposed by legal impediments, so long were the rights of the covenantee suspended; but that when such impediments were removed the covenantee's right of action accrued, notwithstanding A. had put it out of his power to obtain possession of said lands by giving a release of his rights thereto. *Bleecker v. Bond*, * 3 Wash., 529.

§ 1885. *Note maturing according to the terms of a contract.*— Where A. made a note by which a certain sum was payable to B. when the same became due by the terms of a contract between A. and B., and B. made default in the execution of the contract, but finally finished it, and A. executed a release to B. for all demands, etc., by reason of the said default, *held*, that notwithstanding said release, the note never became due. *Smith v. Barker*, * 3 Day (Conn.), 816.

X. MEASURE OF DAMAGES.

1. In General.

SUMMARY — *Breach of contract to keep sheep; set-off for services*, § 1886. — *Failure to accept a manufactured article*, § 1887. — *Failure to deliver goods*, § 1888. — *Under which of two contracts to be assessed*, § 1889. — *Set-off by way of recoupment*, § 1890; *bridge defectively constructed*, § 1891. — *Failure to submit to arbitration*, §§ 1892, 1893. — *Forfeiture on decision of engineer*, § 1894. — *Malicious arrest in aggravation of damages*, § 1895. — *Failure to deliver coke in certain quantities at certain times*, § 1896.

§ 1886. In an action for improper performance of a contract to keep certain sheep of plaintiff's, defendant cannot set off against the damages the value of his services under the contract. He has a separate action for such services. *Crowninshield v. Robinson*, § 1897.

§ 1887. When a certain specific article has been ordered of the manufacturer, and completed according to the order, the measure of damages for failure to accept and pay for it is the contract price of the article. *Bookwalter v. Clark*, §§ 1898-99.

§ 1888. No damages are sustained by plaintiff when he can purchase goods like those specified in the contract sued on, at an equal price, in equal quantity and at the agreed time of delivery. *Barnard v. Conger*, § 1900.

§ 1889. Defendants contracted to deliver to plaintiffs in February, 1869, two hundred tons of logwood. They failed to perform their agreement, but offered by letter to deliver the logwood in the following June. Plaintiffs replied to this letter, accepting the offer, but made material changes in some of its terms, and to this letter defendants had not replied at the time suit was brought for failure to deliver the logwood, either in February or in June. The case was submitted on agreed facts, and the only question before the court was, whether damages should be assessed as of February or as of June. It was held that defendants' second offer had never been accepted by plaintiffs, and that their modification of it had never been accepted by defendants; that consequently the only contract between the parties was that to deliver the logwood in February, and that damages must be assessed as of that date. *Snow v. Miles*, §§ 1901-1905.

§ 1890. In an action upon a building contract, which imposes mutual duties and obligations, when there has been a breach by plaintiff for which a cross action might be maintained by defendants, any damages sustained by defendants by reason of such breach may be

set up by way of recoupment. So where plaintiff sues for the price upon a contract to build a bridge, defendants are entitled to set up any damages sustained by them by reason of the imperfect construction of the bridge. *Railroad Co. v. Smith*, §§ 1906-1908.

§ 1891. In an action by contractors to recover the price stipulated for the construction of a railroad bridge in accordance with a submitted plan and tracings, where the company sought to deduct from the demand, by way of recoupment, expenditures incurred and damages sustained on account of the defective execution of the work, inquiries in a deposition offered as to whether the structure and arrangements of the bridge caused any injury or damage, hindrance or delay to the company in running its trains, and what number of hands were required to work the drawbridge, and what number would be necessary if it had been properly constructed, were held to furnish elements to the jury for a just estimate of the damages to be recouped, and not to be open to the objection of relating to speculative damages. *Ibid.*

§ 1892. If the performance of the condition for a valuation be rendered impossible by the act of the vendee, the price of the thing sold must be fixed by the jury on a *quantum valebat*. So where defendants agreed to pay plaintiff a certain sum for a patent right, and an additional sum should the patent prove valuable, and agreed to submit to arbitrators the question of how much, if anything, the additional sum should be, but afterwards broke this agreement, it was held that plaintiff was entitled to recover the value of his patent in an action at law, the damages to be assessed by the jury. *Humaston v. Telegraph Co.*, § 1909.

§ 1893. If the vendee of a patent right agrees to pay in certain corporate stock the value of the invention, if any, beyond an amount already paid, to be fixed by arbitrators, refuses to submit to the arbitration, and is sued for a breach of the contract, the plaintiff being limited in his recovery to the value of his invention when sold, evidence of the value of the shares of stock is only admissible as tending to show the estimate put upon the property by the parties at the time of the bargain, and evidence of the value of the stock at any other time than that of the contract is inadmissible. *Ibid.*

§ 1894. If an agreement between a corporation and a contractor, for the construction by the latter for the former of a public work, contains an express provision that if the work is not prosecuted in such a way as to insure its completion within the time stated, the engineer of the corporation may declare the contract forfeited, and take possession of the unfinished work in behalf of the corporation, the parties are bound by the decision of the engineer, if made in good faith; and the contractor has no claim for damages arising from a forfeiture declared by the engineer, unless done through fraudulent motives on the part of the engineer and the corporation. In no aspect of the case can the contractor be said to be damaged, if by retaining the work he would have realized no profit, or would have actually sustained a loss. *Culbertson v. Ellis*, §§ 1910-16.

§ 1895. If the defendant, as a means of procuring a forfeiture of his contract with the plaintiff (a third person having the power of declaring such forfeiture for a certain cause), maliciously and without probable cause procures the arrest and imprisonment of the plaintiff, this fact may be taken into consideration in aggravation of the damages, in an action brought on account of the forfeiture. *Ibid.*

§ 1896. The measure of damages for breach of a contract to deliver coke, in certain quantities, at certain times, is the difference between the contract price and the market price of the same article at the place of delivery, and at the several dates when the several deliveries should have been made under the contract, and not the difference between the contract price and the price agreed to be paid to a third party in a new contract to furnish coke for the rest of the time. *Missouri Furnace Co. v. Cochran*, § 1917.

[NOTES.—See §§ 1918-1984.]

CROWNINSHIELD v. ROBINSON.

(Circuit Court for New Hampshire: 1 Mason, 98-95. 1816.)

STATEMENT OF FACTS.—*Assumpsit* upon a special written contract for keeping one hundred sheep of the plaintiff for one year, at a stipulated price. The breach alleged was, that by reason of the negligence of the defendants, etc., the sheep were greatly injured, and some died. The cause was tried upon the general issue. Counsel for the defendants contended that if the jury should be satisfied that the plaintiff was entitled to damages they ought to deduct from such damages the amount which, under a *quantum meruit*, or by the

stipulations of the contract, the defendants would be entitled to recover for the keeping of the sheep; and if this sum was equal to the damages sustained, they ought to return a verdict for the defendants.

§ 1897. *In an action for the improper performance of a contract the defendant cannot set off against the damages the value of his services under the contract. He has a separate right of action for such services.*

Opinion by the COURT.

We are fully aware of the opinions which have been entertained in the English courts upon this subject, and of the strong leaning of the later authorities in favor of the doctrine of the defendants' counsel. But, in our judgment, the true rule under the circumstances of this case is, to estimate the full value of the plaintiff's damages, without taking into the account the possible claims of the defendants for the keeping of the sheep. If the defendants are entitled to anything for the keeping, they may recover it in another form of action, to the extent to which they can show a performance of their contract, and a benefit derived by the plaintiff. A recovery in this action would be no necessary bar to such a suit; and, therefore, the plaintiff might be doubly charged, if the deduction were now made. Besides, if the defendant were entitled to a meritorious compensation, equal to the injury sustained by the plaintiff, then, upon the ground stated, notwithstanding such injury, the verdict of the jury ought to be, that the defendant is not guilty, which would throw the costs of the suit upon the plaintiff; and certainly, in that event, a judgment for the defendant in this action would be no bar to an action on a *quantum meruit* for keeping the sheep; for it never could judicially appear that the former verdict was given upon this special ground, and not upon the ground that the plaintiff had sustained no injury. The verdict would affirm nothing, but a general finding in favor of the defendant, and the private grounds upon which the jury proceeded could never be a fit subject of inquiry, even supposing, what might well be doubted, that they were all agreed on the same grounds. After a good deal of reflection on the subject we think it safest, though the point is certainly not free from difficulty, to adhere to the old doctrine, and to confine the later doctrine to such cases only, where it is incontestable that the parties cannot be prejudiced. It is at most an equitable offset, which ought not to be admitted when it may work against equity. The case might have admitted of a very different consideration if the present defendants had brought an action upon the contract for compensation for keeping the sheep; for to such an action, gross negligence and injury would be a complete defense, since they would establish the fact of a non-performance of the contract according to the express engagement of the defendants. And even on a *quantum meruit* such negligence or injury might, under circumstances, constitute a bar to the action, or be proper evidence to reduce the amount of the compensation. (Verdict for the plaintiff.)

BOOKWALTER v. CLARK.

(Circuit Court for Wisconsin: 10 Federal Reporter, 793-798. 1882.)

Opinion by BUNN, D. J.

STATEMENT OF FACTS.—This case was tried before the court without a jury, a jury having been waived by the consent of parties in open court. There is no dispute about the facts. On December 17, 1880, defendants made an order in

writing upon the plaintiffs, signed by them, which was delivered to and accepted by the plaintiffs, as follows:

"WAUSAU, WISCONSIN, December 17, 1880.

"*James Leffel & Co., Springfield, Ohio:*

"You will please manufacture and ship to the undersigned, at Wausau, Wisconsin, Marathon county, one of your sixty-six-inch Leffel water-wheels, running with saw. Bore top half of coupling five and seven-eighths. Wheel to be shipped by the 15th day of February, 1881. To drive gang-mill situated in Wausau, Wisconsin, and displace — wheel under ten feet head and fall.

"In consideration of which the undersigned agree to pay, with exchange, besides freight from manufactory, the sum of \$950; \$300 cash, balance in good notes, drawing seven per cent. interest, payable in six and nine months from date of shipment. After the wheel has run thirty days, they want privilege of taking up notes at a discount of three per cent.

[Signed]

"CLARK, IRELAND & Co., Wausau, Wisconsin."

This order was, on the day of its date, delivered by defendants to D. J. Murray, residing at Wausau, who was acting as local agent of plaintiffs in taking orders for plaintiffs for the manufacture of machinery, and forwarded by him on the next day to the plaintiffs, at Springfield, Ohio, who received it by due course of mail, on December 20th, and on that day or the next proceeded to manufacture the wheel, which they completed according to contract in about twelve or fifteen days from the receipt of the order, and on the 13th of January shipped it to the defendants, at Wausau, according to the directions in the order, notifying defendants of its shipment, and inclosing blank notes for them to sign and return. The wheel reached the railroad depot in Wausau by due course of freight, when the defendants saw and had a chance to inspect the same; but they refused to receive the wheel or to pay the purchase price. This action is brought, setting forth all the facts, to recover the amount of the contract price of the machinery, either as upon a sale and delivery of the goods manufactured, or as damages for non-performance of the contract on defendants' part.

Defendant John Clark testifies that about December 20th he went to the agent, Murray, who had taken the order, and told him that he was negotiating with C. P. Hazleton for a second-hand wheel, and wanted him to hold on to the order, and told Murray to write to plaintiffs at Springfield to delay the manufacture. On December 30th Murray wrote as follows to plaintiffs:

"WAUSAU, WISCONSIN, December 30, 1880.

"GENTS: Messrs. Clark, Ireland & Co. came here and requested me to write you and say they think some of purchasing a second-hand wheel, and would ask you to hold on with the order for the sixty-six-inch wheel. You had better write them. The matter is in your hands.

"Yours truly,

D. J. MURRAY."

This letter was received by the plaintiffs at Springfield on January 3d, and an answer by letter returned by them on that day to defendants stating that they were not willing, under the circumstances, that defendants should purchase anything but the Leffel wheel, and that they were not disposed to give up a contract upon which they had already done considerable work; that they expected to complete and ship their wheel at the time agreed in the contract. The wheel at this time was in course of manufacture, and about half done. This letter was received by the defendants at Wausau on January 5th, and on that day they wrote themselves to the plaintiffs as follows:

“WAUSAU, WISCONSIN, January 5, 1881.

“*James Leffel & Co., Springfield, Ohio:*

“SIRS — Yours of the 3d received. We ordered through Mr. Murray, your agent, a wheel, and a day or two after we told him to notify you to hold on with the order, as we were not positive we wanted it. You sold C. P. Hazeltine & Co. a wheel of that size and kind which he designs to take out and use steam instead, and we have been negotiating with them for the wheel, pinions, core-wheel and shafting; and, if he finally concludes to put in steam, we shall buy of him, and do not want your wheel; and, if he does not make the contemplated change, we want the wheel of you. If you want to deal that way, all right; if not, you can consider the order countermanded now, and we will take our chances of getting a wheel that will suit as well as yours. The wheel Mr. Hazeltine has got is your make of wheel, and if he does not want to use it you had not ought to stop his selling it by crowding. Will let you know within ten days the result of trade with Hazeltine.

“Yours, respectfully, CLARK, IRELAND & Co.”

When this letter was received by the plaintiffs, on January 8th, the wheel was nearly completed. The plaintiffs' testimony shows that this wheel was unusually large, and they did not keep such in stock, and only made them to order; that forty-four inch wheels were as large as they kept in stock, and that it was only occasionally that they had an order for so large a one as this; that it consisted of some twenty large castings and a great many small pieces, and that it would ordinarily require considerable change to fit another customer if they found one wanting so large a one; that some of the wheels ran with and some against the saw, and that a wheel made to run with the saw could not be made to fit with machinery that was intended for the other kind.

§ 1898. *The measure of damages in the case at bar is the contract price of the wheel.*

The defendants had ample opportunity to inspect the machinery at Wausau, and there is no point made that it is not manufactured in all respects and shipped according to the contract. It is admitted also that defendants have broken their own contract *in toto*; but they insist that the plaintiffs are not entitled to recover the full value of the machinery, but only the difference between the contract price and market price, leaving the wheel for plaintiffs to dispose of as best they may, and that they are not entitled to recover at all in this suit.

§ 1899. *Circumstances under which one who has fulfilled his contract and made and tendered the article in question is entitled to the contract price as the measure of his damages.*

But whether or not that rule be more properly applicable in cases of stocks or ordinary merchandise already in existence when the contract is made, and which has some certain market value, it seems quite clear to me that it is not the one which metes out the most exact justice between the contracting parties in a case of this kind, or which is best sustained by reason or authority. In the first class of cases the authorities are decided; some holding, as in *Thorndike v. Locke*, 98 Mass., —, and *Pearson v. Mason*, 120 Mass., 53, that the vendor of the goods, upon tender made of delivery and refusal to receive, may leave the goods with the vendee or with some person for him, and recover the contract price; or that he may keep the goods and recover as damages the difference between the contract price and the market value at the time of the breach; or that he may resell the goods and charge his vendee with the differ-

ence between the selling and contract price; while other cases, as in *Gordon v. Norris*, 49 N. H., 376, confine the vendor to the last two remedies named, and deny him the first, on the ground that the defendant refusing to accept, no title passes, and the vendors cannot have the goods and their value.

But where a person orders an article to be manufactured according to a certain measure, pattern or style, as a suit of clothes, or a carriage, or a steam-engine, here, I think, the weight of authority and the best reason concur that the manufacturer, after he has completed his contract and tendered the article, is entitled to recover the contract price. The reason for the distinction is that in such a case there is presumably no certain market value for goods made according to such a specific order, and that the manufacturer having done all that is required of him to do to entitle him to the full benefit of his contract, he cannot, with any certainty, have this full benefit in any other way. If he was required to resell an article of this kind before he could maintain his action, he might be compelled to wait until the vendee should become irresponsible, and the article might have no market value, or no appreciable value at all, for any other person except the one ordering. In such a case it seems more just and equitable that the loss and inconvenience of having a cumbrous article like the one in suit on hand for sale, and taking the chances of finding a purchaser, should fall upon the party who is in fault in not fulfilling his contract, rather than upon the party who is in no fault, and is claiming nothing but just what the other party has agreed to do.

It may be that if the defendants had countermanded the order before any work had been done, and especially if they had also tendered to the plaintiffs the fair profits of the manufacture, that it would have been the duty of the plaintiffs to have desisted from going on with the work. But when the letter from Mr. Murray was received the work was in progress and about half completed; besides, the defendants did not remand their order, nor in any way attempt to rescind their contract, but simply requested the plaintiffs to delay the manufacture until they could have time to see if they could consummate a trade with another party to better advantage. If they could not, they still wanted the wheel. It is evident that the plaintiffs were not bound to delay the manufacture for such a purpose. If it takes two to make a contract, it also takes two to rescind or modify one. I think the plaintiffs were justified in continuing the work, and shipping the wheel according to the terms of the contract.

Many of the cases on this subject turn upon a mere question of pleading; or whether, where there is no delivery and no title passes, the vendor can maintain *assumpsit* for the purchase price *as upon a sale*. There is no question of that kind here. The facts are all set up, and the plaintiffs are entitled to such relief as the facts seem to justify, whether it be a judgment for the purchase price, as in *assumpsit*, or for damages for a non-fulfillment of the contract on defendants' part. And the case does not turn, in my judgment, upon the question as to whether the title to the goods has passed from plaintiffs to defendants. If the plaintiffs have fulfilled their contract, and delivered or tendered delivery, this is all they can do; and if defendants refuse to accept the goods, and being made to order, they are, presumably, not marketable, I think the plaintiffs are entitled to recover, as their true measure of damages for non-fulfillment, the contract price of the article, though it be conceded that no title has passed. The title, I think, in such cases would pass upon the rendition of judgment.

But is it clear that no title has passed? It is shown that the wheel was manufactured and shipped on board the cars at Springfield according to the contract. This was all the plaintiffs could do, and it seems to be the delivery contemplated by the parties; and as further confirmation of this, they provide for interest on the notes from the day of shipment at Springfield. Undoubtedly the defendants had the right to inspect the goods upon their arrival at Wausau, and upon such inspection, if they found them not in compliance with contract, they would not be bound to pay for them. But, as the case stands, it is just the same as if defendants had inspected them, and found them in compliance. They had the opportunity to inspect them, and they make no point that the goods are not perfect, but only that they had changed or might change their minds about wanting them, and had notified the plaintiffs to withhold the manufacture until further orders. The general rule is, in such cases, that no title passes until the goods are manufactured and delivered, *or are ready for delivery*. These were certainly ready for delivery, and I think it not at all clear that they were not delivered when shipped at Springfield, subject only to defendants' right of inspection and rejection of the goods at Wausau, in case they should be found not to comply with the contract. However this may be, I think the plaintiffs entitled to recover the contract price of the goods, with interest at seven per cent. from the time of shipment. *Bement v. Smith*, 15 Wend., 493; *Ballentine v. Robinson*, 46 Penn. St., 177; *Shawhan v. Vanpest*, 15 Am. Law Reg. (N. S.), 153.

In this last case, which was recently decided by the supreme court of Ohio, the authorities are so fully and ably reviewed that no further discussion of them seems necessary.

BARNARD v. CONGER.

(Circuit Court for Michigan: 6 McLean, 497-499. 1855.)

Opinion by the COURT.

STATEMENT OF FACTS.— This action is founded upon a contract for the delivery of five hundred thousand feet of lumber at Albany, in New York, at certain prices stipulated, dated 19th of April, 1854; to be delivered the same year, before the close of navigation. Of the first and second quality the defendant was permitted to deliver, at the prices stated, as he might choose. Thirty-two dollars for the clear, per thousand feet, and \$24 for the second quality. Two hundred thousand feet of said lumber which may be delivered shall be counted at \$2 per thousand feet less than the prices above named, in consideration that the said Barnard & Son advanced to said Conger on the contract the sum of \$3,000, they charging interest on said advance from the payment until the money shall be repaid by the delivery of that amount of lumber. The delivery to be made at the plaintiff's wharf in Albany. It was proved that, in the summer and fall of 1854, the market price of clear lumber was \$35 per thousand feet; \$27 per thousand for the second quality. Other witnesses stated that, in September and October, 1854, lumber sold, first quality for \$34 per thousand, and second quality for \$24. Boat loads sold, at first quality, \$32; second quality, from twenty-two to twenty-three dollars per thousand.

§ 1900. *Measure of damages on breach of contract. No loss, no damages.*

The court instructed the jury that, if lumber embraced by the contract was worth more in the market in Albany than the prices stipulated in the contract to be paid to the defendant, at the period within which the lumber was to be

delivered, the plaintiff was entitled to recover, by way of damages, the difference. But if the price of lumber in the Albany market was as low or lower than the prices agreed to be paid by the plaintiff, he suffered no damage by the failure of the defendant. If the plaintiff, with the money in hand, could, in the market at Albany, purchase lumber at the same price that he had agreed to pay the defendant, he was entitled to no compensation, as he sustained no loss.

A sale of lumber in small quantities, or by retail, will not fix the prices in the present case; nor would prices paid for a much larger amount than is named in the contract fix the price. This would bring down the price too low, while the retail price would place it too high. The true rule will be found in such quantities as provided for in the contract; and, if you shall find that a purchase could have been made by the plaintiff, at the time the defendant should have delivered the lumber, at the contract or a less price than that agreed to be paid at the place of delivery, the plaintiff is entitled to no damages. The \$3,000 advanced, with the interest, it is understood, will be satisfactorily arranged.

SNOW v. MILES.

(Circuit Court for Rhode Island: 3 Clifford, 608-614. 1873.)

STATEMENT OF FACTS.—Defendant agreed to deliver in February, 1869, two hundred tons of logwood to plaintiffs, but failed to perform his contract. Subsequently he offered by letter to deliver the logwood in the following June; to this letter plaintiffs replied, accepting the offer, but with material modifications of it; defendant had not replied to this letter at the time suit was brought. The declaration alleged a breach of the contract to deliver in February, and also a breach of the contract to deliver in June. The case was submitted to the court upon agreed facts.

Opinion by CLIFFORD, J.

Damages are claimed in the first count for the breach of the contract made on the 13th of May, 1869, for the delivery of two hundred tons of logwood in the month of June following; but the declaration contains a second count, in which the original contract is set forth according to its tenor and effect, and which contains the further allegation that the time for the delivery of the logwood was subsequently postponed, and the breach alleged is that the defendant did not deliver the same during the month of June, as stipulated between the parties in the form of the contract as modified; appended to the special counts are counts also for goods sold and delivered, and the common counts.

Argument to show that the defendant was guilty of a breach of his contract is unnecessary, as that is admitted. The only question of much importance submitted to the court in the agreed statement being, whether the damages of the plaintiffs shall be assessed as of the 15th of February next after the date of the original contract, or as of the 30th of June of the same year. It is admitted by the defendant that he is liable for a breach of his contract, the only question being whether the damages shall be the difference between contract price and the market value of the logwood in February, 1869, or the June of the same year. Some doubts are expressed by the defendant whether the declaration is sufficient to warrant a judgment for the plaintiffs if the court adopts the first theory, which, as he contends, is the only theory the facts will sustain; but the court is of the opinion that those doubts are without any foundation, as the agreed statement in terms submits that question to the determination of the court.

§ 1901. *Submission on agreed statement of facts waives objections to form of action.*

Objections to the form of the action are usually considered as waived by submitting the case to the decision of the court upon an agreed statement of facts, unless such objections are expressly reserved for the consideration of the tribunal to which the submission is made. *Ellsworth v. Brewer*, 11 Pick., 318; *Kimball v. Preston*, 2 Gray, 567; *Scudder v. Worster*, 11 Cush., 574. But it is not necessary to resort to that well settled rule of practice in this case, because it is expressly stipulated between the parties that the question for the determination of the court is whether the damages shall be computed as of the date first mentioned or of the second date, which is all that need be said upon the subject. Suppose that is so, then the defendant admits that he is liable in damages for the difference between the contract price of the logwood and the market price of the article on the 15th of February, when he contracted to deliver it to the plaintiffs. Large damages, however, are claimed by the plaintiffs, as the market price of the article increased before the 30th of June in the same year, when, as they contend, the breach of contract actually took place.

§ 1902. *Rule as to contracts by letter and their authentication by revenue stamps.*

Their theory is that the time for the delivery was extended, by mutual consent of the parties, from the 15th of February to the 30th of June, as evidenced by the correspondence. Two answers are made by the defendant to that proposition: 1st. He contends that it amounts to a new contract, and that it cannot be supported as a new contract, as the letters composing the correspondence are without the requisite stamps. 2d. His second proposition is, that the theory is not supported by the true construction of the letters. 1st. Strong doubts are entertained whether letters of the kind are required to be stamped, as no one of them contains a contract; but the better answer to the objection in this case is, that the letters are not offered to prove a new contract, but only to show that the condition of the subsisting contract between the parties was waived; but if it were otherwise, the objection cannot prevail, as the act of congress does not make the contract void for want of a stamp. Contracts not stamped are not admissible in evidence; but the objection in this case comes too late, as the letters, without any objection or reservation of any kind, are annexed to and made a part of the statement of facts, and must therefore be considered as before the court by the consent of both parties, as evidence in the case.

§ 1903. *Liability as affected by payment of money into court.*

Before discussing the second question, it may be important to inquire whether the act of defendant in paying money into court admits the claim of the plaintiffs, as set forth in the second special count. It appears that the defendant, at the return term, under the common rule, paid \$400 into court, and the plaintiffs, four days before the agreed statement of facts was signed, took the same out of court. Serious question would arise if the writ contained only the special count, alleging the breach in June, whether that payment into court, under the common rule, did not admit the breach as alleged, and entitle the plaintiffs to a judgment on that count. Besides the special counts, however, the declaration contains a general count of *indebitatus assumpsit*, and the common counts in such a case. The better opinion, as tested by more recent authorities, is, that the payment of money into court is not an admission of all the counts in the declaration. Where there is a count on a special contract, to-

gether with the general *indebitatus* counts, the payment of money, generally, upon the whole declaration, says Phillips, is an admission of the defendant's liability upon the special count, and there are other authorities to the same effect. 1 Phil. Ev., 4, Am. Ed. by Edwards, 788; Jones v. Hoar, 5 Pick., 290; Huntington v. American Bank, 6 Pick., 347. Undoubtedly the rule is so where a special cause of action only is set out in the declaration; but the rule is now well settled otherwise, where the declaration, as in the present case, contains the general counts in addition to a special count which may include many causes of action, as the defendant, in such cases, by payment of money into court, does not admit any specific contract, the only effect being that he admits a liability on some one or more of the causes of action set out in the declaration, not exceeding the amount paid into court. Hubbard v. Knous, 7 Cush., 557.

§ 1904. *Construction of the correspondence between the parties.*

Repeated decisions have established that rule both in England and in this country. Kingman v. Robins, 5 Mees. & W., 94; Archer v. English, 1 Man. & G., 691; Story v. Finnis, 6 Exch., 123; Hurlst. & Gord., 123. Evidently, therefore, the case must depend upon the legal effect of the letters given in evidence, as the agreed statement confers no authority upon the court to draw any other inferences than such as their language imports. Weighed in that light, I am of the opinion that those letters do not establish a mutual agreement between the parties to extend the time of delivery, as alleged in the plaintiffs' declaration. Coming to the correspondence, the defendant, in his letter of May 13th, states to the effect that he has two small vessels at Jamaica, one hundred and sixty tons each, that should be here next month, and that he has ordered his brother to load them with logwood at any price, "therefore I want you to await their arrival, when the first shall be delivered to you;" adding, "Sooner or later you will get your two hundred tons of logwood." Such language cannot be construed into an absolute promise or statement that the vessels would arrive in June, nor that the two hundred tons of logwood would be delivered in June, but only that he confidently expected that the vessels would arrive in June, and that the plaintiffs, on their arrival, should have their contract filled, as originally promised. Grant all that, still the suggestion is, that the plaintiffs understood the matter differently, and reference is made to their letter as proving that suggestion, and it must be admitted that its tendency is that way, as they say in their reply, "Yours is received, advising you are to have two cargoes of logwood from Jamaica next month, and proposing to fill our contract from these vessels. We accept the proposition, and will thank you to advise the arrival of the vessels, when we will promptly give" the necessary directions.

§ 1905. *An offer imposes no obligation on the party offering unless it is accepted.*

It is an undeniable principle of the law of contracts that an offer of a bargain from one person to another imposes no obligation upon the former unless it is accepted by the latter according to the terms in which the offer was made; any qualification of or departure from those terms invalidates the offer unless the same be agreed to by the person who made it; until the terms of the agreement have received the assent of both parties the negotiation is open, and imposes no obligation upon either. Eliason v. Henshaw, 4 Wheat., 228 (§ 20, *supra*).

Beyond all doubt the reply of the plaintiffs to the offer made by the defend-

ant is a wide departure from the proposition tendered by the latter, and it is quite probable that the modification of the proposition offered was made for the purpose of securing better terms than those proposed by the defendant in his letter; but the insuperable difficulty in the plaintiffs' case is, that the agreed statement does not show that the suggested modification of the offer was ever accepted by the defendant; and the rule is that until the terms of the agreement have received the assent of both parties, the negotiation is open. Taken as made, the offer was never accepted by the plaintiffs; and there is no evidence whatever to show that the defendant ever accepted the modification suggested by the plaintiffs, but both parties suffered the matter to drop without completing any new arrangement, so that the question must turn upon the construction of the first letter of the defendant; and in respect to that it is clear that he did not make an absolute offer to deliver the logwood in June, as assumed in the declaration. All he did was to express a confident opinion that the vessels would arrive in June, and promised to the effect that the plaintiffs should have their logwood from the first cargo; but they never accepted those terms, and the matter was suffered to drop without any new arrangement having been accepted. Tested by these views, it is clear that the plaintiffs are entitled to recover as damages the difference between the contract price of the logwood and the market value of the same on the 15th of February, at the time the defendant stipulated to deliver the same in the original contract. Hearing if necessary as to judgment.

RAILROAD COMPANY v. SMITH.

(21 Wallace, 255-264. 1874.)

ERROR to U. S. Circuit Court, District of Florida.

STATEMENT OF FACTS.—This action was brought to recover a balance due for the construction of a swinging drawbridge across the Amelia river, in Florida. The bridge was to be constructed according to plans furnished, and to be paid for on completion of the work. The plaintiffs contended that they completed the bridge in accordance with the stipulations of the contract, and that the same had been accepted. The nature of the defense is sufficiently indicated in the opinion. There was a verdict for the plaintiffs.

Opinion by MR. JUSTICE FIELD.

The interrogatories to the witness Meador, the answers to which were excluded, inquired whether the structure and arrangements of the bridge caused any injury or damage, hindrance or delay, to the company in the running of its railroad, and whether any hindrance or delay was caused by the imperfect construction of the bridge to any vessel in the navigation of the river, and whether the structure or working of the bridge rendered it liable to be injured or destroyed by vessels navigating the river, and what number of hands were required to work the drawbridge, and what number would be necessary if it had been properly constructed.

The exclusion of these interrogatories and the answers to them constitutes the first error assigned for a reversal of the judgment. The objection to them was that they related to speculative damages. This objection cannot apply to two of the inquiries, the first and the last stated. The damages sustained by the company by any detention of its cars from the imperfect working of the bridge would be the subject of actual estimation; and the same thing may be said when the difference was ascertained between the number of hands re-

quired to work the bridge and the number necessary if it had been properly constructed. The facts the inquiries sought to elicit would at least have furnished elements to the jury for a just estimate of the damages to be recouped from the demand of the plaintiffs. All damages directly arising from the imperfect character of the structure, which would have been avoided had the structure been made pursuant to the contract, and for which the defendant might have instituted a separate action against the contractors, were provable against their demand in the present action. The law does not require a party to pay for imperfect and defective work the price stipulated for a perfect structure; and when that price is demanded, will allow him to deduct the difference between that price and the value of the inferior work, and also the amount of any direct damages flowing from existing defects, not exceeding the demand of the plaintiffs. This is a rule of strict justice, and the deduction is allowed in a suit upon the contract to prevent circuitry of action. In some states the law goes further and permits the defendant to recover judgment for any excess in his damages over the demand claimed.

§ 1906. *To render an exception available, it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case.*

But although the interrogatories were pertinent and proper in themselves, we are unable to decide whether any harm resulted from the ruling of the court in excluding them and the answers obtained, for the answers are not contained in the record. For aught that we can know, the witness may have answered that he was unable to state what injury or damage, hindrance or delay was occasioned to the company in the running of the road by the defective character of the bridge, or what number of hands were employed or would have been necessary if the bridge had been properly constructed. We cannot, therefore, see that any harm resulted to the defendant from the exclusion. Whatever may be the rule elsewhere, to render an exception available in this court it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case. If the exception is to the refusal of an interrogatory, not objectionable in form, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material. Such has been the decision of this court in several cases, and was distinctly affirmed at the present term in the case of *Packet Co. v. Clough*, 20 Wall., 528. We must, therefore, dismiss the first assignment of error as untenable.

§ 1907. *In an action upon a building contract evidence is admissible on behalf of the defendant to show that he has been damaged by reason of the defective manner in which the contract had been executed by the plaintiff.*

But the defendant also offered to prove by experts, among other things, that the plan of the machinery and the machinery itself on which the bridge rested and swings was so defective and so unskillfully put up, and the turning-gear itself was so defective and unskillfully attached, that it took eight or ten men to swing the bridge, and that the bridge had to be swung twice a week on an average at a cost of \$15 each time; and that under a contract to build such a drawbridge as is specified in the contract between the parties, it is the common understanding among persons skilled in bridge building that the bridge should be so constructed as to be easily turned in two or three minutes by one man; and also, that the quality of the material of the bridge, both wood and iron

was bad, and was put together in an unworkmanlike manner. The circuit court held that the proof thus offered was inadmissible and irrelevant, and in this ruling there was manifest error. It in fact denied the right of the defendant to set up any damages sustained by way of recoupment. Whereas, that right exists in all cases where an action is brought upon a building contract, which imposes mutual duties and obligations, and there has been a breach of its terms, either in the manner or time of execution, on the part of the plaintiffs, for which a cross-action might be maintained by the defendants.

§ 1908. *Where a drawbridge pier was built under the supervision of an agent of the party who built the superstructure, and on account of a defect in the pier the bridge worked imperfectly, held, that the builders of the superstructure were liable.*

The counsel of the plaintiffs seek to avoid the error of this ruling by insisting that the imperfect working of the bridge was owing to a defect in the pier and not to any defect in the bridge, and that it was the duty of the defendant to put the pier in proper order to receive the bridge. The court below took this view of the duty of the defendant, and instructed the jury, in substance, that for any defects in the pier the defendant was alone chargeable, and that if the difficulty in turning the bridge arose from a defect in the pier and not in the bridge, the plaintiffs were not responsible to the defendant for the result and consequent damages. The evidence shows that the pier was built under the supervision of an agent of the contractors, and in accordance with his directions, and was adopted by him as sufficient. He was superintendent in the construction of the bridge, and the plaintiffs were bound, and he as their superintendent was bound, before proceeding with the construction, to see that the pier was in a proper condition for the bridge. His adoption of the pier as built was, therefore, directly within the sphere of his agency. The alleged defect in the pier, if any existed, consisted in its variation from a level as it was originally laid, and of course, as justly observed by counsel, was patent to the builders at the inception and at every stage of the construction. Under such circumstances, the contractors can no more justify their proceeding with the work without satisfying themselves of the fitness of the pier for the superstructure intended, than they could justify the erection of the bridge at some other point on the river. In the case of *Dermott v. Jones*, 2 Wall., 7 (§§ 1348–50, *supra*), it was held that the performance of a contract to build a house for another on his soil, and that the work should be executed, finished and ready for occupation, and be delivered over on a specified day, was not excused by the fact that there was a latent defect in the soil, in consequence of which the walls sank and cracked, and the house became uninhabitable and dangerous, and had to be partially taken down and rebuilt on artificial foundations. The present is a much stronger case for the application of the same principle. Here there was no latent defect discovered after the work was commenced. Whatever defect there was, was necessarily known to the agent of the contractors under whose supervision both the pier and the bridge were constructed. His knowledge in this particular was their knowledge. The contract called for the construction of a bridge upon which the cars of the company could cross, and implied that the bridge should be serviceable for that purpose and capable of being used with the like facility and ease as similar bridges properly constructed are used. If the condition of the pier, by its variation from a level or any other cause, prevented this result from being attained, it was the duty of the contractors to insist upon its alteration or to make the

necessary alteration themselves. The position of counsel is, therefore, not tenable, and the instruction of the court upholding it was erroneous.

Other exceptions were taken to the rulings of the court, but as we have noticed those that went to the substance of the defense and the attempted answer to it, it is unnecessary to consider the case further.

Judgment reversed, and the cause remanded for a new trial.

HUMASTON v. TELEGRAPH COMPANY.

(20 Wallace, 20-30. 1873.)

APPEAL from U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Humaston sold to the telegraph company certain patents and inventions, and a contract was made which is set forth and analyzed in the opinion of the court. There was to be an appraisal of their value, but the company withdrew its submission to the arbitration. Humaston sued and obtained judgment for \$7,500.

Opinion by MR. JUSTICE DAVIS.

Whether or not the court erred in its charge, and in the exclusion of the evidence excluded, depends on the proper interpretation of the contract and the rule of damages which shall be applied in this action to the breach of it. It is insisted by the plaintiff that the defendant promised to pay him for his invention four hundred shares in addition to the one hundred shares paid on the delivery of the title, unless the arbitrators should relieve the company by fixing some less amount, and a great deal of learning touching the doctrine of conditions subsequent and precedent has been invoked in support of this position. But this doctrine has no application here, for, manifestly, this is not an undertaking to which a condition subsequent could be attached. It is easy to determine why this contract was made, the nature of it, and the acts to be performed by the contracting parties. The American Telegraph Company were engaged in carrying on the telegraph business in some portions of the country, and naturally desirous of appropriating to itself any new invention which would facilitate the transmission of telegraphic messages. Humaston claimed that his system just patented would do five times as much business on one wire as the ordinary systems then in use. If it could do this with equal accuracy and reliability, and at no greater cost, the value of it could be hardly overestimated, but there had been no experiments to test the question of whether or not it was capable of doing these things. It might do the work claimed for it, and yet be so unreliable, or the expense of working and using it so much greater than the expense of working and using the inventions then open to the public or used by the company, that its purchase would be dear at any price. The company, desirous of possessing everything new and useful in the line of their business, were willing to risk something in the acquisition of these inventions, but unwilling to pay the estimate of value which Humaston put upon them without trial of their utility. This estimate was \$50,000, as the proof on the trial was that the stock of the company stood at par in the market at the date of the contract. The company said to Humaston, we will take your patents, whether valid or not, and pay you \$5,000 for them, if you and Lefferts stipulate not to compete with us for a period of ten years, and if they are valid, whether useful or not, the compensation shall be increased to \$10,000. But we cannot promise additional compensation unless, after proper experiment, your system shall be proved to be worth more. It may be that your claim of rapid

performance can be sustained, and yet the system, owing to its greater cost than those now in use, or some other controlling practical consideration, be of comparatively little value to us. This can only be determined, after trial, by some impartial tribunal. We are willing that this tribunal shall be referees mutually selected, to whom shall be submitted the question of whether we shall pay anything more than the \$10,000 already paid, after the merits of your system have been tested by them and its capability and value established. They may reach the conclusion that you are sufficiently compensated already, and if they do, their award must be accepted as a final settlement of the matters of difference between us. If they reach a contrary conclusion, they must fix the amount of consideration which we are to pay, in addition to what you have already received; but this must be within the limit of four hundred shares of stock, equivalent to \$40,000.

This is a fair analysis of the provisions of the contract and of the considerations on which it was based. Instead of it binding the company to pay four hundred shares, unless a less number was fixed by the arbitrators, it left them to say whether Humaston was entitled to any more than he had already got, and if so, how much. There was no concession by the company that the inventions were worth any more to it than the hundred shares. It might turn out on the trial that the price already paid was excessive, or, on the contrary, that it was not sufficiently remunerative. This point of value the triers were to determine, and if determined favorably to the plaintiff he would have a cause of action against the defendant. Until this determination, if there had been no interruption to the arbitration, no cause of action could arise. It was a reasonable provision that the value of these inventions should be submitted to the arbitration of practical business men, and if Humaston, instead of the company, had refused to proceed with the arbitration, he could not resort to an action, for the defendant would not have been in default, and, therefore, not liable to suit. *Delaware and Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y., 250. But the defendant broke the agreement and revoked the submission, and Humaston asks that in consequence of this wrongful action of the defendant, his rights may be determined by the court and jury, instead of by arbitration.

It becomes, therefore, important to determine what is the measure of liability for the breach of contract by the defendant. If we are correct in our interpretation of the contract, this action cannot be supported as an action seeking damages for breach of contract to deliver stock, for there was no engagement to deliver any, except on a condition which has not happened, and there is no proof that the arbitrators would have found that Humaston was entitled to receive more stock than he had already obtained.

§ 1909. *Where the performance of a condition for a valuation is rendered impossible by the action of the vendee, the value must be fixed by a jury on a quantum valebat.*

The action can be supported for the value of the property, and this was the proper subject of inquiry at the trial. The company covenanted to pay this value, to be ascertained in a particular mode, and as they have prevented this mode being adopted, they cannot take advantage of their own wrong and deprive the plaintiff of the opportunity of showing to the court and jury what it is. In lieu of the award of the arbitrators, the verdict of the jury can be asked by the plaintiff to determine it. The ascertainment of this value was the essence of the contract, the thing on which the submission was based, and the

revocation of the submission leaves the jury to settle it. Benjamin, in his *Treatise on Sales* (1st ed., p. 430), says, if the performance of the condition for a valuation be rendered impossible by the act of the vendee, the price of the thing sold must be fixed by the jury on a *quantum valebat*, as in *Clarke v. Westrope*, 18 Com. B., 765, where the outgoing tenant sold the straw on a farm to the incomer, at a valuation to be made by two indifferent persons, but, pending the valuation, the buyer consumed the straw. And the doctrine of the text is sustained by adjudged cases in this country and England. *Inchbald v. The Western, etc., Plantation Co.* (head-note), 112 Eng. Com. L. (17 Com. B., N. S.), 733; *Hall v. Conder*, 89 id. (2 Com. B., N. S.), 53; *United States v. Wilkins*, 6 Wheat., 135, 143; *Kenniston v. Ham*, 9 Foster (N. H.), 506; *Holli-day v. Marshall*, 7 Johns., 213; *Cowper v. Andrews*, Hob., 40-43.

Nothing is, therefore, due on this contract, unless the court and jury, sitting in the place of the arbitrators, shall decide that the plaintiff is entitled to recover for the sale of his inventions more than he has already received. The case was tried on this theory, and the court charged the jury that the value of a specified amount of stock was not the legal measure of the plaintiff's damages, but that he was entitled to recover the excess (if any there was) which the value of what he sold and transferred to the company, enhanced by the agreement of the plaintiff and Lefferts not to enter into competition with the company, as stipulated in the contract, had, when sold and delivered, over the amount which he had already received; and this the parties agreed was one hundred shares of the defendant's stock, of the aggregate value of \$10,000, with interest on such excess from the date of the revocation of the powers of the arbiters. This charge is in conformity with the views we have expressed of the obligations of this contract, and of the rule of damages applicable to the breach of it.

It is urged, however, that the court erred in excluding testimony of the value of the defendant's stock both when they sold out to the Western Union Company, and when the revocation occurred. It is not perceived how the sale to the Western Union Company changed the rights of the parties, for there is nothing to show that it hindered the defendants from acquiring in the market at any time a sufficient number of shares of its stock to comply with the award which it was expected the arbitrators would be suffered to make long after this sale took place.

If there had been an agreement to deliver a certain quantity of stock, and an action had been brought for the conversion of it, on the ground that the defendant by the sale to another company had put it out of its power to comply with the terms of its agreement, evidence of the value of the stock at the time the sale occurred would be competent. And so would evidence of its value at the date of the revocation, if the plaintiff was in a position to support an action for damages for breach of contract to deliver stock. But as he is limited in his recovery to the value of his inventions when sold and delivered, evidence of the value of shares of stock at all is only proper as tending to show the estimate put upon the property by the parties at the time they made their bargain. And as the value of the stock in 1861, when the contract was concluded, was directly shown, its value at any other time became unimportant. The circuit court proceeded on the theory, and we think correctly, that the defendant intended to give for and considered the plaintiff's property worth (if it performed certain conditions) the cash equivalent of five hundred shares of stock. This was \$50,000, which the plaintiff must also have adopted as his estimate of

the value of the property when he sold it, as he offered evidence tending to show that it was worth that sum, and claimed that the evidence proved the fact. The conflict of testimony on the worth of the Humaston inventions was very great, for the defendant also introduced evidence tending to prove, and claimed it was proved, that these inventions were of no value, or if any, no more than the amount already paid for them.

In this condition of the evidence it was a difficult matter for the jury to settle the issue submitted to them, but as they were able to do it with the aid of the court and eminent counsel, after a lengthy trial, by finding a considerable verdict for the plaintiff, it would seem that he ought to be satisfied with it. At any rate there is no error in the record, and the judgment must be affirmed.

CULBERTSON v. ELLIS.

(Circuit Court for Indiana: 6 McLean, 248-258. 1853.)

Opinion by LEAVITT, J.

STATEMENT OF FACTS.—This is a special action on the case, brought for the recovery of damages, on grounds set forth in the plaintiff's declaration, and which will be indicated with sufficient clearness by the following brief statement: A company had been incorporated by the legislatures of the states of Indiana and Illinois, by the name of the Wabash Navigation Company, for the improvement of the navigation of the Wabash river at the Grand Rapids, by means of a crib lock and dam. On the 21st of August, 1847, the president and directors of said company entered into a written contract with the plaintiff and one Isaac Culbertson, since deceased, by which the Culbertsons agreed to construct the lock and dam, in the manner and upon the conditions specifically stated in said contract. One of the conditions was, that the work should be completed by the 1st of November, 1848, with a clause to the effect that if the work was not prosecuted with the force and diligence necessary to insure its completion by the time stated in the contract, it should be competent for the engineer of the company to declare it forfeited, and take possession of the work in behalf of the company. It was also agreed, in case the Culbertsons failed to complete the lock and dam within the contract time, they were to be subject to a deduction of one-sixth of the amount of the work done by them. Soon after the execution of the contract, the Culbertsons procured tools, implements and other property, and commenced the execution of the work, and continued their operations during the autumn of 1847 and the summer of 1848; and on the 2d of September in the last-named year the engineer declared the contract to be forfeited, and the company took possession of the work and carried it on to its completion.

The averments in the declaration are, in the substance, that the plaintiff had faithfully performed his part of the contract, up to the time of the forfeiture, having made all the progress therein that was practicable, and was then engaged on the work in the vigorous prosecution of the same; that the engineer, at the instance of the defendants, wrongfully, and without any sufficient reasons, declared the contract to be forfeited; and that the defendants, being at the time directors in said company, corruptly conspiring together to injure the plaintiff, wrongfully and maliciously urged the engineer to declare the forfeiture, and with the same purpose and motive affirmed the act of the engineer, and wrongfully took possession of the tools, implements and other property of the plaintiff; and as a means to accomplish their unlawful purpose, maliciously

filed a false affidavit that they were in fear of personal injury and violence by the plaintiff, and on the 7th of September, 1848, sued out a warrant of the peace against him, and procured him to be arrested and held in custody thereon. The plaintiff claims damages for the loss, which he alleges he sustained by reason of the forfeiture of the contract, and the illegal proceedings of the defendants in getting possession of his property and arresting and imprisoning his person.

The defendants plead, first, not guilty, thereby putting in issue all the allegations in the plaintiff's declaration; and secondly, that the plaintiff, in a prior suit against the Wabash Navigation Company, tried in this court, obtained a verdict and recovered judgment for nearly \$10,000, in which was included his claim for the injury sustained by him arising from the annulment of the contract.

It is not deemed necessary, in committing this case to the jury, to restate or minutely analyze the great mass of evidence which has been introduced on this protracted trial. It will be my purpose to bring to the notice of the jury, with as much brevity as possible, the legal principles involved, and leave them in the discharge of their rightful duties—to apply these principles to the facts before them. Upon the first issue made by the parties, two principal inquiries arise: first, whether, in the forfeiture of the contract by the engineer, the affirmation of that forfeiture by the defendants, and the acts consequent thereon, the defendants were influenced by the malicious or improper motives imputed to them by the plaintiff; and, secondly, whether the forfeiture resulted to the injury of the plaintiff, by depriving him of profit which otherwise would have inured to him from the fulfillment of the contract.

§ 1910. *Where there is a right of forfeiture of contract reserved in the agreement, a forfeiture declared under it, through mistake of facts, does not authorize damages.*

In relation to the first of these inquiries, it will be noticed by the jury, as a fact not controverted in the case, that the contract between these parties contains an explicit provision to the effect that, in case the Culbertsons shall not prosecute the work in such a way as to insure its completion within the time stated, the engineer may declare it forfeited and take possession of the unfinished work in behalf of the company. It is not pretended that any fraud or undue means were used to induce the plaintiff to become a party to this contract. It was voluntary on his part. The clause of forfeiture is one usually inserted in contracts for the construction of important public works, and is obligatory on the parties to it, not being against law, or condemned by any principle of public policy. For the purpose indicated by this clause in the contract between the parties, they constitute the engineer their mutual agent, and are bound by his decision, if made in good faith. It has been held by the supreme court of the United States, in reference to a clause of forfeiture in a contract similar to this, that if the engineer declares a forfeiture under the belief that the contractor was not prosecuting his work with proper diligence and energy, and an apprehension that the work would not be completed within the contract time, damages are not recoverable for the forfeiture, though it should appear that the contractor was not in default, and that the engineer acted under a mistaken view of his conduct. 13 How., 307 (§§ 1595–1608, *supra*). This principle is, however, stated by the court, with the limitation that the forfeiture shall not deprive the contractor of what was previously earned by or due to him under the contract.

§ 1911. *By contract parties agree that work done shall be forfeited and the contract annulled, if in the judgment of a certain third person one party is not carrying out the contract with proper diligence. Damages for the forfeiture cannot be recovered unless the third person acted fraudulently.*

As the result of this doctrine, thus settled by the supreme court, it will be observed, the plaintiff in this action has no legal claim for damages arising from the act of forfeiture, unless the engineer, with the knowledge and approbation of the defendants, and from corrupt and malicious motives, annulled the contract, and the act of annulment, from like motives, was sustained and affirmed by the defendants. The motives of the engineer and defendants, in this transaction, are proper for the consideration of the jury; and these can only be inferred from their acts, as adduced in evidence. If there was reasonable or probable cause for the declaration of forfeiture, it affords at least a *prima facie* presumption that it was done in good faith, and without any improper motive. In the consideration of this subject, it will be the duty of the jury to scrutinize the evidence, and decide according to the light which it affords. The work which the plaintiff contracted to perform was one of very considerable magnitude; and it was obviously important to the company of which the defendants were the representatives, as well as to the public, that it should be completed within the time stated in the contract. The work, while in progress and in an unfinished state, would be a hindrance to the navigation of the Wabash river, in those stages of water when it could be used for that purpose, and, if unnecessarily protracted, would subject the company to damages for its obstruction. Hence the propriety and necessity of the clause of forfeiture in the contract to secure the prompt and timely completion of the work. The contract, as already stated, was dated in August, 1847, and the locks and dams were to be completed by the 1st of November, in the following year. The declaration of forfeiture was made the 2d of September: leaving but two months from that date for the completion of the work. The testimony of a number of witnesses is before the jury, touching the manner in which the work had been prosecuted, prior to the forfeiture, and the amount of work then to be done. It also appears that the season of 1848 was not favorable to the prosecution of the work, owing to the occurrence of frequent floods in the river, and to the sickness of both the Culbertsons, resulting in the death of one of them. I do not propose to advert specially to the testimony on these points. The engineer who superintended the work from its commencement, and by whom the forfeiture was declared, has been very closely examined on all the points involved in this controversy. He is wholly unimpeached as a witness, and appears to be a gentleman of great intelligence and candor. It will be for the jury to decide what weight shall be given to his testimony. He has stated very clearly the progress of the work, up to the time of the forfeiture, and what then remained to be done. With a full knowledge of all the facts, he gives it as his opinion, there was not even a remote probability that the work would be completed by the 1st of November; and that under this conviction, and wholly uninfluenced by the defendants or others, and solely on his own responsibility, he declared the annulment of the contract. It moreover appears, from his testimony, that so far from any act being done to obstruct the progress of the work, he and the defendants evinced the greatest anxiety for its rapid advancement and its completion by the plaintiff within the contract time. And to this end it appears the board of directors, during the summer of 1848, passed several resolutions of a conciliatory character,

enjoining upon the plaintiff to apply more force to the work, and prosecute it with greater energy.

§ 1912. *If a forfeiture be declared from corrupt and mercenary motives the party injured is entitled to damages.*

Some testimony has been introduced by the plaintiff proving that some of the defendants, on different occasions, and to different persons, expressed the opinion that by annulling the contract a considerable saving would result to the company; and it is insisted in behalf of the plaintiff that this was the motive in declaring the forfeiture. If such an inference is fairly sustainable, the jury will be fully justified in finding the allegation of evil motive, as alleged in the declaration, to be true, and returning a verdict accordingly. If a wrong has been committed in this transaction, with the low and mercenary design of benefiting the company, it affords a fair implication that the annulment was wrongful and malicious, and the plaintiff is well entitled to recover the full amount of any injury which he has thereby sustained. The jury, however, must be satisfied beyond a fair doubt that the defendants were actuated by a motive so dishonorable and fraudulent. And they will not be justified in such a presumption by the fact that some of the defendants expressed an opinion that the forfeiture would result in a saving to the company. Such an opinion may have been entertained without presuming that it necessarily induced the act of forfeiture. Indeed, such an inference is in direct contradiction to the testimony of the engineer, who, as before stated, testifies that he declared the forfeiture from a conviction of duty, and on his sole responsibility. He also swears that, in his judgment, no saving would accrue to the company by the annulment of the contract.

§ 1913. *If the plaintiff suffers no actual loss by the forfeiture of his contract by defendants, under an agreement allowing such forfeiture under stated circumstances, he is entitled to no damages.*

In no aspect of this case can the plaintiff's alleged loss from the forfeiture of the contract be taken into consideration by the jury in estimating damages, if they are satisfied that, by retaining the work, he would have realized no profit, or that there would have been an actual loss. Some of the witnesses for the plaintiff express the opinion that the plaintiff would have made some profit on his contract if he had been permitted to complete it. Others, among whom is the engineer, having an accurate knowledge of all the facts necessary to a correct judgment on this point, say the plaintiff would have lost money by holding on to the contract and completing the work. It will be for the jury to decide as to the preponderance of the testimony relating to this point of the case. Whether, on the supposition of a loss to the plaintiff from the forfeiture, he is not barred from recovering it in this action by his recovery in the prior suit will be a proper subject of inquiry in considering the second plea of the defendants.

With reference to the question of loss or profit by the plaintiff if the contract had not been annulled, there is evidence which is entitled to the consideration of the jury, proving that the plaintiff had no hope or expectation of completing the work within the contract time. By the terms of the contract, in the event of a failure to finish the work according to its requirements, he was subject to a deduction of one-sixth upon the entire value of work done; and his profit, if any, would be reduced by this amount. And, moreover, without question, failing to complete the work by the 1st of November, 1848, the contract would then be at an end, and the work pass into the company's hands. These sug-

gestions are submitted to the jury to aid them in coming to a just conclusion in reference to the probabilities of profit to the plaintiff if the contract had not been annulled.

§ 1914. *Where malicious motives constitute the gravamen of the complaint, circumstances showing difficulties in complying with the contract on the part of the plaintiff are not to be considered.*

With reference to the issue on which the jury are to pass in this case, it is perhaps not necessary to decide whether the sickness of the plaintiff and his brother, during the summer of 1848, and the prevalence of high water in the Wabash during that season, which may have retarded the progress of the work, would have afforded a legal excuse for not completing it within the contract time, if there had been no annulment of the contract. These contingencies were not provided for in the clause of forfeiture, and did not affect the right of the engineer to annul the contract, if, without reference to these, the facts justified the act. In the posture in which this case is before the court and jury, the question is not whether the plaintiff is excusable for not prosecuting the work with more diligence and energy, but whether the plaintiff's allegations of malicious motives in the forfeiture are sustained by the evidence.

§ 1915. *Malicious arrest of plaintiff can only be shown as evidence of improper motives on the part of defendants in forfeiting the contract, and in aggravation of damages.*

As to the arrest and imprisonment of the plaintiff on a warrant of the peace, issued at the instance of one of the defendants, with the alleged malicious purpose of compelling a transfer or sale of the plaintiff's tools, implements, etc., to the company, which, it is insisted by counsel, is of itself a sufficient ground to justify a verdict of damages in this action, it will be noticed that it is not set forth in the declaration as a distinct and substantive cause of action. It is stated as one of a series of acts showing the malicious purpose of the defendants in the entire transaction. Isolated from the other facts of the case, it cannot constitute a legal basis for a general verdict against the defendants; but, if the jury believe the main fact charged, namely, that the defendants maliciously procured the declaration of forfeiture and subsequently affirmed the act, and that the arrest and imprisonment of the plaintiff were without probable cause, and with a bad purpose, the latter facts may properly be taken into consideration in aggravation of damages.

§ 1916. *A former recovery in debt against a corporation is no bar to a suit for damages against individuals for malicious proceedings on their part against the interests of plaintiff.*

The views of the court on the plea of a former recovery, interposed by the defendants, will now be briefly stated. As before noticed, it is insisted by counsel that the jury may include in their verdict the prospective profit of the plaintiff, on his contract with the company, if there had been no annulment, even if the jury in the former suit estimated such profit in their verdict. The court, on this point, has no hesitancy in saying, if the jury are satisfied the supposed profit on the contract was taken into consideration by the former jury, and was included in their verdict, it cannot be embraced in the verdict to be returned in this case. It is a plain principle of law, and an obvious dictate of justice, that a party shall not have two recoveries for the same cause of action. The former action, as appears from the record, was in debt, against the Wabash Navigation Company, and the amount recovered was nearly \$10,000. Three of the jurors in that case testify that their recollection is dis-

tinot,—that the prospective profit of the plaintiff on his contract with the company was included in their verdict. In addition to this, it is proved by two gentlemen who were of counsel in that case, on opposite sides, that this claim was insisted on in argument to the jury; and they have no doubt, from the amount of the verdict, that it was considered and allowed by them. This evidence would seem to be satisfactory on this point. But the present action against the defendants as individuals is not barred by the recovery in the former action. If the jury find that the acts charged in the declaration are proved, and were done with the malicious motives imputed to them, it will be competent for them to return a verdict for such damages as they may deem just, excluding from their computation the amount of any supposed loss to the plaintiff from the forfeiture of the contract.

MISSOURI FURNACE COMPANY v. COCHRAN.

(Circuit Court for Pennsylvania: 8 Federal Reporter, 463-467. 1881.)

Opinion by ACHESON, D. J.

STATEMENT OF FACTS.—This suit, brought February 26, 1880, was to recover damages for the breach by John M. Cochran of a contract for the sale and delivery by him to the plaintiff of thirty-six thousand six hundred and twenty-one tons of standard Connellsville coke, at the price of \$1.20 per ton (subject to an advance in case of a rise in wages), deliverable on cars at his works, at the rate of nine cars of thirteen tons each per day on each working day during the year 1880. After three thousand seven hundred and sixty-five tons were delivered, Cochran, on February 13, 1880, notified the plaintiff that he had rescinded the contract, and thereafter delivered no coke. After Cochran's refusal further to deliver coke, the plaintiff made a substantially similar contract with one Hutchinson for the delivery during the balance of the year of twenty-nine thousand five hundred and eighty-seven tons of Connellsville coke at \$4 per ton, which was the market rate for such a forward contract, and rather below the market price for present deliveries on February 27, 1880, the date of the Hutchinson contract. The plaintiff claimed to recover the difference between the price stipulated in the contract sued on, and the price which the plaintiff agreed to pay Hutchinson under the contract of February 27, 1880. But the court refused to adopt this standard of damages, and instructed the jury that the plaintiff was "entitled to recover, upon the coke which John M. Cochran contracted to deliver and refused to deliver to the plaintiff, the sum of the difference between the contract price—that is, the price Cochran was to receive—and the market price of standard Connellsville coke, at the place of delivery, at the several dates when the several deliveries should have been made under the contract." Under this instruction there was a verdict for the plaintiff for \$22,171.49. As the plaintiff had in its hands \$1,521.10 coming to the defendant for coke delivered, the damages as found by the jury amounted to the sum of \$23,692.50.

The plaintiff moved the court for a new trial; and, in support of the motion, an earnest and certainly very able argument has been made by plaintiff's counsel. But we are not convinced that the instruction complained of was erroneous.

§ 1917. *Measure of damages when vendor refuses to deliver goods according to contract. Cases cited.*

Undoubtedly it is well settled, as a general rule, that when contracts for the sale of chattels are broken by the vendor failing to deliver, the measure of

damages is the difference between the contract price and the market value of the article at the time it should be delivered. Sedgwick on the Measure of Damages (7th ed.), 552. In *Shepherd v. Hampton*, 3 Wheat., 200, this rule was distinctly sanctioned. Chief Justice Marshall there says: "The unanimous opinion of the court is that the price of the article at the time it was to be delivered is the measure of damages." *Id.*, 204. Nor does the case of *Hopkins v. Lee*, 6 Wheat., 118, promulgate a different doctrine; for, clearly, "the time of the breach" there spoken of is the time when delivery should have been made under the contract.

It is said in Sedgwick on the Measure of Damages (7th ed.), 558, note b: "Where delivery is required to be made by instalments, the measure of damages will be estimated by the value at the time each delivery should have been made." In accordance with this principle the damages were assessed in *Brown v. Muller*, Law Rep., 7 Ex., 319, and *Roper v. Johnson*, Law Rep., 8 C. P., 167, which were suits by vendee against vendor for damages for failure to deliver iron in the one case, and coal in the other, deliverable in monthly instalments. In one of these cases suit was brought after the contract period had expired; in the other case before its expiration; but in both cases the vendor had given notice to the plaintiff that he did not intend to fulfil his contract. To the argument, there urged on behalf of the *vendor*, that upon receiving such notice it is the duty of the vendee to go into the market and provide himself with a new forward contract, Kelly, C. B., in *Brown v. Muller*, said: "He is not bound to enter into such a contract, which might be to his advantage or detriment, according as the market might fall or rise. If it fell, the defendant might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand."

Where the breach is on the part of the *vendee*, it seems to be settled law that he cannot have the damages assessed as of the date of his notice that he will not accept the goods. Sedgwick on Measure of Damages, 601. The date at which the contract is considered to have been broken by the buyer is that at which the goods were to have been delivered, not that at which he may give notice that he *intends* to break the contract. Benjamin on Sales, § 759. And, indeed, it is a most rational doctrine that a party, whether vendor or vendee, may stand upon his contract and disregard a notice from the other party of any intended repudiation of it. If this were not so, the party desiring to be off from a contract might choose his own time to discharge himself from further liability. The law as to the effect of such notice is clearly and most satisfactorily stated by Cockburn, C. J., in *Frost v. Knight*, Law Rep., 7 Ex., 112.

"The promisee, if he pleases, may treat the notice of intention as inoperative, and wait the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him to decline to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will

be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

We do not think the force of the English cases referred to has been at all weakened by that of the *Dunkirk Colliery v. Lever*, 41 Law Times Rep. (U. S.), 632, so much relied on by the plaintiff's counsel. Nor are the facts of that case similar to those of the case in hand. There the controlling fact was that at the time the vendee definitively refused to accept, *there was no regular market for cannel coal*, and the vendors resold as soon as they found a purchaser according to the ordinary course of their business, and without unreasonable delay. Therefore, it was held that the plaintiffs were entitled to the full amount of the difference between the contract price and that which they obtained.

Our attention has been called to *Masterton v. Brooklyn*, 7 Hill, 61. Undoubtedly this is a leading case in this branch of the law, and especially upon the subject of the profits allowable as damages, and the principles upon which they are to be ascertained. The suit, however, was upon a contract to procure, manufacture and deliver marble for a building, and involved an investigation into the constituent elements of the cost to which the contractor might have been subjected had the contract been carried out, such as the price of rough material in the quarry, expenses of dressing, etc. Upon the question as to the *time* at which the cost of labor and materials was to be estimated the court was divided, and I do not find that the views of the majority upon this precise point have been followed. The case, however, lacked the element of market value (*Id.*, 70); and as Judge Nelson cited with approbation *Boorman v. Nash*, 9 Barn. & C., 145, and *Leigh v. Paterson*, 8 Taunt., 540, it cannot be supposed that the court intended, in a case of a marketable article having a market value, to sanction the principle contended for here.

I see nothing in the present case to distinguish it from the ordinary case of a breach by the vendor of a forward contract to supply a manufacturer with an article necessary to his business. For such breach what is the true measure of damages? Says Kelly, C. B., in *Brown v. Muller*: "The proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed." That result — which is compensation — is secured, it seems to me, by the rule given to the jury here, unless the case is exceptional. The vendee's real loss, whether delivery is to be made at one time or in instalments, ordinarily is the difference between the contract price and the market value at the times the goods should be delivered. If, however, the article is of limited production, and cannot, for that or other reason, be obtained in the market, and the vendee suffers damage beyond that difference, the measure of damages may be the actual loss he sustains. *McHose v. Fulmer*, 73 Penn. St., 367; *Richardson v. Chynoweth*, 26 Wis., 656; *Sedgwick on Dam.*, 554. With this qualification to meet exceptional cases, the rule that the damages are to be assessed with reference to the times the contract should be performed, furnishes, I think, a safe and just standard, from which it would be hazardous to depart.

In this case I fail to perceive anything to call for a departure from that standard. There was no evidence of any special damage to the plaintiff by the stoppage of its furnaces or otherwise. Furthermore, the contract with Hudson, February 27, 1880, was made at a time when the coke market was

excited and in an extraordinary condition. Unexpectedly and suddenly coke had risen to the unprecedented price of \$4 per ton; but this rate was of brief duration. The market declined about May 1, 1880, and by the middle of that month the price had fallen to \$1.30 per ton. The good faith of the plaintiff in entering into the new contract cannot be questioned, but it proved a most unfortunate venture. By the last of May the plaintiff had in its hands more coke than was required in its business, and it procured—at what precise loss does not clearly appear—the cancellation of contracts with Hutchinson to the extent of twenty thousand tons. As the plaintiff was not bound to enter into the new forward contract, it seems to me it did so at its own risk, and cannot fairly claim that the damages chargeable against the defendant shall be assessed on the basis of that contract. The motion for a new trial is denied.

§ 1916. **Damages limited to those in the contemplation of the parties at the time of the contract.**—The owner of a vessel having an order for coal was directed by the shipper to take on part of the cargo at one dock, and the balance at his own dock. Having taken on board a part of his cargo from the upper dock, and the weather being threatening, the master put to sea without completing his cargo or signing bills of lading, or reporting his departure to the shipper. The cargo was lost by perils of the sea. There was an agreement between the shipper and the consignee that the former should insure this cargo of coal for the benefit of the consignee, but this was unknown to the master. This cargo was not insured by the shipper because he did not know of the departure of the vessel. In an action by the consignee against the owner for damages for the failure of the master to report to the shipper, by reason of which the insurance was lost, it was held that as only those damages can be recovered on a contract which were in the contemplation of parties thereto at the time of the making thereof, and that as damages for the failure to insure cannot be held to have been in the contemplation of the parties to the contract of affreightment, therefore the consignee could not recover. *The Ontario*, 1 Brown, 483.

§ 1919. **Not to be decided on demurrer.**—The amount of damages to which plaintiff is entitled is not to be decided upon a demurrer. *Hoppock v. Wicker*, 4 Biss., 489 (§§ 331, 332).

§ 1920. **Expectations of profits.**—Evidence that it was expected that saw-mills would be built along the line of a proposed railroad, and that the road would make a profit of \$20,000 in transporting lumber, is too vague to afford a basis for estimating damages. *Phillips, etc., Construction Co. v. Seymour*, 1 Otto, 646 (§§ 896-903).

§ 1921. **Loss of opportunity.**—Though a party by the non-payment of money due to him may lose an opportunity for an advantageous bargain, yet such a loss is not recoverable in an action for the money due. *Pope v. Barrett*, 1 Mason, 123.

§ 1922. **Damages resulting from breach of warranty of quality may be set up in recoupment in an action for the price of goods sold.** *West, Bradley & Cary Manuf'g Co. v. Ansonia Brass & Copper Co.*, 4 Fed. R., 145 (§ 324).

§ 1923. **Damages are given only to time of suit brought.**—In an action for the hire of a steamboat, the hire cannot be estimated or damages given to any time posterior to the institution of the suit. A judgment was, in this case, reversed because the jury were instructed to give damages to a time posterior to the issuing of the writ and the appearance by the defendant and giving a rule to declare. *Bradley v. Steam Packet Co.*, *9 Pet., 107.

§ 1924. **Damages for delay caused by law.**—If, after the making of a contract, its execution is suspended by law, such suspension operates to release all parties from any claim for damages for delay. *Kelly v. Johnson*, 8 Wash., 47.

§ 1925. **Damages for breach on part of plaintiff.**—In an action of covenant, if the defendant has been injured by a breach of the covenant on the part of the plaintiff, he may recover damages in an action against him, but he cannot give such breaches in evidence, either by way of bar, of offset or in mitigation. *Webster v. Warren*, *2 Wash., 456.

§ 1926. **Breach of contract to deliver merchandise.**—The measure of damages for a failure to deliver merchandise at the time and place specified in the contract is the difference between the contract price and the current market price at the time and place of delivery. *Halsey v. Hurd*, 6 McL., 106; *White v. Arleth*, 1 Bond, 326; *Thompson v. Cincinnati, W. & Z. R. Co.*, *1 Bond, 152.

§ 1927. **The measure of damages for a failure to deliver certain machines according to the terms of a contract of sale is the price at which the vendee at the time of the breach could procure machines of the same kind and number. The measure of damages where the breach is only partial, by reason of the machines not being fit for use, is the amount which it would**

cost to supply the defects in the machines, irrespective of the amount of the contract price. *Marsh v. McPherson*, 15 Otto, 717.

§ 1928. The measure of damages for a failure to deliver merchandise is its market value on the day on which it should have been delivered. In estimating such damages the jury cannot go beyond the value of the merchandise at the time when it should have been delivered, whatever are the motives of the seller in refusing to deliver, nor can it take into account the profits at which the vendee might have sold it. If the market price is fixed, that furnishes the measure of damages, but if it is fluctuating, the jury may take any price not above or below the limit, and may fix on the higher price if the conduct of the seller has been wilful. *Blydenburgh v. Welsh*, Bald., 338.

§ 1929. The price of an article at the place of delivery is the standard by which to estimate the damages for non-delivery. But where defendants had entire control of the market at that place, it was held that the measure of damages was the difference between the price of the article in the place of delivery and the price in the nearest available market, plus the increased expense (if any) of transportation to the agreed place of delivery. *Grand Tower Co. v. Phillips*, 23 Wall., 471 (§§ 1025-27).

§ 1930. In 1879 defendants agreed to deliver a certain quantity of ice "during the following season," i. e., (say) between April and December. In July, 1880, they refused to perform their contract, on account of the great rise in the value of ice. At that time ice was worth \$3 per ton, but fell later in the season to \$2. In an action for breach it was held that it was to be presumed that defendants, had they performed, would have done so at that time of the season when ice was lowest, and that damages should be assessed at \$3 per ton. *Dingley v. Oler*, 11 Fed. R., 372 (§§ 1861-62).

§ 1931. Failure to deliver goods of the quality contracted for.—Where a breach of contract in the quality of goods furnished under a contract is set up as a defense in an action on a promissory note given for such goods, the measure of damages is the difference in the worth of the goods contracted for and those furnished, computed at the time and place of the delivery. *Youqua v. Nixon*, Pet. C. C., 223.

§ 1932. In the case of a contract for the sale of goods to be shipped to a foreign market, if the goods delivered are not of the quality contracted for, the measure of damages is to be computed from the price at the place where they were to be delivered, and not from the price at the place to which they were to be sent. *Willings v. Consequa*,* Pet. C. C., 172.

§ 1933. Failure to deliver teas of certain quality.—In assessing damages for breach of contract in failing to deliver teas of the first quality, it is held that the difference between the sales of the teas at the foreign market and other teas of the first quality is not otherwise to be regarded than as it furnishes a test of the quality and the rate of loss to be applied to the prime cost. *Willings v. Consequa*,* Pet. C. C., 301.

§ 1934. In case of a failure to deliver at Canton the quality of tea bargained for, the measure of damages is to be determined by taking the difference between the price obtained for the tea at the Dutch sales, and that obtained for other teas of the quality contracted for, and to make that difference the rate of injury sustained, and apply it to the first cost of the tea at Canton, adding thereto the premium of insurance, duties, and all other usual expenses and charges. *Cheongwo v. Jones*,* 3 Wash., 359.

§ 1935. If teas furnished are not according to contract and are inferior to other teas of the agreed quality, the difference between their value and that of teas of the agreed quality is the measure of damages. *Youqua v. Nixon*,* Pet. C. C., 222.

§ 1936. The measure of damages for the breach of a contract to deliver teas of a specified quality is to consider the sales of the teas at the markets where they were disposed of, and compare them with the sales of other teas of the same quality, to determine the rate of loss, and apply this rate to the prices of tea of the same quality at the place where purchased, and in the absence of evidence the contract price may be taken as evidence of that price. *Gilpin v. Consequa*,* 3 Wash., 184.

§ 1937. Seller not relieved from damages for failure to deliver, by exhaustion of the market.—If the quality and quantity of goods contracted to be delivered could not be obtained at the time and place of delivery, this does not relieve the seller from his liability for damages resulting from his breach of contract. He should have taken care before he made the contract, and in case the state of the market would not allow it, he should have provided therefor in his contract. *Youqua v. Nixon*, Pet. C. C., 222.

§ 1938. For a breach of a contract to deliver property on demand the measure of damages is the price to be paid therefor at the time of the demand. *Cottle v. Payne*,* 3 Day (Conn.), 295.

§ 1939. Failure to ship sugars as promised.—Where A., in possession of sugars of B., agreed, in consideration of C.'s giving to B. an authority to draw on him (C.) to ship the sugars then in his possession at New York to C., at Marseilles, it was held, in an action by

C. against A. for failure to do so, that the measure of damages was the value of the sugars in New York at the time of the breach of the contract. *Rabaud v. DeWolf*, *1 Paine, 580.

§ 1940. Refusal to receive and pay for goods bought.—A party to a contract of sale is liable for a refusal to receive and pay for the goods, and the measure of the seller's recovery is the loss suffered by him. *Gibbons v. United States*, 8 Wall., 272.

§ 1941. When a contract to purchase carbines is broken, and it is not shown that they at any time had a market or selling price, and it is not found how much they were worth at the time delivery was offered and refused, or whether they could have been sold at all at that time, the measure of damages is the actual loss suffered by the seller. *Manufacturing Co. v. United States*, 17 Wall., 595.

§ 1942. Where the vendee in a contract of sale refuses to accept the goods when tendered, the vendor may sell them, and, in an action, recover the difference between the contract price, with interest thereon from the day of tender, and the price for which they were sold, less the reasonable expenses of the resale. *Pope v. Filley*, *3 McC., 190.

§ 1943. In an action for breach of contract on the part of the defendant in refusing to accept certain fire hose for the manufacture of which it had contracted with the plaintiff, evidence as to the amount of leather which had been cut at the time the notice was given by the defendant, and that the leather so cut could not be made into marketable hose without being cut down some, and thus wasting a part of it, was held inadmissible as bearing on the question of damages. *Chicago v. Greer*, *9 Wall., 726.

§ 1944. Where a contract has been made for furnishing a quantity of merchandise at a given place within a given time, when the time for the acceptance of the property has expired, if the property has not been accepted, the vendors have the legal right to throw the property upon the vendees and recover the contract price, or to dispose of it as the trustees of the vendees, crediting them with the amount it brought and charging them with the balance which might remain. But in making this election their conduct must be clear and unmistakable so as to put the vendees upon their guard, and inform them of the course which the vendors intend to pursue. In so acting as trustees the vendors are bound to proceed in the manner prescribed by the well known and well settled rules of law which fix the duties and responsibilities of trustees in like circumstances. They have no right to ship the article to an unusual and dangerous market, nor to hold a perishable article for the chance of realizing a better price. *Hughes v. United States*, *4 Ct. Cl., 74.

§ 1945. Where the buyer sells the goods for the benefit of the seller.—A contract was made for the purchase of shingles at \$3.25, the quantity to be sold for that price, however, not being specified. After a quantity were delivered the seller demanded that price per bunch, and the buyer offered to pay that price per thousand. As they could not agree, the buyer offered to return the shingles, but the seller refused to accept them. Thereupon the buyer sold them for the benefit of the seller. *Held*, that the measure of the seller's recovery in a suit against the buyer was the price received by him on the sale, less a reasonable compensation to him for his services in making it. *Greene v. Bateman*, 2 Woodb. & M., 332.

§ 1946. Failure to pay in the paper of a certain company.—Where a party agreed to make payment in paper of the M. Company and failed to pay at the agreed time, it was held that the measure of damages was the specie value of the M. Co.'s paper at the time it was due, and that the debtor was not bound to pay in specie because he had failed to pay at the agreed time. *Robinson v. Noble*, 8 Pet., 181 (§§ 1033-34).

§ 1947. If one has paid money for a consideration which fails, and which in equity ought to be paid back, as for goods bought by him and not delivered, the measure of damages, on recovery, is the sum paid with interest. *Nash v. Towne*, 5 Wall., 689 (§§ 1030-42).

§ 1948. Delay in payment of money due.—Interest is the measure of all damages for delay in the payment of money due upon contract. *Loudon v. Taxing District*, *14 Otto, 771.

§ 1949. The measure of damages for a debtor's failure to pay money, or deliver his obligations to pay money, is the amount due with the interest given by the *lex loci contractus*, and as a rule collateral damages cannot be given. *City of Memphis v. Brown*, 1 Fip., 210.

§ 1950. Breach of contract to transport merchandise.—The owner of a vessel contracted to transport a cargo of brick, but before the brick were loaded the vessel froze up and the master died. The owner refused to perform the contract and to allow any brick to be loaded or unloaded. *Held*, that the owner of the brick could recover the value of the brick loaded and withheld; the cost of transporting the residue from the storehouse to the dock; for injuries received while lying on the dock waiting for the vessel to receive them; and the difference against him, if any, between what he had agreed to pay for the transportation, and what he was obliged to pay for some other mode of conveyance; but that he could not recover for damages received by the bricks after notice of the refusal of the owner of the vessel to complete the contract. *The Flash*, Abb. Adm., 120.

§ 1951. **Contract for the carriage of goods rescinded by the sender.**—A contract to carry certain merchandise to a certain point was rescinded by the party for whom the work was to be done. *Held*, that the measure of damages is the clear net profits which would have been realized had the contract not been rescinded, or, in other words, the difference between the compensation which the carrier was to receive and what it would cost him to perform the service. *Moore v. United States*,* 1 Ct. Cl., 95.

§ 1952. **Failure to transfer stock.**—In an action for failure to transfer stock, the measure of damages is the value of the stock on the day on which it ought to have been transferred. *Taylor v. Turner*,* 2 Cr. C. C., 203.

§ 1953. **Failure of owner to sell cattle and divide with the feeder according to promise.**—B. contracted with T. to take charge of certain cattle belonging to T., and tend them till a certain date, at which time T. was to sell them, and, after deducting the first cost of the cattle, was to divide the surplus equally. *Held*, that the measure of damages for the failure of T. to sell and divide is the half of the market price of the cattle on the day on which they should have been sold, after deducting the first cost of the cattle. *Beckwith v. Talbot*,* 2 Colo. Ty., 650. See §§ 1797-98.

§ 1954. **Contract for convict labor — Failure of warden to keep the convicts in order.**—By contracts to furnish convict labor, the warden of the prison agreed to keep the convicts in order. This he failed to do, and, in consequence, the productiveness of the convict labor was reduced one-third during the larger part of the time included in the contracts. *Held*, that for such time the warden was entitled to recover only two-thirds of the contract price. *In re Southwestern Car Co.*,* 9 Biss., 76.

§ 1955. **Building not constructed according to the terms of the contract.**—It seems that when a builder has not constructed a building according to the terms of the contract under which he has worked, the measure of damages is the difference in value of the building as finished, and as required to be finished by the terms of the contract. *Schaefer v. Gildea*,* 8 Colo. Ty., 18.

§ 1956. **Promise by one to erect and lease a building — Rescission by the other.**—A party contracts to erect a building and lease it to another at a certain rate for a certain time. Before the building is completed the other party rescinds the contract. *Held*, that the measure of damages is the net gain which the builder would have derived from the full performance of the contract; and for the purpose of ascertaining this profit, interest on investment, taxes and repairs are to be deducted from the total rent contracted for. *Adams v. United States*,* 1 Ct. Cl., 106.

§ 1957. **Contract payable in Confederate currency.**—Where a contract was made during the war of the rebellion, which provided for the payment of Confederate currency, the measure of recovery in an action, after the suppression of the rebellion, is the value of the Confederate currency as represented by federal currency at the time the contract was entered into. *Wilmington & Weldon R'y Co. v. King*, 1 Otto, 5.

§ 1958. **Failure to deliver property seized by government for condemnation.**—The measure of damages for a failure to deliver property seized for condemnation by the government, and for which a delivery bond is given, is the highest price for which the property might have been sold at any time between the breach and the commencement of suit. *United States v. Rob Roy*, 1 Woods, 43.

§ 1959. **Agreement to pack pork — Refusal to perform by furnishing the hogs.**—Where the plaintiff agreed to pack a definite number of hogs for the defendant, and made all his preparations to do so, but the defendant refused to perform his agreement to furnish the hogs to be packed, the measure of damages is the difference between the cost of doing the work and the price which the plaintiffs were to receive for it, making a reasonable deduction for the less time engaged, and for the release from the care, trouble, risk and responsibility attending a full execution of the contract. *United States v. Speed*, 8 Wall., 84.

§ 1960. **A party hires another to slaughter and cure a certain number of hogs, but fails to furnish the hogs.** *Held*, that the measure of damages for the failure to furnish the hogs is the net profit which the packer would have derived from the transaction, and to estimate this the price at which he could have procured the work to be done will be taken, less a reasonable sum to be therefrom deducted on account of relief from responsibility, and for the time and trouble which full performance would have entailed. *Floyd v. United States*,* 2 Ct. Cl., 441.

§ 1961. **Contract to pack pork — Failure to use care and skill.**—Where a party undertakes to pack pork for another, agreeing that it shall be well put up, he is bound to use care and skill, and if any of the pork shall be damaged by reason of a want of care or skill, the measure of damages is the difference between the value of the pork, as damaged, and the price of sound marketable pork. *Forman v. Miller*,* 5 McL., 218.

§ 1962. If the party for whom the pork is packed changes the ordinary mode of packing, the packer, thus far, is not liable for damages. *Ibid*.

§ 1963. Breach of contract for wages, or for freight, or for the lease of buildings.—The measure of damages, where a person legally elected is kept out of an office of trust and confidence pending legal proceedings, is the whole amount of the salary received by the intruder during such time. The rule which measures the damages upon a breach of a contract for wages, or for freight, or for the lease of buildings, has no application. In these cases the party aggrieved must seek other employment, or other articles of carriage or other tenants, and the damages recovered will be the difference between the amount stipulated and the amount actually received or paid. But no such rule can be applied to public offices of trust and confidence, the duties of which are not purely ministerial or clerical. *United States v. Addison*, 6 Wall., 297.

§ 1964. Failure to return bonds borrowed of a city.—The measure of damages for the failure of contractors to return to a city its bonds which were lent by it to them for a certain time is the sum for which such bonds could be purchased in the market at the time they should have been returned, and this rule is in no way affected by the fact that at such time the city has no money at hand with which to make such purchases. No court and no government can protect against the misfortunes of poverty. *City of Memphis v. Brown*, 20 Wall., 804.

§ 1965. Breach of contract to provide a sinking fund for the payment of bonds.—The measure of damages for a failure to deliver corporate bonds which are vendible in the markets at a fixed value is not the nominal value of the bonds, but the actual loss to which the party is subjected by reason of the failure to deliver the bonds. Where there was an agreement by a city to furnish a contractor with certain bonds, and to provide a sinking fund for their payment, and the bonds were furnished but no sinking fund was provided, the measure of damages was held to be the difference in value between the bonds as actually furnished and what they would have been worth had the sinking fund been provided as agreed. *City of Memphis v. Brown*, 1 Flip., 215.

§ 1966. Where the hirer prevents the performance of the work.—Where a railway has entered into a contract with a contractor to construct certain track, and prevents the contractor from finishing his work, the measure of the contractor's damage is the difference between the cost of the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital and assumes the risks which attend the enterprise, and to deprive him of it, when the other party has broken the contract, and unlawfully put an end to the work, would be unjust. *Myers v. New York & Cumberland R'y Co.*, 2 Curt., 38.

§ 1967. Where a person contracts for the performance of certain work and afterwards requires the work to be stopped, he is liable to the other party for all damages sustained by him, and this includes compensation for labor performed, and prospective profits on the part unperformed; but the party employed has no right to persist in the employment and thus increase the damages. *McKee v. United States*,* 1 Ct. Cl., 842.

§ 1968. Where one, by his non-performance, prevents the other's performance.—Where a contract to furnish supplies to enable another to get out lumber, and purchase such lumber after it is gotten out, is broken by the person who was to furnish supplies, the damages must be limited to the act of refusal, and the immediate consequences resulting therefrom. The injury cannot extend to the profits which would have arisen on the contract if it had been performed. *Chapin v. Norton*,* 6 McL., 500.

§ 1969. Where the other party prevents a performance—Profits.—If a party to a contract is prevented from performing it by the other party thereto, he is entitled to recover as well such damages as he actually sustains, as the profits he would have realized. The loss of such profits is a part of the damage which he sustains. The expected benefits of the contract are his property. Unreasonably large profits may be an evidence of fraud, but when the contract is established against all charges of fraud, and is held valid, it is entitled to all the legal consequences and incidents of a valid contract. *Hitchcock v. City of Galveston*, 3 Woods, 294.

§ 1970. Debt payable in one country sued for in another.—It seems that whenever a debt is made payable in one country and is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay; for then, and then only, is he fully indemnified for the violation of the contract. In every such case the plaintiff is, therefore, entitled to have the debt to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to or subtracted from the

amount, as the case may require, in order to replace the money in the country where it ought to be paid. *Grant v. Healey*, 3 Sumn., 524 (§§ 1203-1206).

§ 1971. **Contract in one country to pay money in another in the currency of the latter—Suit brought in a third.**—Where a contract is made in one country for the payment of money in another country, in the currency of the latter country, upon suit brought in another country to recover for a breach of the contract, the plaintiff ought to recover such a sum in the currency of the country where the suit is brought as would be equivalent to the sum to which he would be entitled in the country where the debt is payable, calculated by the real and not the nominal par of exchange. Wherever a creditor may sue for his debt he is entitled to have an amount equal to what he must pay in order to remit it to the country where it is payable. *Hargrave v. Creighton*, 1 Woods, 491.

§ 1972. **Quantum meruit for extra work.**—By a special contract a contractor agreed to do certain building for a railway company for which he was to receive a fixed sum, payable partly in stock and partly in cash. During the progress of the work it became necessary to do a large amount of extra work, and furnish a large quantity of extra materials. In an action on an implied *assumpsit* it was held that the contractor was entitled to receive in cash the value of the extra work and materials. The promise implied by the law in such a case is a promise to pay in money what the work is reasonably worth, and is in no respect qualified or governed by the existence of a special contract for doing other work, however intimately the two kinds or amounts of work may in fact be connected together. *Childs v. Somerset & Kennebec R'y Co.*, * 20 Law Rep. (10 N. S.), 564.

§ 1973. Where parties covenant that the value of all extra work done under a contract shall be assessed by two arbiters, one to be appointed by each party, and defendant neglects to appoint such arbiter, plaintiff then has an action on *quantum meruit* for the extra work done; his only action on the covenant is for defendant's failure to appoint an arbiter. *Baker v. Herty*, * 1 Cr. C. C., 249.

§ 1974. **Quantum meruit for work done in part performance.**—Plaintiff did certain work for defendant as part performance of a contract under seal, but was prevented by the act of defendant from completing the work. *Held*, that a count for a *quantum meruit* could not be maintained. *Young v. Preston*, * 4 Cr., 239. Reversing *Preston v. Young*, * 1 Cr. C. C., 857.

§ 1975. Where the parties fail to fix a price.—Where a contract of sale does not fix a specific price, but it is to be settled by the parties, neither party can act alone in the matter, but the act must be joint. If they cannot agree, then a reasonable compensation must be allowed, and such reasonable compensation must be proved by competent evidence and settled by a jury. If the sum fixed by one is not a reasonable compensation, the other is allowed to show this. *United States v. Wilkins*, 6 Wheat., 143.

§ 1976. **Compensation to be settled by the terms.**—Where work is done under a contract, the terms of the contract should settle the amount to be paid, unless it is shown that in consequence of variations from the plan the compensation agreed upon should be increased or diminished. *Schaefer v. Gildea*, * 3 Colo. T'y, 18.

§ 1977. **Law of Pennsylvania as to damages on foreign bills returned protested—Contract made to operate as if bills had been drawn.**—Certain persons bind themselves to the United States to pay to the bankers of the latter at Amsterdam a certain sum on a certain day. The condition of the bond, as well as the agreement under which the bond is given, in case the sum is not paid as agreed, is to repay the amount to the United States, "at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of twenty per cent., in the same manner as if bills of exchange had been drawn for the said sum and they had been returned protested for non-payment, and lawful interest for any delay of payment that may take place after the demand." Payment is made on a day subsequent to the day named, and is received without any agreement whatever. The agreement being made in Philadelphia, the persons making it resident there, and the damages upon bills of exchange returned protested being, under the law of Pennsylvania, twenty per cent., it is held that the parties contemplate a repayment in Philadelphia in the event of non-payment in Amsterdam. And it is held that the reference to bills of exchange is satisfactory evidence that the parties intend the contract, if not as a complete substitute for bills of exchange, to operate between themselves as if bills had been drawn. By the law of Pennsylvania damages are not demandable until the bills are returned back under protest, and receipt of payment before the bill is returned does away with the right to demand them. It is held, in this view, that the United States, by receiving payment at Amsterdam after the day, waive any right to demand the damages, but are entitled to interest from the day fixed for payment to the day payment is made. *United States v. Gurney*, * 4 Cr., 333.

§ 1978. **Evidence as to rates of contracting with others.**—In an action on a contract, evidence as to what rates defendants made contracts with others for similar articles is not ad-

missible to determine the extent of the defendants' obligations to the plaintiff. *Chicago v. Greer*,* 9 Wall., 726.

§ 1979. A surety cannot recover of his principal sums which he is bound to pay without showing that he had paid them before action brought; and if the surety does not show that he has paid them, the presumption is that he has not. *Pigon v. French*,* 1 Wash., 278.

§ 1980. Contract for the division of the net profits of a business.—Under a contract providing for a division of the net profits of a trading business, it is proper to deduct from the gross profits sums paid for taxes, clerk hire and advertising for the business. *Foster v. Goddard*,* 1 Cliff., 138.

§ 1981. It was agreed between G. and F. that G. should carry on the business, and that F. should share the profits. G. sold certain goods to O., but the amount of O.'s indebtedness was in dispute. O. tendered G. a certain amount, which was refused, and after the claim was outlawed O. made another tender, which G. refused, though F. wished to take his share. *Held*, that as G. had the management of the business, and claimed a sum larger than the tender, he had a right to refuse it, and that it was proper to charge the sum claimed as a loss against the business. *Ibid*.

§ 1982. Acceptance of certain sum as compensation.—The allowance and acceptance, without protest, of a certain sum as compensation for services is conclusive upon the employee as to all claims up to the time of such allowance, but after such acceptance the employee is not precluded from claiming compensation for further services, unless it appears that it was intended that such services should be gratuitous. *Oliver v. Vernon*,* 4 Mason, 275.

§ 1983. Breach by notice of intention not to perform.—As to the measure of damages when a contract has been broken by notice of an intention not to perform, given before the time fixed for performance. *Grau v. McVicker*, 8 Biss., 13 (§§ 1838-60).

§ 1984. Contract by purchasers to hold coal or its representative subject to a lien of ship-owners.—A gas company, which had contracted with the charterers of a ship for a large quantity of coal at a certain price, agreed to receive it and hold it, or its representative in value, for the charterers, subject to the lien of the owners of the ship for sums due under the charter-party. The coal having been used, and the owners of the vessel having filed a libel against the coal, or its representative in value, for moneys due under the charter-party, the court held that the representative in value of the coal was the sum which the company was to pay for the same under the contract with the charterers. *Six Hundred and Four Tons of Coal*,* 7 Ben., 525.

2. Liquidated Damages and Penalties.

SUMMARY—*Sum held a penalty*, §§ 1985, 1986, 1988.—*Reduction of damages*, § 1987.—*Sum held liquidated damages*, § 1989.

§ 1985. Owners of a steamboat agreed "to forfeit the sum of \$1,000," if they failed to perform a certain contract. *Held*, that the sum was to be considered a penalty and not liquidated damages. *Taylor v. Steamer Marcella*, § 1990.

§ 1986. A building contract contained the following clause: "The said houses to be completely finished on or before the 24th day of December next, under the penalty of \$1,000, in case of failure." *Held*, that the sum was to be considered as a penalty and not as liquidated damages, and could not be set off in an action of *assumpsit*. *Talloe v. Sandiford*, §§ 1991-94.

§ 1987. The damages in an action of contract may be reduced by evidence of a partial failure of consideration, non-fulfillment of the contract, or breach of warranty. *Van Buren v. Diggs*, §§ 1995-98.

§ 1988. When a written contract which is clear in its terms speaks of a certain sum as a penalty for failure to perform, parol evidence is not admissible to show that such sum was intended by the parties as liquidated damages. *Ibid*.

§ 1989. A contract provided that defendants should erect certain buildings and lease certain rooms therein to plaintiffs for five years, and that for failure to perform the damages should be fixed at \$2,000. *Held*, that such sum must be considered as liquidated damages and not as a penalty. *Harris v. Miller*, §§ 1999-2001.

[NOTES.—See §§ 2002-2012.]

TAYLOR v. STEAMER MARCELLA.

(Circuit Court for Louisiana: 1 Woods, 302-306. 1873.)

Opinion by WOODS, J.

STATEMENT OF FACTS.—This is a libel brought by certain mariners for their wages, against the steamer *Marcella*, and against the freight earned by her on

fifty-seven thousand staves. Avendano & Bros., the owners of the staves have been made defendants, and to the claim of libelants answer in substance: that on the 16th of April, 1863, they made an agreement in writing with the owners of the Marcella, whereby the latter contracted to transport on board the Marcella, from Richland Parish to New Orleans seventy thousand staves, for the freight of \$55 per thousand, and to make two trips if all the staves could not be brought at one trip. Avendano & Bros. agreed to pay freight on seventy thousand staves, whether they furnished that number for transportation or not, and the owners of the boat agreed "to forfeit the sum of \$1,000," if they failed to carry out the contract, except by reason of accidents beyond their control. The answer admits that the Marcella transported under the contract about fifty-seven thousand staves, on which the freight amounted to \$3,132.80, but claims that respondents are entitled to a credit on this amount for \$1,011.40, for certain staves not delivered, and for cash advanced and costs paid, leaving a balance due of \$2,121.40, from which latter sum the respondents claim should be deducted the \$1,000 named in the contract, as the amount to be paid by the owners of the Marcella in case they did not perform the contract.

The only point in the case is whether the respondents, Avendano & Bros., are entitled to the credit of \$1,000 by reason of the failure of the Marcella to transport the thirteen thousand staves, the residue of the seventy thousand named in the contract. No question is made of the right of the Marcella to the freight earned on the fifty-seven thousand staves, although the contract was only partially performed. The precise point to be determined is whether the \$1,000 named in the contract is to be considered a penalty merely, or as liquidated damages. Suppose the Marcella had refused to perform any part of the contract, could the Avendano Bros. have recovered the \$1,000 for the breach? In answering this question, it is to be noted, first, that where it is doubtful on the face of the instrument whether the sum mentioned was intended to be stipulated damages, or a penalty to cover actual damages, the courts hold it to be the latter. *Bearden v. Smith*, 11 S. C. Law Rep., 554.

§ 1990. "*We agree to forfeit one thousand dollars if we fail to carry out this contract*" stipulates a penalty, not liquidated damages.

One of the tests by which this question is to be solved is the language of the contract. In the contract under consideration, the word *damages* is not used. The language is, "We, the owners of the Marcella, agree to forfeit \$1,000 if we fail to carry out this contract." While no particular phraseology is held to govern absolutely, and although the term "liquidated damages" will not be conclusive, the phrase "penalty" is generally so, unless controlled by other very strong considerations. *Higginson v. Weld*, 14 Gray, 165; *Richards v. Edick*, 17 Barb., 260; *Leggett v. Ins. Co.*, 50 id., 616; *Powell v. Burroughs*, 54 Penn. St., 329. The word penalty is not used in this contract, but the word *forfeit* is, which may fairly be regarded as an equivalent. The verb "to forfeit" is defined, "to lose by some breach of condition; to lose by some offense." The noun "forfeit" is defined to be "a forfeiture, a fine, a mulct." The noun "penalty" is defined, "forfeiture, or a sum to be forfeited for non-compliance with an agreement, a fine." See *Worcester's Dictionary*.

These definitions show that the words *forfeit* and *penalty* are substantially synonymous, so that when the owners of the Marcella agreed that in a certain contingency they would forfeit \$1,000, their meaning was, that the penalty for non-performance should be that sum. So that the contract under consideration provided for a penalty to cover actual damages, and did not stipulate for

liquidated damages. The damages sustained by a breach of this contract were such as could, without difficulty, be ascertained. This is another reason for construing the contract to provide for a penalty to cover actual damages only. *Kimble v. Farren*, 6 Bing., 141; *Lampman v. Cochran*, 16 N. Y., 275; *Higginson v. Weld*, 14 Gray, 165; *Berry v. Wisdom*, 3 Ohio St., 241. In *Tayloe v. Sandiford*, 7 Wheat., 13 (§§ 1991-94, *infra*), Marshall, C. J., said: "In general, a sum of money to be paid in gross for the non-performance of an agreement is considered a penalty. It will not, of course, be considered as liquidated damages." But in the case under consideration there had been a part performance of the contract; by far the larger part of the service to be done had been performed, and there appears to have been an acceptance of such part performance. In such a case the rule has been laid down, that when the contract is such that it can be separated, as to performance, so as to admit of an assessment of damages for a breach of one part and not of another, a party should not, for a small omission, be made responsible for the whole amount of damages specified. *Colwell v. Lawrence*, 38 Barb., 643; *Fitzpatrick v. Cottingham*, 14 Wis., 219.

In the case of *Shute v. Taylor*, 5 Metc., 61, the supreme court of Massachusetts, after stating it to be the tendency and preference of the law to regard a sum stated to be payable, if a contract is not fulfilled, as a penalty and not as liquidated damages, held it decisive against the latter construction, that in the case before them there had been a part performance and an acceptance of such part performance. These rules of construction and authorities, it seems to me, settle beyond controversy that the \$1,000 named in the contract of the *Marcella* is to be considered as a penalty only, to cover the actual damage arising from the non-performance of the contract. The *Avendano Bros.* are, therefore, entitled to deduct in equity from the freight carried only the actual damage sustained by the non-performance of the contract, and cannot claim a credit for the \$1,000 as liquidated damages in full. As there is no actual damage shown or even claimed, they are not entitled to any reduction from the freight actually carried.

I have considered the question just as if the *Marcella* had attempted to offer no excuse for the non-performance in full of her contract. It is claimed on her part, that she was disabled, and that the water in the bayou became so low as to be unnavigable for her, and that these facts excused the full performance of the contract, which provided for a failure arising from accidents beyond control. But in the view I have taken of the contract, it is unnecessary to consider this question. Let there be a decree that *Avendano & Bros.* pay into the registry of the court the sum of \$2,121.40, the freight due the *Marcella*, with interest from date of judicial demand, and without any deduction for damages.

TAYLOE v. SANDIFORD.

(7 Wheaton, 13-22. 1822.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a writ of error to a judgment of the circuit court of the county of Alexandria, rendered in an action of *assumpsit* brought by T. and S. Sandiford against John Tayloe. It appeared on the trial of the cause, that on the 13th of May, 1816, the parties entered into a written contract, by which the defendants in error undertook to build for the plaintiff three houses on Pennsylvania avenue in the city of Washington. On the 18th day of the same month, the parties entered into a contract, under seal, for the building of three

additional houses, at a stipulated price. This contract contains the following covenant: "The said houses to be completely finished on or before the 24th day of December next, under a penalty of \$1,000, in case of failure." The parties entered into a third verbal contract for some additional work, to be measured, and paid for according to measurement. These three houses were not completed by the day, and the plaintiff in error claimed the sum of \$1,000 as stipulated damages, and retained it out of the money due to the defendants in error. This suit was thereupon brought, and on the trial of the cause the defendant in the circuit court claimed to set off in this action \$1,000, as in the nature of stipulated damages; but the court overruled this claim, and decided that the said sum of \$1,000 had been reserved in the nature of a penalty and could not be set off in this action.

The defendant then moved the court to instruct the jury that "upon the evidence offered, if believed, the plaintiffs were not entitled to recover in this action the said sum of \$1,000, inasmuch as the same, if due at all, was due under a contract under seal, and that the declarations of the defendant, and the understanding between the parties as to the reservation of the said \$1,000, given in evidence as aforesaid, was competent and sufficient evidence of the defendant's intention to apply his payment to the extinguishment, in the first instance, of such parts of the said moneys as were due by simple contract, and to reserve the \$1,000 out of the money due under the said original contract." This instruction the court refused to give; and did instruct the jury "that it was competent to the plaintiffs to recover the said \$1,000 in this action, unless they should be satisfied by the evidence that the defendant, at the time of paying the money, had expressly directed the same, or a sufficient part thereof, to the payment of the \$1,500 due on the simple contract." To both these opinions the defendant excepted, and the jury having given a verdict for the plaintiff in the circuit court, this writ of error was brought to the judgment rendered thereon.

It is contended by the plaintiff in error that the circuit court erred: 1. In overruling the claim to offset the \$1,000 mentioned in the agreement. 2. In declaring that the plaintiff in that court might so apply the payments made as to discharge the contract under seal, and leave the sum retained by the defendant in that court to be demanded under the simple contract.

§ 1991. *Rules to distinguish penalties from liquidated damages.*

1. Is the sum of \$1,000 mentioned in the agreement of the 13th of May to be considered as a penalty or as stipulated damages?

The words of the reservation are: "The said house to be completely finished on or before the 24th day of December next, under the penalty of \$1,000 in case of failure." In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not of course be considered as liquidated damages, and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty, and it would require very strong evidence to authorize the court to say that their own words do not express their own intention. These writings appear to have been drawn on great deliberation, and no

slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms they have employed.

The counsel for the plaintiff in error supposes that the contract furnishes clear evidence that the parties intended this sum as liquidated damages. The circumstance that it is annexed to the single covenant, stipulating the time when the work shall be completed, is considered as showing that it was intended to fix the damages for the breach of that covenant. Without deciding on the weight to which this argument would be entitled, if supported by the fact, the court cannot admit that it is so supported. The engagement, that the said houses shall be completely finished on or before the 24th day of December next, is as much an engagement for the manner as for the time of finishing the work, and covers, we think, all the covenants made by the defendants in error in that agreement. The case, therefore, presents the single question whether an agreement to perform certain work by a limited time, under a certain penalty, is to be construed as liquidating the damages which the party is to pay for a breach of his covenant. This question seems to have been decided in the case of *Smith v. Dickenson*, reported in 3 Bos. & Pull., 630.

§ 1992. *Penalty cannot be a set-off in an action of assumpsit.*

The plaintiff in error relies on the case of *Fletcher v. Dyche*, reported in 2 Term R., 32, in which an agreement was entered into to do certain work within a certain time, and if the work should not be done within the time specified, "to forfeit and pay the sum of 10*l.* for every week," until it should be completed. But the words "to forfeit and pay" are not so strongly indicative of a stipulation in the nature of a penalty as the word "penalty" itself; and the agreement to pay a specified sum weekly during the failure of the party to perform the work partakes much more of the character of liquidated damages than the reservation of a sum in gross. The court is well satisfied that this stipulation is in the nature of a penalty, and, consequently, that there was no error in rejecting it as a set-off in this case.

§ 1993. *In the case at bar action should have been brought on the sealed instrument.*

The second objection goes entirely to the form of the action. The declaration is in *assumpsit*; and the plaintiff contends that the money claimed was due on a sealed instrument. It is admitted that all the money for the whole work performed by the defendants in error was paid, except the sum of \$1,000, which was retained by the plaintiff in error expressly on account of that sum, which he supposed himself entitled to under the contract of the 18th of May, on account of the failure to complete the buildings by the 24th of December. If this money was due on the simple contract, then this action was clearly sustainable; if it was due under the sealed instrument, then it could be recovered only by an action on that instrument. Its being due on the one or the other depends on the application of the payments made by the plaintiff to the defendants in error. The court instructed the jury that it was competent to the plaintiff to recover the said \$1,000 in this action, "unless they should be satisfied by the evidence that the defendant, at the time of paying the money, had expressly directed the same, or a sufficient part thereof, should be applied to the extinguishment of the \$1,500 due on the simple contract."

This instruction of the court is given in terms the correctness of which cannot be entirely admitted. It would exclude an application of the money made by the creditor himself, with the assent of the debtor, to the simple contract debt;

for, in such case, it would not appear that the debtor had "expressly directed" the application. Thus, among the accounts exhibited at the trial, is a receipt for the whole sum due for extra work performed under a verbal contract. It was not proved that the application of this money to the discharge of the verbal contract was "expressly directed." Yet no person will say that the creditor was at liberty to controvert this application, or to change it.

§ 1994. *Application of payments.*

A person owing money under distinct contracts has undoubtedly a right to apply his payments to whichever debt he may choose; and, although prudence might suggest an express direction of the application of his payments at the time of their being made, yet there may be cases in which this power would be completely exercised without any express direction given at the time. A direction may be evidenced by circumstances as well as by words. A payment may be attended by circumstances which demonstrate its application as completely as words could demonstrate it. A positive refusal to pay one debt, and an acknowledgment of another, with a delivery of the sum due upon it, would, we think, be such a circumstance. The inquiry, then, in this case, will be, whether the payments made by the plaintiff to the defendants in error were accompanied with circumstances which amount to an exercise of his power to apply them.

A circumstance of no light import was given in evidence by the creditor himself. It was that, at the time of discharging the account for the extra work, the debtor confessed "that he had retained in his hands \$1,000, as the forfeiture under the original contract for not finishing the houses in the time stipulated by contract, and that he would hold it, unless compelled by law to pay it." This \$1,000 was the penalty stipulated in the agreement under seal; and when all the residue of the money was paid, the inference is very strong that this sum was reserved out of the money stipulated by the same agreement, and that the payments were made in discharge of the sums acknowledged to be due for other work.

The final payment was made by Tayloe, through the hands of a third person. His original purpose seems to have been to insist on a receipt in full before he would pay the sum which remained due, independent of the sum in contest. But on a representation of the peculiar pressure under which the Sandifords labored, they having a note in bank, which had become due, he agreed to pay the whole money due, under all the contracts, except the sum of \$1,000, which he claimed a right to retain, under the stipulation of the sealed instrument. There existed no objection to the payment of the money due, under the simple contract. The whole objection was to the payment of that under the sealed instrument, out of which he claimed a right to deduct \$1,000, on account of a failure in the performance of that contract. Under these circumstances, we think that the money retained must be considered as reserved out of the sum due on that contract, and that the simple contract was discharged.

The court erred, then, in this direction to the jury, and the judgment must be reversed, and the cause remanded for a new trial.

VAN BUREN v. DIGGES.

(11 Howard, 461-480. 1850.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—The defendant in error, in a form of proceeding practiced in the circuit court for the county of Washington, instituted a suit in the nature of an action of *assumpsit* against the plaintiff, upon a contract in writing for building a house. The contract between these parties, which is drawn out in much minuteness of detail, it is not deemed necessary to set forth here *in extenso* in order to a correct understanding of the questions of law raised upon this record. Enough for that purpose will be shown in the following extracts from the agreement above mentioned. After giving the dimensions of the house to be built, the contract proceeds with these stipulations concerning the work to be done, and the compensation to be paid therefor:

“House to be built of two stories, with attic chambers above, of first rate materials throughout, including office and back buildings, and in the best and most modern style of workmanship, and to be entirely finished and fit for occupation on or before the 15th of December, 1844. For the brickwork throughout, the best hard-burned red brick are to be employed, with sharp river sand and best lime. For the flooring throughout, the best quality narrow North Carolina yellow heart pine, tongued, grooved and secret nailed. Roofs to be slated in the best manner. Spouting to be thoroughly arranged, in the least conspicuous manner, so as to carry off all the water that falls on the roofs of the main building, office and back buildings. Door and window frames and doors to be of perfectly seasoned material, warranted not to shrink.”

After a long detail, having reference rather to an enumeration than to the quality of the several things to be done in completing the house and offices, the agreement concludes in these words: “That the said William H. Van Buren is to pay to the said William Digges for the house built and finished as above specified, the sum of \$4,600 in gold or silver current money of the United States, or its equivalent in bank-notes, in the following manner, namely: \$1,000 on the 1st day of September, \$1,000 on the 1st day of October, \$1,000 on the 1st day of November, and \$1,600 on the day that the house is entirely finished and fit to occupy, provided that it shall not be later than the 25th day of December, 1844; he, the said William Digges, to forfeit ten per cent. on the whole amount if the said house is not entirely completed and fit to occupy at the time agreed upon, namely, December 25, 1844.”

Subsequently, namely, on the 1st day of September, 1844, the above agreement was altered by the parties in the following particulars, namely, “that, in place of the attic story with rooms, as specified in the above contract, William H. Digges is to build a third story, divided and finished in all respects like the second story;” and, after reciting some directions with respect to divisions and arrangements in this third story, the new arrangement provides for the “finishing of a garret, to be floored, plastered and divided as agreed upon, with the necessary stairways, in the best manner and with the same materials employed in the second story.” For the work to be performed under this new agreement, when it should be completed, the plaintiff in error was to pay the additional sum of \$525; but no stipulation appears therein as to the time within which this additional work was to be completed.

The plaintiff in error, the defendant below, pleaded the general issue (*non-assumpsit*), filed a bill of particulars, amounting to the sum of \$707, for moneys paid, expenses incurred and damage sustained, by reason of the non-performance by the plaintiff of his agreement; and filed also with this bill of particulars a notice in writing, in which the amount of that bill was claimed in diminution of the plaintiff's demand. Upon the issue joined, the jury rendered a verdict for the plaintiff for the sum of \$1,223.21, with interest from the 21st day of August, 1845, till payment; and for this sum, with the costs of suit, the court gave judgment against the defendant below. At the trial of this cause there were nine separate prayers to the court, and nine bills of exceptions sealed to the rulings of the court upon the prayers thus presented to them. Some of these exceptions it will be unnecessary particularly to discuss, as they are clearly embraced, if not within the terms, certainly within the meaning of others which were taken. We will, therefore, examine those exceptions only which are regarded as propounding in themselves some distinct and separate legal principle.

The first exception by the defendant below, the plaintiff in error here, is as follows: "The plaintiff, in support of the issue joined upon the plea of *non-assumpsit*, produced and proved written contracts between the parties, as follows, . . . and further offered evidence tending to prove that he had executed the work therein stipulated for, and had delivered it to the defendant, who received it without objection. And thereupon the defendant offered to prove, by competent witnesses, that, before receiving said work, and during the progress thereof, he had objected to the sufficiency of various parts of the same as a compliance with the contract, and had communicated said objections to the plaintiff, and that there were various omissions of work stipulated to be done, and various portions of the work contracted for were done in a defective and inferior manner, and not as well as contracted for by the plaintiff, and that some of these defects were not, and could not, be discovered by the defendant until after the defendant had entered into the possession and use of the house; and the defendant offered to prove, by way of set-off, and having filed a bill of particulars of said alleged omissions and defects, and given due notice thereof to the plaintiff, and of his purpose in reduction of the contract price of the whole work sued for by the said plaintiff, the value of said omissions, and the difference in value between the actual work defectively executed and that contracted for; to which evidence so offered, or any of it, the plaintiff objected, as inadmissible under the issue, and the court, on the objection so taken, refused to admit any of said evidence for said purpose." The decision of the circuit court rejecting the evidence described and tendered for the purposes set forth in this exception cannot be sustained upon any sound legal principle.

§ 1995. *In an action on a contract, defendant may give in evidence, to reduce the amount claimed, the failure of plaintiff to perform his part of the contract.*

We are aware of the rule laid down in the earlier English cases, which prescribed that, in all instances wherein a party shall have been injured, either by a partial failure of consideration for the contract, or by the non-fulfillment of the contract, or by breach of warranty, the person so injured could not, in an action against him upon the contract, defend himself by alleging and proving these facts; but could obtain redress only by a cross-action against the party from whom the injury shall have proceeded. This doctrine of the earlier cases has been essentially modified by later decisions, and brought by them to the

test of justice and convenience, which requires that, whenever compensation or an equivalent is claimed by a party in return for the performance of conditions for which such compensation or equivalent has been stipulated, the person so claiming is bound to show a fulfillment in good faith of those conditions; and the party against whom the claim shall be made shall be permitted to repel it by proof of an entire failure to perform, or of an imperfect or unfaithful performance; or by proof of injurious consequences resulting from either of these delinquencies; and shall not be driven exclusively to his cross-action. Of this doctrine the following examples, amongst others to be found, may be adduced from the English courts.

Per Parke, justice, in the case of *Thornton v. Place*, 1 Moody & Rob., 219, it is said: "When a party engages to do certain work on certain specified terms, and in a specified manner, but in fact does not perform the work so as to correspond with the specification, he is not of course entitled to recover the price agreed upon in the specification; nor can he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon, subject to a deduction; and the measure of that deduction is, the sum which it would take to alter the work so as to make it correspond with the specification." In *Chapel v. Hickes*, 2 Crompt. & M., 214, it is said: "In an action on a special contract for work done under the contract, and for work and materials generally, the defendant may give in evidence that the work has been done improperly and not agreeably to the contract; in that case the plaintiff will only be entitled to recover the real value of the work done and materials supplied."

In the case of *Cutler v. Close*, 5 Carr. & P., 337, where a party had contracted to supply and erect a warm-air apparatus for a certain sum, it was ruled, in an action for the price (the defense to which was that the apparatus did not answer), that, if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sums as would enable the defendant to do what was requisite. And Tindal, C. J., in his instructions to the jury, uses this language: "The plaintiffs say that they have performed their contract and are entitled to be paid. On the contrary, the defendant says that the apparatus is not at all of the sort he contracted for, and therefore he is not liable to pay for it. The law on the subject, as it seems to me, lies in a narrow compass. If the stove in question is altogether incompetent and unfit for the purpose, and either from that, or from the situation in which it is placed, does not at all answer the end for which it was intended, then the defendant is not bound to pay. If it is perfect, and the fault lies in management at the chapel, then the plaintiffs will be entitled to recover the whole price. But there is another view of the case. The apparatus may be in the main substantial, but not quite so complete as it might be according to the contract; and in that case, if it can be made good at a reasonable expense, the proper course will be to give your verdict for the plaintiffs, deducting such sum as will enable the defendant to do that which is requisite to make it complete."

But, as conclusive with this court upon this point, it may be remarked that it was carefully considered at the last term in the case of *Withers v. Greene*, 9 How., 213; the decisions applicable thereto from the courts both in England and the United States were then collated and examined, and upon that examination the doctrine herein above propounded received the concurrence of all

the judges. Again expressing our approbation of this doctrine, we conclude that the proof tendered, as declared in the first exception of the defendant below, should have been admitted, and that the circuit court erred in ruling its exclusion from the jury.

§ 1996. *When a written contract speaks of a certain sum as a penalty, parol evidence is inadmissible to show that such sum is liquidated damages.*

The second exception by the defendant states that, in addition to the evidence previously tendered by him, he offered proof tending to show the peculiar adaptation of the house contracted for, both in its design and situation, to the defendant's personal and professional pursuits and convenience, and that the amount of ten per centum on the contract price, stipulated to be forfeited if the house was not entirely finished and ready for occupation, as therein provided, on the 25th of December, 1844, was intended by the parties as and for liquidated damages, that would result and fairly belong to the said defendant by reason of said failure to finish the said house on the 25th of December, 1844; and that the court refused to hear the evidence thus tendered. In the refusal of the court to admit the evidence thus tendered, we think they decided correctly. It would have been irregular in the court to go out of the terms of the contract, and into the consideration of matters wholly extraneous, and with nothing upon the face of the writing pointing to such matters as proper or necessary to obtain its construction or meaning. The clause of the contract providing for the forfeiture of ten per centum on the amount of the contract price, upon a failure to complete the work by a given day, cannot properly be regarded as an agreement or settlement of liquidated damages. The term forfeiture imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, namely, that of a penalty. In a defense like that attempted by the defendant in the circuit court, upon the essential justice and fairness of the acts of the parties, a positive immutable penalty could hardly be applied as a fair test of their merits.

§ 1997. *Defendant cannot charge plaintiff for work done outside the contract.*

In the third exception by the defendant it is stated that the plaintiff, having given evidence to show that the defendant, whilst the house in question was being built, made a contract for an alteration in the style and finish of the plastering of the house, with a third person, and not with the plaintiff; and thereby the execution of the work on the said building was delayed beyond the 25th of December, 1844; the defendant offered evidence tending to prove that the said plastering and the style and finish thereof were usual and proper and necessary to the completion of the said house; and further offered to prove that, at the time of the execution of the said plastering, the defendant, in the presence of the plaintiff, insisted on and required him to execute the same as a part of his contract; and that he refused so to do, and that to the admissibility of this evidence, objection being made, it was excluded from the jury by the court. In this decision the court were certainly correct. The defendant could have no right to insist upon the performance of plastering, or of any other description of work, unless it came within the provisions of the contract; the

simple fact that the work demanded was suitable to the style of the defendant's house could give him no right to demand its execution, unless the plaintiff had contracted for its performance. It was incumbent, therefore, on the defendant, to prove by legal evidence that the work demanded by him was within the provisions of the contract; but instead of doing this, he insisted upon showing merely that he, the defendant, had determined this work to be proper and within the provisions of the contract, and that the plaintiff's non-concurrence in this determination, and consequent refusal to do what the defendant required, were to be received as proof of a failure on the part of the plaintiff to perform his contract; and as forming a just ground with the defendant for his resistance to the action. It would indeed have been strange, if the court could have tolerated such an irregularity as this; by which the defendant would have been permitted to become a witness in his own behalf.

The fourth and fifth exceptions on the part of the defendant below, relating merely to the admissibility of testimony to show a failure to perform, or an incomplete performance, on the part of the plaintiff, are embraced within the first exception already considered, and the rulings of the court as to these two last instances being in contravention of our opinion as declared upon the first exception are pronounced by this court to be erroneous.

§ 1998. *Plaintiff is not responsible for failure to perform his contract at the agreed time, when such failure is caused by act of defendant.*

In the sixth exception of the defendant, two subjects essentially distinct in character are blended. As to the first, it is stated that the plaintiff, having further given evidence tending to show that, after the plastering of the house was begun, the defendant entered into a contract with the plasterer to make cornices and centre-pieces for the parlors and passages; that a delay in the work for a week was occasioned by the negotiation leading to the said agreement; and a further delay of two weeks by the additional plastering, and part of the same being frozen, insomuch that the plasterer could not finish the work until some days after the 25th of December, 1844, and much of the carpenters' work and the painters' was thereby postponed and delayed until after the said day; and the said defendant then gave evidence to show that the plaintiff knew of the said agreement for the said additional plastering, and did not object thereto. And thereupon the defendant prayed the court to instruct the jury that if they shall find that any delay was caused in completing the work in consequence of the extra plastering in the parlors and passage, done under the distinct contract therefor given in evidence, and they shall further find that said extra plastering was so done with the full knowledge and sanction of the plaintiff, and without any understanding between him and the defendant at the time; that in consequence thereof a further time should be allowed for completing the building, then the plaintiff is not entitled to any further time for completing the building because of such work, and the delay attending the same.

The second subject embraced in this exception is the forfeiture of ten per centum upon the contract price of the work, which the court was asked to declare was the amount of liquidated damages, the whole amount of which on the price of the work the defendant was authorized to claim for a failure to complete the work by the 25th of December, 1844, unless the jury should find that the failure to complete the work proceeded wholly from the acts or default of the defendant. The refusal by the circuit court of both the instructions appearing upon this exception is entirely approved. It is difficult to conceive

upon what ground the defendant could be permitted to interpose an obstruction to the fulfillment of the contract, and then to convert that very obstruction into a merit on his own part, or into the foundation of a claim against the party whom he had already subjected to the inevitable consequences of the obstruction so interposed; an inability to comply with his engagement, and a postponement of the fruits of a compliance therewith, if that had been permitted. Mere acquiescence in this irregularity by the plaintiff should not subject him to further mischief. With respect to the second subject embraced in this exception, namely, the forfeiture of ten per centum claimed by the defendant, we deem it unnecessary to add to what has been already said on that subject. We will here remark, once for all, with respect to this penalty, that, as it constitutes the only ground for the eighth and ninth exceptions taken by the defendant below, those exceptions must be regarded as expressly overruled.

By the seventh exception of the defendant below, it appears that the court were asked to propound as the law, that if, from the evidence, it should appear that the plaintiff contracted with the defendant in writing, to build, complete and deliver the said house to him on or before the 25th day of December, 1844, and that the plaintiff failed to do so; and the jury shall find that the time for said completion and delivery was not extended beyond the said 25th of December, 1844, by the agreement of the said plaintiff and defendant, or by the act of the defendant, then the plaintiff is not entitled to recover in this action, which instruction the court refused to give.

The ruling of the court, as set forth in this exception, though not reconcilable with their own decision on the first prayer presented to them by the defendant, is in accordance with the opinion we have expressed in reference to the questions raised by that prayer, and also with the doctrine ruled by this and in other tribunals upon those questions, as in treating of that first prayer we have already shown. It places the parties upon the true ground of contestation between them, namely, the truth, the extent and manner of performance on the one hand; the degree of injury from omission, neglect or imperfection of performance on the other. The ruling of the circuit court, therefore, upon this exception, is entirely approved; but as that court has erred in its decision in reference to the prayers in the first, fourth and fifth exceptions of the defendant, its decision as to those prayers is hereby reversed with costs, and this cause is remanded to the circuit court with orders for a *venire facias* for a new trial in conformity with the principles expressed in this opinion.

HARRIS v. MILLER.

(Circuit Court for Oregon: 6 Sawyer, 319-328. 1880.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—The plaintiffs, M. Harris and M. Lichenstein, bring this action to recover the sum of \$2,000, as liquidated damages for the alleged violation of an agreement by the defendants, James D. Miller and Charles P. Church, to construct a brick building on the southeast corner of First and Morrison streets, in this city, and to lease to the plaintiffs certain rooms therein for the term of five years from and after July 1, 1878. The cause was heard by the court without a jury upon the issues of fact, and at the same time upon a demurrer to the replication. From the evidence it appears that on December 8, 1878, the plaintiffs and defendants entered into a written agreement whereby

the latter agreed to erect a brick building upon a lot on the southeast corner of First and Morrison streets, in this city, and to lease to the former certain rooms therein for the term of five years from and after July 1, 1878, for the monthly rent of \$150, payable in advance; in consideration whereof the defendants agreed to so pay said rent, and "to make, execute and deliver" to the defendants on or before February 1, 1878, and to their satisfaction, "a good and sufficient and approved bond in the sum of \$2,000, conditioned to become void on the payment of said rent;" and to become forfeited as "the agreed and fixed amount of damages" to be recovered by the defendants for a default of thirty days in the payment of said rent; and a failure on the part of the plaintiffs to so furnish such bond was to render the agreement void. It is also provided in said agreement that any failure upon the part of the defendants to perform the same shall entitle the plaintiffs to recover the sum of \$2,000 for such failure, as "stipulated and liquidated damages."

The defense to the action as contained in the answer is, that the sum mentioned in the agreement as liquidated damages for the violation thereof was only intended as a penalty; that the defendants erected the building as per said agreement, but that the plaintiffs did not, on or before February 1, 1878, nor since, deliver to the defendants a good and sufficient bond, as by said agreement they undertook and promised.

The replication alleges that before February 1, 1878, the defendants had so changed the plan of said building as to put it out of their power to comply with their agreement, and thereby excused the plaintiffs from tendering the bond for payment of the rent.

The argument in support of the replication is, that if the defendants, on February 1, 1878, by reason of their own act, were unable to perform their contract, the plaintiffs may recover the stipulated damages for non-performance, without having complied with the condition precedent on their part, to wit, the delivery of the bond for the payment of the rent. As authority for the proposition, counsel cite *Patridge v. Gildermiester*, 40 N. Y., 96, and *Hawley v. Keeler*, 53 id., 120. The first case is one where a party to a contract having failed to perform a condition precedent, the other was allowed to recover for part performance, and is therefore not in point. In the second case, the court does say that "the party who disables himself from performing his contract before default by the other party waives the performance of acts by the latter, which, except for such disability, he would be bound to perform as conditions precedent to a recovery on the contract." But the court held that the contract to give security for the payment of a quantity of cheese was not a condition precedent to the delivery thereof, but only concurrent with such delivery, and that therefore when the owner of the cheese had otherwise disposed of the same before the time for delivery, the other party was excused from providing or tendering the security, and might maintain an action for the non-delivery.

But the giving of the bond for the payment of the rent was a condition precedent in this case, and a very material one; for upon the faith of it the defendants were not only to furnish the rooms for five years, but in a large part to incur the expense of constructing a comparatively costly building.

However this may be, this demurrer must be sustained because a mere change of plan before February 1, 1878, did not in the least degree affect the ability of the defendants to construct the building so as to furnish the plaintiffs with the rooms therein according to the contract. The plan of the building might be changed every day. The defendants were under no obligation to

build according to any plan until the bond was furnished for the rent, and when that was done, they could build according to the agreement, notwithstanding any changes of plan that may have been made in the mean time.

Considering the case, then, with this demurrer sustained, from the evidence the further facts appear to be, that early in January the plaintiffs delivered to the defendants a bond in the sum of \$2,000, in due form of law, conditioned for the payment of the rent, as provided in the agreement, executed by themselves and William Harris and Isaac Friedman, of San Francisco, on December 26, 1879. Soon after it was received, the defendants sent the names of the sureties to Dun & Co.'s commercial agency in San Francisco, to ascertain their financial condition and standing, and towards the last of January received an answer to the effect that they were not at all equal to any such undertaking, and that what real property they had was covered with homesteads; and there is no evidence in the case tending to show the fact to be otherwise. On January 30th, defendants returned the bond to the plaintiffs, saying: "Neither of the parties referred to seem to be men of any financial standing beyond the value of homestead exemption, and we therefore refuse the bond offered by you, not being satisfied with the guarantors thereon. We require men of undoubted standing as bondsmen, particularly as the amount of the bond is much less than the aggregate liability for rental."

The work upon the building was not commenced until in March; and so far as the rooms which the plaintiffs were to have are concerned, the building was constructed substantially as was contemplated at the time of the agreement, except that the width of the principal room on the lower floor was one foot in twenty-nine less, and that an elevated platform and a small circular stairway, convenient for the uses of the plaintiffs, were not put in said room, but can be at any time, at a comparatively small cost. After refusing the bond offered by the plaintiffs, the defendants were still willing, and offered to allow the plaintiffs to give a satisfactory bond; but the plaintiffs did nothing further in the matter, except to claim that the one given was sufficient; when, about the last of February, the defendants told the plaintiffs that the contract was at an end, and they could not have the rooms. The building was finished in July, when the portion which the plaintiffs were to have was leased to a third person for something less than they were to pay for it.

§ 1999. *Rules as to penalties and liquidated damages.*

Upon these facts the first point made by counsel for defendants is that the sum named in the agreement as liquidated damages, to be paid by them for a failure to furnish and lease the rooms, is, notwithstanding such designation, only a penalty, and therefore can only be recovered so far as the proof shows the plaintiffs to have been injured by such failure. Upon this subject the law is peculiar, and instead of giving effect to the contract of the parties according to their intentions, it assumes to control them according to its standard of justice.

And, 1. Whenever it is at all doubtful whether the sum mentioned was intended as stipulated damages or a penalty to cover actual damages, the law, which always favors the latter as against the former, declares that the sum was intended as a penalty. 2. When the contract is explicit that the sum named shall be considered as liquidated damages, the contract is to be enforced according to its terms, unless qualified by some other circumstance, as when one agrees to pay a larger sum upon the failure to pay a smaller one, or when the damages resulting from a failure to perform the contract are certain, or

can be reasonably ascertained by a jury. But wherever the contract is for the doing or not doing a particular act or acts, and there is no certain pecuniary standard by which to measure the damages resulting from a breach thereof, an agreement to pay a stipulated sum as damages for such breach will be enforced literally. 1 Am. Dec., 335; Sedg. on Dam., 399.

§ 2000. *In this case the sum fixed is to be treated as liquidated damages.*

This case falls exactly within the last category. The contract provides that for a failure to furnish the rooms and lease the defendants shall pay \$2,000 as liquidated damages. The rooms were wanted for the clothing business in the business part of the city, for a term of five years. It would be impossible to say what damage the plaintiffs might suffer from a breach of this contract, without at least waiting until the end of the five years, and that would be equivalent to a denial of any. The damage might have been merely nominal or it might have been very large, depending upon circumstances uncertain and contingent in their character. Situated thus, the parties having taken the precaution to agree upon the amount of damages to be recovered for a violation of their contract in this particular, the law, it seems to me, would hinder rather than promote the administration of justice by refusing to enforce it accordingly.

§ 2001. *The giving of a bond satisfactory to defendants was a condition precedent to their liability. An agreement to execute a bond is not satisfied unless a bond with sureties is tendered.*

But counsel for defendants insist that there never was any breach of this contract by the defendants, because they were not bound to do anything under it, until the plaintiffs had furnished a satisfactory bond for the rent, which was not done. It is admitted that the defendants could not arbitrarily and without some substantial reason refuse to receive a bond tendered them under this agreement. But the bond was to be to their "satisfaction;" and if in the exercise of their judgments, acting upon the best information conveniently within their reach, they in good faith concluded that the bond was not sufficient, why then the plaintiffs were bound by their action. And there is no presumption against the integrity of the defendants' conduct in the premises, but the contrary. If the plaintiffs claim that the refusal to accept the bond was unjustifiable, they must show it.

The defendants had a right to a bond to their satisfaction, not only because that was the express agreement, but for the reason that in the very nature of the case it was right and just that they should. They were about to erect a costly building—possibly with borrowed money—relying upon this bond as a good security to them for \$1,800 a year towards the accomplishment of this enterprise for the next five years. Under such circumstances I think the law would say, in the absence of any agreement to the contrary, that the security should be good beyond a reasonable doubt.

The plaintiffs have offered no evidence as to the responsibility of the sureties in this bond. But upon it is the justification of each of them to the effect that he is worth \$2,000 over all debts and liabilities and property exempt from execution. On the other hand, defendants have introduced evidence which shows that for the year 1877–78 the real property of Harris was only valued for taxation at \$1,830, and that of Friedman's at \$2,480, upon the most if not all of which there are homesteads; that if they have any personal property, it is employed in some retail business in which they are engaged, and that they returned no such property for taxation during the year aforesaid. It being manifest that a bond with such sureties, living, too, in another state, would not

be good, if any, security for the payment in Portland of \$1,800 a year for five years, counsel for the plaintiffs are driven to rest their case upon the proposition that by the terms of the agreement they were not bound to give a bond with any sureties, and that they complied with their contract when they tendered the defendants their own bond in the sum agreed upon, executed in due form of law.

It may be admitted that if the agreement was that the plaintiffs were only to give a bond executed by themselves, then the bond tendered was a "good and sufficient" one, because it was executed by them in due form of law in the sum and upon the conditions specified in the agreement. In *Aiken v. Sandford*, 5 Mass., 499; *Tinney v. Ashley*, 15 Pick., 552; *Van Eps v. Schenectady City*, 12 Johns., 342, and *Gazley v. Price*, 10 Johns., 268, it was held that a bond on condition that the obligor would make and deliver to the obligee a good and sufficient deed to a certain parcel of land was satisfied by the execution of a deed in due form of law to pass whatever title the obligor might have.

And it must be admitted that upon the mere letter of this agreement it may be said that nothing more is required than the bond of the plaintiffs. The language of the instrument is, "that they (the plaintiffs) further agree to make, execute and deliver to the said parties of the first part a good and sufficient and approved bond in the sum of \$2,000, conditioned," etc. But the cases are not parallel. A covenant that A will make a good and sufficient deed to certain property is performed by the execution of a deed by him in due form of law. There are no sureties in a conveyance. But a bond on condition is more often made with sureties than otherwise, because it is usually intended as a guaranty for the performance of some act by the principal obligor; and therefore a covenant that A will give a bond to the satisfaction of B for the payment of money which A is already otherwise bound to pay, does not appear to be satisfied with the bond of A without sureties. And it is very certain that it was not the understanding of the parties to the agreement, at the date of its execution and afterwards, that the bond of the plaintiffs was all that was required.

In the construction of this contract the court may consider the circumstances under which it was made and the situation of the subject of it and the parties thereto, and they all point to the conclusion that the parties contemplated that the plaintiffs were to give satisfactory security for the payment of the rent. It is not pretended that the plaintiffs are persons of any considerable means or financial ability. They appear to have been engaged in this city in a small clothing business, in the old wooden house that was removed to make room for this building; and it is not likely that the defendants would incur the risk of erecting a costly building upon the faith of their unsecured promise to pay the rent for the principal portion of it for a period of five years. Besides, there was no necessity for the plaintiffs giving their bond merely for the payment of the rent; for they were already bound by the agreement to take the rooms and pay the rent, and upon the acceptance of the lease, they would continue to be so bound by that instrument. Nor, under the circumstances, does the agreement of the plaintiffs, "to make, execute and deliver" a bond—not their bond—necessarily imply that such bond shall be executed by the plaintiffs alone, or even at all. The only possible reason for giving or taking a bond was, that the defendant might have security for the payment of the rent, which necessarily means something more than the promise of the plaintiffs to pay it, for that they already had.

My conclusion is, that the agreement should be construed as requiring the plaintiffs to furnish the defendants, on or before February 1, 1878, a good and sufficient bond, executed by themselves and others, or by others alone, which would be recognized by the business community as at least reasonable security for the payment of \$1,800 a year for the period of five years. In addition to these considerations, the evidence shows that the plaintiffs understood that the agreement required them to furnish a bond with sureties, and that they acted accordingly.

At the time of the execution of the agreement, the subject of sureties on the bond seems to have been spoken of, when Harris, who appears to reside in San Francisco, said he did not expect to give certain persons, naming some well known capitalists there, but that he had friends worth \$25,000, who would go on the bond. The bond tendered was executed with sureties, and when it was refused, on the ground of their insufficiency, no suggestion was made that the plaintiffs were not required to furnish a bond, with sureties.

On the whole, it is clear that the plaintiffs having failed to perform the condition precedent, by tendering the defendants a bond within the time required that was a reasonable security for the payment of the rent, the contract for the lease was at an end, and the plaintiffs are not entitled to recover the damages stipulated for withholding the same. There must be findings and judgment for the defendants accordingly.

§ 2002. When treated as a penalty and when as liquidated damages.—In a contract in which certain acts are to be done or omitted, and the contract is of such a nature that the actual damages are susceptible of computation in money, and a sum is named as a penalty or forfeiture for a violation, it is to be viewed as a penalty and not as liquidated damages, and in such case the actual damages sustained will constitute the rule of recovery. *White v. Arleth*, * 1 Bond, 323.

§ 2003. Where the word penal, or penalty, is used, it must be construed as being so intended by the parties; but where the sum named is called liquidated damages, it will be held as a penalty, if it seems from the contract that it was so intended by the parties, and the justice of the case requires such a construction. *Ibid.*

§ 2004. A covenant by which the parties mutually bind themselves to pay \$2,000 in case of default stipulates for a penalty and not liquidated damages. *Goldsborough v. Baker*, * 8 Cr. C. C., 48.

§ 2005. A charter-party contained the clause, "Penalty for non-performance of this charter-party, \$1,000." *Held*, that this sum was penalty and not liquidated damages. *Swain v. United States*, * Dev., 35 (75).

§ 2006. A written contract contained the following clause: "In further confirmation of the said agreement, the parties bind themselves each to the other in the penal sum of \$1,000." *Held*, that this sum was a penalty and not liquidated damages. *Robinson v. Cathcart*, 2 Cr. C. C., 599; S. C., 8 Cr. C. C., 384.

§ 2007. Where a sum named in a contract is intelligently and unequivocally stated to be ascertained or liquidated damages for the breach of a contract, and the language used is not qualified or rendered doubtful by other expressions contained in the paper, and especially where the actual extent of damages is difficult of ascertainment, and the sum named is not very greatly in excess of the probable injury, the amount will be treated as liquidated damages. *Nielson v. Reed*, 12 Fed. R., 444.

§ 2008. Depends on intention.—Whether the sum stipulated to be paid upon breach of the agreement is to be taken as liquidated damages or only as a penalty depends upon the intention of the parties, to be ascertained by a fair and just interpretation of the contract. *Lester v. United States*, * 1 Ct. Cl., 59.

§ 2009. Penalty, when only accessory — Test as to relief in equity.—Where a penalty or forfeiture is inserted in a contract merely to secure the performance or enjoyment of some collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory. But in every such case the test by which to ascertain whether relief can or cannot be had in equity is to consider whether compensation can or cannot be made. *Klein v. Insurance Co.*, 14 Otto, 90.

§ 2010. A sum named in a bond as penalty is to be regarded simply as security, and should not be enforced beyond indemnity. *Bank of Mount Pleasant v. Sprigg*, 1 McL., 184.

§ 2011. Option to sue for penalty or damages.— Where a contract stipulates for a penalty, it is optional with the plaintiff to sue for that or for the actual damages sustained. *White v. Arleth*, * 1 Bond., 326.

§ 2012. Liquidated damages recouped.— By the law of Michigan, damages, whether liquidated or not, claimed by a defendant as arising out of the contract or transaction upon which an action is brought, may be set up by way of recoupment against the demand of the plaintiff; and, if found to exceed such demand, the defendant can have judgment for the balance. (Per FIELD, J.) *Lumber Co. v. Buchtel*, * 11 Otto, 638.

See **BILLS AND NOTES; BONDS; CONVEYANCES; SALES.**

Government Contracts, see **GOVERNMENT.**

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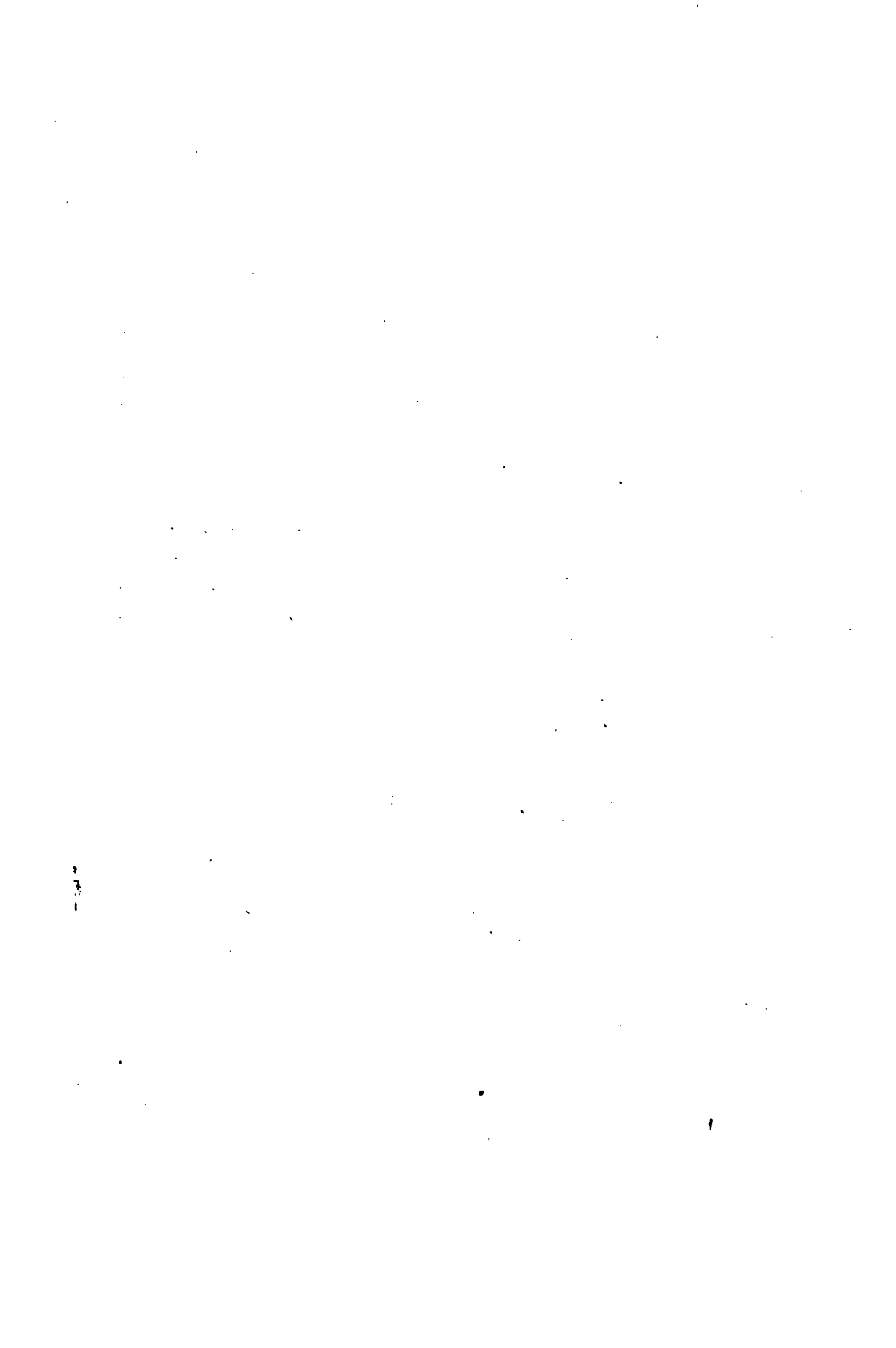
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2. LEX LOCI CONTRACTUS.
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- 3a. THE LAW OF THE PLACE ADOPTED BY THE PARTIES.
4. LEX FORI.
5. MATTERS OF THE REMEDY GOVERNED BY LEX FORI.
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3a. THE LAW OF THE PLACE ADOPTED BY THE PARTIES.

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- f. As to price, amount of payment, or liquidated damages.** See *Damages; Measure of Damages*.
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where a previous authority to draw amounts to an acceptance. Contracts, § 314.

construction of authority to draw on either of two persons. Contracts, § 315.

of agreement as to whether letter of credit has been used. Contracts, § 319.

of authority to dispose of property in payment of debt. Contracts, § 329.
 2. FORMATION OF THE CONTRACT.
 - a. *Generally.*

need not be addressed to any particular person. Contracts, §§ 107, 254.
 - b. *Acceptance.* See *Acceptance.*

whether notice of to guarantor necessary; cases cited. Contracts, §§ 208, 223, 257-63.

notice of acceptance; is necessary only when the letter of guaranty amounts to an offer to guaranty. Contracts, §§ 209, 297.

unnecessary to unconditional guaranty; instance. Contracts, § 210.

and to a guaranty of existing debt, or guaranty on new consideration. Contracts, § 209.

by performance of the consideration. *Id.*

it may be laid down as a mere question of law, that notice is essential. Contracts, § 214.

unnecessary when purchase made in guarantor's name and approved by him. Contracts, §§ 215, 216.

instance of an offer in which notice was required. Contracts, § 218.

certain admission held not to be evidence of. Contracts, § 223, p. 87.

essential when guaranty is of draft thereafter to be drawn. Contracts, §§ 190, 224-227.

GUARANTIES AND LETTERS OF CREDIT, FORMATION OF THE CONTRACT, *Acceptance*—continued.

notice of acceptance; wholly unnecessary on guaranty of existing, not future, demand. Contracts, §§ 226, 300.

need not be technical or written; must be given within reasonable time. Contracts, §§ 223, 230.

mistaken admission of liability not a waiver of. Contracts, § 231.

alter of acknowledgment of debt without mistake. Contracts, § 232.

promise to pay on condition rejected by creditor, not a waiver of. Contracts, § 233.

necessary when the transaction is prospective only. Contracts, §§ 297, 299, 300.

c. *Consideration.* See *Consideration*, 1, 2.

nominal, is sufficient. Contracts, § 211.

original, between creditor and principal; new, between guarantor and guarantee. Contracts, §§ 209, 242, 291.

a guaranty on a bond, made before its delivery, supported by consideration of bond. Contracts, §§ 193, 242-48, 376.

guaranty made after delivery of instrument guaranteed must have a distinct consideration. Contracts, §§ 243, 291, 375.

a valuable one, however small, sufficient. Contracts, §§ 200, 267, 385-86.

words "for value received" are *prima facie* sufficient. Contracts, § 292.

acting on confidence in guarantor. Contracts, § 387.

8. RIGHTS, DUTIES AND REMEDIES.

a. *Generally.*

power of corporation to make guaranty need not be pleaded, when. Contracts, § 244.

guarantor generally bound to same extent as principal. Contracts, § 278.

b. *Exhausting other remedies.*

on guaranty of ultimate payment of securities, plaintiff must first exhaust the remedies thereon. Contracts, §§ 184, 207.

guaranty to pay "after due course of law;" suit must be brought against principal, though insolvent. Contracts, §§ 196, 249-53.

means only a timely and regular proceeding to judgment and execution. Contracts, § 253.

what laches excuse guarantor. *Id.*, p. 113.

when legal proceedings against principal essential. Contracts, § 307.

c. *Demand of principal.*

distinction between suretyship and guaranty; demand and notice unnecessary in the latter. Contracts, § 223.

unnecessary, when guarantor not prejudiced by failure to give. Contracts, §§ 191, 227-33.

held necessary. Contracts, §§ 227, 237; but see § 229, where, in the same case, insolvency of principal held to excuse. See § 301.

so on guaranty of contract to deliver goods. Contracts, § 294.

necessary, at expiration of credit. Contracts, § 290.

so when guarantor's liability depends on collateral act by principal. Contracts, § 298.

demand and notice necessary on guaranty of note, unless principal insolvent. Contracts, § 301.

d. *Notice to guarantor.*

of default of principal, failure by guarantee to give is a defense only when loss occurs. Contracts, §§ 191, 213, 223, 227, 233.

whether reasonable, a question for jury. Contracts, § 270.

necessary, of amount of guarantor's liability, at close of transaction. Contracts, §§ 223, 236, 296.

of alterations in contract with principal. Contracts, §§ 219, 220.

of demand on principal, when. Contracts, §§ 227, 298; but see § 229, where, in the same case, insolvency of principal held to excuse. See § 301.

of sum due, when continuing guaranty is closed. Contracts, § 236.

of sum finally advanced. Contracts, §§ 199, 257-66, 299.

of failure of principal, on guaranty of contract to deliver goods on a day certain. Contracts, § 294.

of credit, when the credit is neither absolute nor definite. Contracts, § 295.

of demand in guaranty on note, unless principal insolvent. Contracts, § 301.

unnecessary; immediate notice of amount of purchases under letter; cases reviewed. Contracts, §§ 221-23.

of future and successive advances on continuing guaranty. Contracts, § 227.

or on ordinary guaranty. Contracts, § 296.

of each acceptance under continuing guaranty. Contracts, § 236.

to one indorsing notes for collection, or as collateral. Contracts, § 271.

4. ASSIGNMENT OF RIGHTS AND REMEDIES. See *Assignment*.

a guaranty written on a negotiable instrument is itself negotiable. Contracts, §§ 195, 242-48.

GUARANTIES AND LETTERS OF CREDIT, ASSIGNMENT OF RIGHTS AND REMEDIES—cop. of debt, from creditor to guarantor, valid, if as security; but a payment by guarantor extinguishes the debt. Contracts, § 804.
by purchase of interest of guarantor in property connected with the contract. Contracts, § 820.

5. CONSTRUCTION AND INTERPRETATION. See *Construction of Contracts*.

a. Generally.

distinction between suretyship and guaranty of *ultimate* payment. Contracts, § 208.

between absolute guaranty and an offer to guaranty. Contracts, §§ 208-10.

is to be liberal. Contracts, §§ 212, 234, 267; but, see §§ 251, 303.

agency or guaranty? how determined; instance of agency. Contracts, §§ 214-16.
a guaranty limiting the period of purchase does not limit the term of credit. Contracts, § 221.

correspondence and other evidence may explain and apply. Contracts, § 288.

contemporaneous letter, written on a guaranty, admissible, when. Contracts, §§ 190, 224-26.

are construed by the intention of the parties. Contracts, § 224.

but not by the construction or reliance of the guarantee. Contracts, pp. 97, 98.

of debt, "after due course of law." Contracts, §§ 196, 249-53.

"cattle," in guaranty, held to include hogs. Contracts, § 255.

for definite amount, not extended beyond it; instance. Contracts, §§ 199, 257-66.

instance of unconditional guaranty. Contracts, § 257.

of advances to firm, does not cover loans to one partner after dissolution. Contracts, § 263.

intention to be bound for another's debt must be clear; mere recommendation to confidence not enough. Contracts, §§ 201, 272-77.

same at law and in equity. Contracts, § 272.

instance of, indorsed on contract to deliver machinery. Contracts, §§ 202, 278-80.

mercantile, limited by recitals in restraint of general words. Contracts, § 284.

general words not so restrained as to lead to unmeaningness. Contracts, § 285.

the most probable and natural conduct should be ascribed to the parties. Contracts, § 286.

general rules of; cases cited. Contracts, §§ 285-86.

all surrounding circumstances and facts are to be considered. Contracts, §§ 202, 288.

of guaranty to A. against debts of former firm paid by his firm and not by him. Contracts, §§ 289, 290.

guaranty of paper payable at bank does not cover paper not there payable. Contracts, § 293.

of a bond, may impose obligations distinct from those in the bond. Contracts, § 302.

instance of; suit against principal held necessary. Contracts, § 307.

of guaranty by a city, of notes for work on streets. Contracts, § 312.

held to be of payment, not of collection. Contracts, § 313.

of letter of credit, creating no debt, but only authority to create one. Contracts, § 317.

instance of joint and several. Contracts, § 358.

guaranty of interest by railroad held an original undertaking. Contracts, § 1141.

guaranty of city bonds held to extend to interest. Contracts, § 1144.

letter of credit made by agent of English firm in Boston, governed by law of Massachusetts. Contracts, § 1233.

b. Continuing.

agreement to be responsible "at any time," for advances made "from time to time," is a. Contracts, §§ 194, 227, 234, 239.

instances of, cited. Contracts, § 234, p. 100. See § 268.

instances where guaranty held not. *Id.*, p. 101.

notice to guarantor of each acceptance not necessary, but only of final sum due. Contracts, § 236.

all guaranties presumed not to be. Contracts, § 262.

second loan on different terms may be made. Contracts, §§ 200, 267-71.

c. Time of taking effect.

when on delivery; when only on notice of acceptance. Contracts, §§ 185, 208-13.

d. Scope or extent; parties. See *Contracts*.

guarantor liable for purchase from B., on letter to A., especially if he ratifies the change. Contracts, §§ 215, 217.

guaranty on bonds to whoever may take them, valid. Contracts, § 309.

promise to accept bills, designed to be shown to third persons, construed. Contracts, § 316.

e. Questions of evidence.

the policy of extending exceptions to the statute of frauds disapproved. Contracts, § 240.

letter of credit to A. and C. not shown by parol to have been intended for A. and B. Contracts, §§ 194, 241.

no ambiguity exists in such a case, latent or patent. Contracts, § 240.

GUARANTIES AND LETTERS OF CREDIT, CONSTRUCTION AND INTERPRETATION. *Questions of evidence* — continued.

- all facts and circumstances go to the jury on the question of intent. Contracts, § 288.
- expert testimony inadmissible to explain when language clear. Contracts, §§ 770, 771-76.
- 6. TERMINATION AND DISCHARGE.**
 - by failure to give notice, exhaust remedies, etc., see *supra*, 2, 8.
 - not by guaratee's receiving and discounting notes of principal, when. Contracts, § 288.
 - by guaratee giving principals, being surviving partners, credit on their several shares of guaranty. Contracts, § 265.
 - extension of time does not *per se* discharge surety. Contracts, § 279.
 - guaranty of quality of machinery not discharged by a settlement between the other parties. Contracts, § 280.
 - certain correspondence held not to terminate. Contracts, §§ 1, 11-14.
 - payment by guarantor extinguishes debt in favor of principal, when. Contracts, § 304.
 - fraudulent representations to guarantor not communicated to guaratee. Contracts, § 305.
 - by subsequent contract merging former. Contracts, § 308.
 - revocation of letter of credit must be express. Contracts, § 318.
 - alteration of original contract without his consent discharges him. Contracts, §§ 219-20, 1704.

H.

HALF BREEDS.

- what not an assignment of land scrip. Contracts, § 513.

HEIR.

- naked promise to give property to another, void. Contracts, § 418.
- contract with executor to divide property if will held invalid, is void. Contracts, § 637.

HIGHER SECURITY. See *Merger*.

- taking sealed instrument does not merge antecedent simple contract, when. Contracts, § 83.

HIRING. See *Convict Labor; Services*

HOGS. See *Definitions; Measure of Damages*.

HORSE. See *Race Horse*.

HORSE RACE.

- agreement to run a, construed. Contracts, § 1096.

HUSBAND AND WIFE.

- promise to convey property to her on marriage is *nudum pactum*. Contracts, § 422.
- assignment of mortgage by husband to wife to support her and their children, valid. Contracts, § 888.

I.

IGNORANCE. See *Incapacity; Mistake*.

- misrepresentation of matters within reach of party, or of the legal effect of a contract, immaterial. Contracts, § 765.
- whether shown by parol, to affect contract. Contracts, § 811.
- of foreign law, no excuse when contract made with a view thereto. Contracts, § 1235.

ILLEGALITY (OF CONTRACTS). See *Consideration, 7; Duress and Undue Influence; Fraud; Margins or Options; Restraint of Trade; Sale; Usury*.

1. IN GENERAL. CONTRARY TO STATUTE.
2. AS TO PUBLIC POLICY OR MORALITY.

1. IN GENERAL. CONTRACTS CONTRARY TO STATUTE.

- an insurance company may recover money paid on fraudulent claim of loss, though the original contract was invalid. Contracts, §§ 751, 756-60, 1299.
- as an excuse for not performing contract, see *Performance*, 4.
- assumpsit* will lie for cost of feeding and training a racehorse. Contracts, § 159.
- the legality of the contract is generally governed by the *lex loci*. Contracts, §§ 1214, 1229, 1231-33, 1291, 1299.
- whether contracts in fraud of foreign law are valid. Contracts, §§ 468, 689, 1293.
- purchase of liquor to resell in state where sale prohibited, valid. Contracts, §§ 834, 845-56.
- a contract on condition that it shall be sanctioned by the legislature is not illegal. Contracts, § 1866.

ILLEGALITY (OF CONTRACTS), IN GENERAL, CONTRACTS CONTRARY TO STATUTE—con.

agreement to run a horse race, and its breach, construed. Contracts, § 1096.
 no action for price of goods furnished to promote immoral object. Contracts, § 858.
 courts will not interfere with illegal executed contracts, when. Contracts, §§ 432, 433, 482.
 nor enforce them. Contracts, § 438. See §§ 492-85.
 so of executory contracts. Contracts, § 435.
 contracts void by law of state where made, not enforced in federal courts. Contracts, §§ 439, 445, 446. See § 467.
 license from United States nor payment of tax can validate. Contracts, § 446.
 bond of indemnity against acts illegal where done, void, though elsewhere executed. Contracts, §§ 440, 447, 448. See § 467.
 a contract expressly prohibited by law is void. Contracts, §§ 447, 467, 470, 471, 478.
 contract made on Sunday validated by affirmation on week day. Contracts, §§ 441, 449; but see § 479. See § 436.
 principal cannot recover of agent the proceeds of a prohibited transaction. Contracts, §§ 443, 450-51.
 due bill given for proceeds of tickets of prohibited lottery, is void. *Id.*
 a contract illegal in part is void. Contracts, § 451.
 contracts in violation of a statute, whether prohibition is express or implied, void, unless statute shows a contrary intent. Contracts, §§ 448, 452-56. See § 472.
 bringing slaves from one state to another for sale, not void under act of Mississippi of 1822. *Id.*
 subsequent contract in furtherance of first, is also void; but an assignment of an interest thereunder is valid as to assignor. Contracts, §§ 444, 457-58; but see § 475.
 when implied contract to restore proceeds of illegal contract arises, not affected by the illegality. Contracts, § 457. See §§ 1569, 1589-94.
 see *Money Had and Received*.
 usurious contract wholly void, when. Contracts, § 457.
 prohibition of common law or statutes makes contracts illegal. Contracts, §§ 458, 460.
 the prohibitory statute must be clear. Contracts, § 459.
 repeal of prohibitory act does not validate contract. Contracts, § 461.
 contract not affected by subsequent events, except war. Contracts, § 464.
quære, whether vendee in possession can defend for, in action for price. Contracts, § 465.
 cannot be waived. Contracts, § 466. See §§ 449, 479, 486.
 no remedy on illegal contract. Contracts, § 467.
 possible violation of foreign law, not; otherwise of domestic. Contracts, § 467.
 an unjust or immoral contract is valid if supported by positive law. Contracts, § 469.
 unlicensed engineer cannot collect wages, when. Contracts, § 470.
 contract growing out of illegal transaction, void. Contracts, §§ 474, 476, 485.
 remote connection therewith immaterial. Contracts, § 475.
 illegal contract cannot be ratified. Contracts, § 479; but see §§ 441, 449, 480.
 when money paid may be recovered back. Contracts, § 480.
 see *Money Had and Received*.
 on wager. Contracts, § 481.
 prohibited contract of foreign corporation, void; no estoppel on other party. Contracts, § 487.
 equity cannot grant relief on illegal contract. Contracts, § 577.
 invalid are separable from valid parts. Contracts, §§ 501-53.
 of which defendant guilty, will not prevent specific performance. Contracts, § 1528.
 must be pleaded; not urged after judgment. Contracts, § 1559.
 subsequent, of the act to be done, a discharge. Contracts, § 1667.
 law prohibiting corporations from making mortgage, evasion of. Contracts, §§ 488, 492.
 bank-notes not payable on demand, void, when. Contracts, § 489.
 formation of bank in violation of law; acts void. Contracts, § 490.
 contract by city for street improvement, valid, when. Contracts, § 491.
 bills drawn to carry on illegal banking, void. Contracts, § 493.
 loan of prohibited amount by national bank, valid. Contracts, § 494.
 illegal executed contract, valid, when. Contracts, § 495.
 informal contract by insurance company, void. Contracts, § 496.
 contract substituted for usurious one, valid. Contracts, § 497.
 interest in advance, usurious, when. Contracts, § 498.
 usurious contract, void. Contracts, § 499.
 sale of cotton during existence of non-intercourse act, void. Contracts, § 500.
 note for slave, given before emancipation, valid. Contracts, §§ 501, 503.
 note for imported slaves, valid. Contracts, § 503.
 agreement of settlers to purchase public lands, valid, when. Contracts, § 504.
 contract for convict labor, valid, when. Contracts, § 505.
 conducting suit for share of profits, valid. Contracts, § 506.
 insurance on unlawful voyage, void. Contracts, § 507.
 what is an illegal contract of maritime insurance. Contracts, § 508.
 bill drawn in fraud of state law, valid. Contracts, § 509.
 taking fees by officer of soldiers' home, illegal. Contracts, § 510.
 judgment on void gaming contract, valid. Contracts, § 511.
 rights of partners under illegal partnership. Contracts, § 512.
 half-breed land scrip not assignable; what not an assignment. Contracts, § 513.
 validity of contract in violation of neutrality laws. Contracts, § 514.
 the court will not add penalties to those prescribed by law. Contracts, § 515.

ILLEGALITY (OF CONTRACTS)—continued.

2. AS TO PUBLIC POLICY OR MORALITY.

- Confederate money; contracts payable in, generally valid. Contracts, §§ 360-61, 421, 628-29.
- contract against, void; public sale to perfect agreement, void. Contracts, §§ 462, 465.
- immoral contract valid if supported by positive law. Contracts, § 469.
- no action to recover price of goods sold for immoral purpose. Contracts, § 358.
- judgment on gaming debt, valid. Contracts, § 511.
- contracts in aid of rebellion, void. Contracts, §§ 626-29.
- so of agreement for fraudulent pre-emption. Contracts, § 630.
- entry or lease of public land reserved from sale. Contracts, § 631.
- agreement to appoint agent to bid on sale of public lands held valid. Contracts, § 632.
- combination of bidders not to bid against each other, void. Contracts, § 633.
- sale of public land by trespasser, void. Contracts, § 634.
- agreement by executor to pay his surety part of his compensation, valid. Contracts, § 635.
- agreement between administratrix for purchase of land from her vendées, held void. Contracts, § 636.
- between executor and heir to divide property if will avoided, void. Contracts, § 637.
- no suit on contract void as against public policy. Contracts, § 638.
- contract in fraud of foreign revenue law. Contracts, § 639.
- contract for compounding felony not void unless that was the consideration. Contracts, § 640.
- loan of money, or sale, to further criminal purpose, void. Contracts, § 641.
- board and lodging of prostitute not recovered for, when. Contracts, § 642.
- illegal executed contract, how avoided. Contracts, § 643. See *Executed Contracts*.
- contract expressly sanctioned by the legislature, valid. Contracts, § 644.
- whether contract of marriage between aunt and nephew valid. Contracts, §§ 645, 1194.
- agreements between railroad and telegraph companies to transmit messages of the former free of charge, void. Contracts, §§ 646, 647.
- arrangement to form "inside corporation" or auxiliary corporation, by directors, void. Contracts, § 648.
- contract to prevent liberation of negroes, in 1864, void. Contracts, § 649.
- partners engaged in slave trade cannot sue on resulting contracts; nor can their assignee. Contracts, § 650.
- agreement to have vessel condemned as a prize, void; bill for account not sustained. Contracts, §§ 516, 536.
- agreement for compensation in procuring government contract, void. Contracts, §§ 517, 535.
- courts take judicial notice of illegal contracts, whatever the state of pleading. Contracts, §§ 518, 542.
- agreement to use personal influence to obtain government contract, void. Contracts, §§ 519, 544-46.
- sale of personal influence, illegal. Contracts, § 544.
- no waiver of objection to immoral or corrupt contract by waiver or consent. Contracts, § 543.
- agreement for sale of influence by agent of foreign government, void. Contracts, § 545.
- an agreement for contract by which it is attempted to defraud the government is void. Contracts, §§ 520, 548.
- contracts for lobby service, void. Contracts, §§ 521, 522, 551-53, 558.
- contract for professional services blended with forbidden services, void. Contracts, § 554.
- "log-rolling" is fraudulent and criminal. Contracts, § 558.
- agreement for purely professional services as to legislation, valid. Contracts, § 553.
- agreement to use secret or sinister influence on legislation, void. Contracts, §§ 522, 555-62. See §§ 600, 605.
- contract to procure government appointment for division of fees, void. Contracts, §§ 523, 558. See § 601.
- contract to take railroad shares in exchange for land, with guaranty of their value three years hence, valid. Contracts, §§ 524, 564.
- promise of indemnity for doing illegal act, void. Contracts, §§ 525, 563.
- guaranty that stock shall be worth par at a certain date, valid. Contracts, § 564.
- promise of indemnity for publishing a libel is void. Contracts, §§ 526, 567.
- validity of contract depends on good faith of parties, when. Contracts, §§ 527, 565.
- one assisting in transactions with illegal bank cannot sue the bank for moneys due him. Contracts, §§ 528, 570.
- a new promise growing out of illegal consideration is as void as the first one. Contracts, § 570.
- contracts against negligence between employer and employee, void. Contracts, §§ 529, 572.
- agreement to bid at execution sale, void, when. Contracts, §§ 527, 568-9. See § 682.
- agreements to avoid testifying as a witness, void. Contracts, §§ 530, 573.
- agreement in a bond to pay attorney's fee additional to penalty, valid. Contracts, §§ 531, 574.
- an action will not lie for services in obstruction of public justice. Contracts, § 578.
- contract between railroad and construction company void if members of former are members of latter. Contracts, §§ 532, 575.

ILLEGALITY (OF CONTRACTS). AS TO PUBLIC POLICY OR MORALITY — continued.

an attorney may purchase the subject of the action from his client after judgment.

Contracts, §§ 533, 578.

agreement in reference to imported goods which had been seized held valid. Contracts, §§ 534, 581-6.

note by thief for the stolen goods, valid, when. Contracts, §§ 533, 537.

contract partly against public policy valid *pro tanto*, when. Contracts, § 538.

wagers and gambling contracts, when invalid; when not. Contracts, §§ 539-95.

letting of race course illegal, when. Contracts, § 536.

note for lottery ticket void. Contracts, § 537.

agreement held not champertous. Contracts, §§ 539-99.

a contingent attorney's fee for prosecuting government claim valid, when; when not. Contracts, §§ 600-602.

contract for abandonment of caveat against patent held void. Contracts, § 603.

lobbying contracts void; but for collection of evidence, etc., valid. Contracts, §§ 604, 605.

contract foregoing right of lawful trial, or ousting court of jurisdiction, void. Contracts, § 606.

agreement not to remove cause to federal court, void. Contracts, §§ 607, 608.

agreement to arbitrate, and not to sue in the mean time, valid. Contracts, § 609.

contract with alien enemy, from necessity, good. Contracts, §§ 610, 611.

when purchase of cotton from Confederates void. Contracts, § 612.

contract between residents of Confederate and loyal states held void. Contracts, § 613.

effect of the war on executory contracts. Contracts, §§ 614, 615.

contract with alien enemy cannot be ratified. Contracts, § 616.

insurance on life of one becoming alien enemy not affected by the war. Contracts, § 617.

contract for carrying on war of Texan independence, void. Contracts, § 618.

contracts infringing belligerent rights, void. Contracts, § 619.

contracts between belligerents as to cartel ships, valid. Contracts, § 620.

shipment by belligerent in name of another to avoid capture held not invalid. Contracts, § 621.

contract of British consul during the war to protect property from capture for a share of profits, void. Contracts, § 622.

ILLINOIS.

statute as to gambling contracts construed, see *Margins or Options*.

covenant and *assumpsit* not joined in. Contracts, § 902.

usury law of 1837 construed. Contracts, § 1612.

ILLNESS.

of party, no excuse for not performing contract. Contracts, §§ 1433-34.

IMMORALITY. See *Illegality*, 2.**IMPLICATION.** See *Construction of Contracts*, 1; *Covenants*; *Implied Contract*.**IMPLIED CONTRACT.** See *Money Paid*; *Money Had and Received*; *Privity*; *Quantum Meruit*.

none, to pay for voluntary services of which no use made. Contracts, § 18.

none, to pay for services when express contract therefor. Contracts, §§ 7, 28, 79.

indebitatus assumpsit on special unsealed contract fully executed, proper. Contracts, § 32.

effect of previous contract being illegal. Contracts, §§ 751, 756-60. See *Insurance*.

by receipt of goods and their conversion. Contracts, § 70.

with the government, must be a consideration. Contracts, § 71.

knowledge of services without objection, sufficient. Contracts, § 73.

from terms of covenant, when. Contracts, § 74.

duty and obligation to refund money. Contracts, §§ 71, 75.

words unnecessary; shown by circumstances. Contracts, § 76.

of indemnity, from request to sign bond, and compliance therewith. Contracts, § 77.

of bailee who agrees to hold subject to bailor's order. Contracts, § 78.

to pay for services rendered in emergency. Contracts, § 79.

no recovery for services of free person supposed to be a slave. Contracts, § 135.

by assignee of bill of lading to pay freight. Contracts, § 407.

insurance company may recover money paid under fraudulent death claim on invalid policy. Contracts, §§ 751, 756-69.

when covenants are implied, see *Covenants*.

stipulation as to time and place of payment, does not imply a contract to be there to receive it, when. Contracts, § 1010.

by vendor, on receipt of price and refusal to deliver, to restore price. Contracts, § 1041.

to refund purchase money of land, on eviction. Contracts, §§ 938, 1045.

to command voyage, by employment of master to load ship. Contracts, § 1072.

to restore money had under illegal or rescinded contract, see *Money Had and Received*.

IMPLIED WARRANTY. See *Warranty*.

IMPOSSIBILITY.

rule when an interest in property acquired after contract made; estoppel. Contracts, § 130.
 instance of, in contract. Contracts, § 363.
 building contract held not subject to. Contracts, § 1339.
 what will excuse performance of contract; what will not, see *Performance*, 4.
 as to place of performance, another may be fixed and notice given. Contracts, § 1445.
 caused by fortuitous event, a discharge; shipwreck. Contracts, § 1664.
 must be real, and not a mere inconvenience. Contracts, § 1665.

IMPRISONMENT.

duress of, what is; what is not. Contracts, §§ 662-63, 637, 674.

INADEQUACY. See *Consideration*, 2, 8.**INCAPACITY.** See *Capacity; Drunkenness*.

unfair contract by one suffering from injury to the brain, rescinded. Contracts, §§ 676, 678-81.
 mental, what sufficient to avoid contract. Contracts, §§ 678, 682.
 instance of partial, caused by disease. Contracts, § 638.
 ignorant and unlettered person should fully understand the transaction. Contracts, § 689.

INCORPOREAL HEREDITAMENTS. See *Easements*.**INDEBITATUS ASSUMPSIT.** See *Assumpsit*.**INDEMNITY.**

promise of, for illegal act, void. Contracts, §§ 525, 563.
 as, publishing a libel. Contracts, § 567.
 for one purpose or debt, not held for another after first satisfied. Contracts, § 311.
 assignment of contract of, by purchase of property. Contracts, § 820.
 judgment against one indemnified, as evidence. Contracts, § 321.

INDEPENDENT COVENANTS. See *Construction of Contracts*, 2.**INDIANA.**

nil debet may be pleaded in suit on deed. Contracts, § 40.
 statute as to convict labor construed. Contracts, § 505.

INDIANS. See *Half Breeds*.

what is not an assignment of half-breed land scrip. Contracts, § 513.

INDIVISIBLE CONTRACTS. See *Construction of Contracts*, 3.**INDORSER.** See *Bills and Notes*.

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INFANCY.

distinction between and other forms of incapacity; void and voidable. Contracts, § 684.

INJUNCTION.

against violation of contract by telegraph company, refused, when. Contracts, § 164.
 not granted to enforce a void contract. Contracts, § 53.
 against violation of railway contract for connecting two roads. Contracts, § 1093.
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